

FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

JUAN ANTONIO PEREZ-GARCIA,

Petitioner,

v.

TODD BLANCHE, Attorney
General,

Respondent.

No. 24-1092

Agency No.
A215-881-702

OPINION

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

Argued and Submitted September 17, 2025
Phoenix, Arizona

Filed September 25, 2026

Before: Daniel P. Collins, Salvador Mendoza, Jr., and
Roopali H. Desai, Circuit Judges.

Opinion by Judge Desai;
Concurrence by Judge Mendoza, Jr.;
Partial Concurrence and Partial Dissent by Judge Collins

SUMMARY*

Immigration

Granting in part and denying in part Juan Antonio Perez-Garcia’s petition for review of a decision of the Board of Immigration Appeals, the panel held that the BIA legally erred by failing to consider evidence that he paid his voluntary departure bond.

When Perez-Garcia appealed the denial of cancellation of removal to the BIA, he also submitted a receipt for his voluntary departure bond payment. However, in declining to reinstate Perez-Garcia’s voluntary departure period, the BIA stated that the record did not reflect payment of the bond. Although judicial review of the denial of voluntary departure is limited by statute, 8 U.S.C. §§ 1252(a)(2)(B)(i) & 1229c(f), the court has jurisdiction to review “constitutional claims or questions of law,” 8 U.S.C. § 1252(a)(2)(D). The BIA’s failure to consider the bond payment receipt—the only evidence on a dispositive issue—is the type of legal error this court has long recognized as requiring remand.

Despite conceding in its briefing that remand was warranted because the BIA overlooked the proof of payment, the government argued at oral argument that whether the BIA failed to consider record evidence was an unreviewable fact question under *Patel v. Garland*, 596 U.S. 328 (2022). That is not accurate because the petitioner in *Patel* challenged quintessential factual determinations about

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

his credibility and subjective intent but, in contrast, Perez-Garcia challenged the BIA's failure to consider any evidence at all. This inquiry does not require second-guessing factual findings.

The panel remanded for the BIA to consider the record evidence and decide whether to reinstate Perez-Garcia's voluntary departure period.

In a separately filed memorandum disposition, the panel denied the petition as to Perez-Garcia's cancellation of removal claim.

Concurring, Judge Mendoza wrote separately to further address the government's extraordinary position that if an agency entirely fails to consider dispositive and highly relevant evidence in an application for discretionary relief, the noncitizen is simply out of luck and left with no recourse from this court. Although neither party disputed that Perez-Garcia properly paid his bond or that evidence of his payment was properly in the record, the BIA concluded that there was no evidence of this payment. Under this court's case law, this egregious error required remand, and the Supreme Court's precedent did not require a different conclusion.

Concurring part and dissenting in part, Judge Collins agreed with the majority as to cancellation of removal, but he would dismiss the petition for review as to voluntary departure for lack of jurisdiction. Because two provisions of law strip this court of jurisdiction to review denials of voluntary departure, *see* 8 U.S.C. § 1229c(f), 1252(a)(2)(B), the central question was whether the BIA's erroneous conclusion that Perez-Garcia had not posted his bond involved a "constitutional claim[] or question[] of law," so as to fall within that exception to the jurisdiction-stripping

statutes. *Id.* § 1252(a)(2)(D). The BIA’s error here was a factual one, not a legal one. The BIA correctly identified and recited the applicable legal rule, which required Perez-Garcia to post a \$500 bond in accordance with the IJ’s order. *See* 8 U.S.C. § 1229c(b)(3); 8 C.F.R. § 1240.26(c)(3)(i). The BIA simply misapprehended the facts and mistakenly concluded that Perez-Garcia had not posted the bond. Under *Patel*, that factual error is unreviewable. The majority’s contrary view that the BIA committed the legal error of “ignor[ing] key evidence” effectively treats all obvious factual errors as legal errors. Under this view, *Patel* is a dead letter in this circuit.

COUNSEL

Christopher J. Stender (argued), Federal Immigration Counselors AZ PC, Phoenix, Arizona, for Petitioner.

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OPINION

DESAI, Circuit Judge:

An immigration judge (“IJ”) denied petitioner Juan Antonio Perez-Garcia’s application for cancellation of removal but granted his request for voluntary departure. The IJ required Perez-Garcia to pay a \$500 voluntary departure bond, which he paid the next day. Perez-Garcia appealed the denial of cancellation of removal to the Board of Immigration Appeals (“BIA”) and timely submitted proof of payment of the voluntary departure bond. The BIA dismissed the appeal. It also declined to reinstate the voluntary departure period because the record “d[id] not reflect” that Perez-Garcia submitted proof that he paid the bond. In his petition to this court, Perez-Garcia argues that the BIA’s failure to consider his proof of payment requires remand. We agree and grant the petition in part.¹

Background

Perez-Garcia, a Mexican citizen, entered the United States without inspection in 2000. In 2019, the Department of Homeland Security commenced removal proceedings against him. He admitted the factual allegations in his Notice to Appear and conceded removability.

He applied for cancellation of removal and, alternatively, requested voluntary departure. 8 U.S.C. § 1229b(b)(1). He submitted documentary evidence in support of both requests, and the IJ held a hearing. Perez-Garcia testified that he would “follow the [IJ’s] instructions” and timely depart if

¹ In a separately filed memorandum disposition, we deny the petition as to Perez-Garcia’s cancellation of removal claim.

given “an opportunity to leave the country on [his] own,” he had “sufficient funds” to return to Mexico, and he could pay a voluntary departure bond.

On November 14, 2019, the IJ denied Perez-Garcia’s application for cancellation of removal but granted his request for post-conclusion voluntary departure. 8 U.S.C. § 1229c(b)(1). The IJ imposed two conditions on the grant of voluntary departure: Perez-Garcia must (1) post a \$500 bond within five business days and (2) depart the United States within 60 days. 8 C.F.R. § 1240.26(c)(3), (e). The IJ thus held that, if Perez-Garcia did not meet these voluntary departure conditions, “an alternate order of removal to Mexico [would] be entered.” The IJ also advised Perez-Garcia that, if he chose to appeal to the BIA, the BIA would not reinstate the voluntary departure period unless he submits proof of payment of the bond within 30 days of filing the appeal. *See* 8 C.F.R. § 1240.26(c)(3)(ii). Perez-Garcia paid the bond the next day.

On December 6, 2019, Perez-Garcia timely appealed the IJ’s denial of cancellation of removal to the BIA. The documents he filed with his notice of appeal included a receipt from DHS acknowledging that Perez-Garcia paid the \$500 voluntary departure bond on November 15, 2019. The BIA acknowledged receipt of these documents.

The BIA dismissed Perez-Garcia’s appeal. Because the BIA filed its decision more than 60 days after the IJ’s decision, Perez-Garcia had permission to voluntarily depart only if the BIA reinstated the voluntary departure period. The BIA declined to do so because voluntary departure was “conditioned upon the posting of \$500.00 bond,” and the record “d[id] not reflect that [Perez-Garcia] submitted timely proof of having paid that bond.” The BIA thus ordered

Perez-Garcia removed “pursuant to the Immigration Judge’s alternate order.”

Standard of Review

We review de novo questions of law, including whether the BIA failed to consider evidence. *See Flores Molina v. Garland*, 37 F.4th 626, 632 (9th Cir. 2022).

Analysis

I. We have jurisdiction to review legal questions in petitions for review challenging the denial of voluntary departure.

At the conclusion of a removal proceeding, an IJ may allow a noncitizen who meets certain eligibility criteria to voluntarily depart at his own expense “in lieu of removal.” *See* 8 U.S.C. § 1229c(b)(1); 8 C.F.R. § 1240.26(c)(1). If the IJ grants voluntary departure, the noncitizen must post a voluntary departure bond within five business days, depart within a certain period, and comply with any other conditions the IJ imposes. *See* 8 C.F.R. § 1240.26(c)(3). If a noncitizen “who has been granted voluntary departure” appeals to the BIA, he must “submit sufficient proof of having posted the required voluntary departure bond” within 30 days of filing the appeal. 8 C.F.R. § 1240.26(c)(3)(ii). If the noncitizen does not submit timely proof of payment, “the [BIA] will not reinstate the period of voluntary departure in its final order.” *Id.*

Our jurisdiction is limited in cases challenging the denial of voluntary departure. Before the Real ID Act of 2005, two statutes barred our review of voluntary departure decisions. Under 8 U.S.C. § 1252(a)(2)(B)(i), courts lack jurisdiction to review denials of “discretionary” relief, including voluntary departure. And under 8 U.S.C. § 1229c(f), courts

lack jurisdiction over appeals challenging the denial of a request for post-conclusion voluntary departure. But the Real ID Act restored this court’s jurisdiction to review “constitutional claims or questions of law” raised in a petition for review filed “in accordance with this section.” 8 U.S.C. § 1252(a)(2)(D).² Thus, neither of the jurisdiction-stripping statutes apply if Perez-Garcia asks us to review a legal error. *See Wilkinson v. Garland*, 601 U.S. 209, 218 (2024); *Corro-Barragan v. Holder*, 718 F.3d 1174, 1177 (9th Cir. 2013).

II. The BIA made a legal error by ignoring dispositive evidence.

Perez-Garcia challenges the BIA’s decision declining to reinstate his voluntary departure period on the ground that he failed to submit proof that he paid the bond. He contends that this was legal error because the BIA ignored the only piece of relevant evidence in the record: the proof of payment he filed with the BIA. We agree.

This court has long held that the BIA’s failure to consider “highly probative” or “potentially dispositive” evidence is legal error that “cannot stand.” *Flores Molina v. Garland*, 37 F.4th 626, 632, 638 (9th Cir. 2022) (quoting *Cole v. Holder*, 659 F.3d 762, 772 (9th Cir. 2011)). Other circuits have held

² A petition for review filed “in accordance with” section 1252 seeks “review of a final order of removal.” 8 U.S.C. § 1252(a)(1). Perez-Garcia plainly seeks review of a final order of removal. The BIA ordered Perez-Garcia removed under the IJ’s “alternate order of removal” because it declined to reinstate the voluntary departure period. That is, the BIA’s refusal to reinstate voluntary departure “affect[ed] the validity of the final order of removal” and thus “merge[d] into the final order of removal for purposes of judicial review.” *See Nasrallah v. Barr*, 590 U.S. 573, 582 (2020).

the same. See *Contreras v. Bondi*, 134 F.4th 12, 20 (1st Cir. 2025) (“A BIA decision that turns a blind eye to salient facts or completely overlooks critical evidence is erroneous as a matter of law.” (citation modified)); *Paucar v. Garland*, 84 F.4th 71, 84 (2d Cir. 2023) (noting that the BIA “may commit an error of law if important facts have been totally overlooked” (quoting *Doe v. Sessions*, 886 F.3d 203, 211 (2d Cir. 2018))); see also *Cortes v. Garland*, 105 F.4th 124, 133, 137 (4th Cir. 2024) (concluding that the agency made a legal error when it “ignored” key evidence).

In the voluntary departure context, we have likewise held that “whether the BIA and IJ failed to consider the appropriate factors or relied on improper evidence” is a question of law. *Zamorano v. Garland*, 2 F.4th 1213, 1221 (9th Cir. 2021) (citation modified). And when the agency fails to consider any relevant favorable factors supporting the petitioner’s request for voluntary departure, “we generally vacate and remand.” *Id.* (citing *Campos-Granillo v. I.N.S.*, 12 F.3d 849, 853 (9th Cir. 1993)).³

The same principles apply here. There is no dispute that the BIA failed to consider the bond payment receipt Perez-Garcia filed with his notice of appeal to the BIA. In fact, the BIA overlooked this document in the record, which is made clear by its statement that the record “does not reflect” timely proof of payment. Contrary to the dissent’s suggestion, this

³ Our dissenting colleague points out that *Flores Molina* involved “reviewable asylum eligibility determinations.” Dissent at 26. But we have held *in the voluntary departure context* that the agency makes a legal error when it ignores material evidence. See *Zamorano*, 2 F.4th at 1221. And our sister circuits have applied this same principle to other discretionary claims subject to the jurisdictional bar, such as cancellation of removal. E.g., *Contreras*, 134 F.4th at 20; *Paucar*, 84 F.4th at 84; *Cortes*, 105 F.4th at 132–33.

was not a “factual determination.” Dissent at 24, 27–28. It was a failure to consider evidence. What’s more, the BIA’s failure to consider the proof of bond payment was dispositive of Perez-Garcia’s voluntary departure request. Under 8 C.F.R. § 1240.26(c)(3)(ii), the BIA “will not reinstate the period of voluntary departure” if the noncitizen fails to submit proof of payment of his bond. And that is the only ground on which the BIA relied. The BIA cannot “turn a blind eye” to the only relevant evidence on a dispositive issue. *Contreras*, 134 F.4th at 20 (citation modified).

Despite conceding in its answering brief that remand is warranted because the BIA overlooked Perez-Garcia’s proof of payment, the government changed course at oral argument. Counsel for the government argued that whether Perez-Garcia filed proof of payment is a fact question we lack jurisdiction to review under *Patel v. Garland*, 596 U.S. 328 (2022). Not so. In *Patel*, the Supreme Court held that courts lack jurisdiction to review factual findings underlying denials of discretionary relief. *See id.* at 340. There, the petitioner challenged the IJ’s findings about his credibility and his subjective intent—quintessential factual determinations that involved weighing “conflicting evidence” and exercising “judgment” about whether petitioner was “evasive and untrustworthy.” *See id.* at 335, 341; *see also Wilkinson*, 601 U.S. at 220 (explaining that the factual determinations in *Patel* involved “whether petitioner had testified credibly and whether he had subjectively intended to misrepresent himself”). In contrast here, Perez-Garcia challenges the BIA’s failure to consider any evidence at all. “[T]his inquiry does not require us to second-guess the [agency’s] factual findings.” *Cortes*, 105 F.4th at 130.

The dissent insists that we are “treating all obvious factual errors as legal errors.” Dissent at 27 n.6. That is not

our holding. An “obvious” factual error is still a factual error. *See Patel*, 596 U.S. at 334, 339. But failing to consider critical evidence is legal error. If we were to adopt the dissent’s position, the agency could completely abdicate its role in cases involving the jurisdictional bar, refuse to consider any evidence in the record, and simply conclude that a petitioner failed to submit evidence. In the dissent’s view, that would be an unreviewable “factual determination.” We reject this absurd result.

In short, the BIA legally erred by failing to consider Perez-Garcia’s proof of payment of his voluntary departure bond.

Conclusion

We **GRANT** the petition for review in part and **REMAND** for the BIA to consider the evidence in the record and reconsider whether to reinstate Perez-Garcia’s voluntary departure period.

MENDOZA, JR., Circuit Judge, concurring:

I agree fully with Judge Desai’s Opinion, which grants the petition in part and remands to the BIA for the limited purpose of reconsidering whether to reinstate Perez-Garcia’s voluntary departure period. But I write separately because the government’s extraordinary assertions regarding this court’s jurisdiction to review legal errors in discretionary relief decisions demand additional discussion.

In its answering brief, the government originally conceded that limited remand was appropriate to allow the BIA to address its failure to consider the evidence of Perez-Garcia’s payment of his voluntary departure bond. Yet, at

oral argument the Government took the extraordinary position that this court lacked jurisdiction to review the BIA’s voluntary departure denial *entirely*. Putting aside the two-facedness of the government’s cynical maneuvering, it is worth taking its arguments to their full logical conclusion. Essentially, the government’s position is that if an agency entirely fails to consider dispositive and highly relevant evidence in an application for discretionary relief, the noncitizen is simply out of luck and left with no recourse from this court. That is wrong. The government’s position flies in the face of both this court and the Supreme Court’s precedent.

“Although administrative agencies have great latitude in exercising their discretion to grant or deny requests for voluntary departure, such discretion does not ‘strip the inquiry of all guideposts.’” *See Campos-Granillo v. I.N.S.*, 12 F.3d 849, 852 (9th Cir. 1993) (quoting *Mabugat v. INS*, 937 F.2d 426, 432 (9th Cir.1991)), *as amended* (Feb. 16, 1994). Our precedent is clear that an agency’s failure to consider highly probative or dispositive evidence—including when reviewing applications for discretionary relief—constitutes legal error that necessitates remand. *See Flores Molina v. Garland*, 37 F.4th 626, 632 (9th Cir. 2022); *Zamorano v. Garland*, 2 F.4th 1213, 1221–22 (9th Cir. 2021).

That sort of egregious error is exactly what happened here. Neither party disputes that Perez-Garcia properly paid his bond, as required by the voluntary departure regulations. Nor does either party dispute that evidence of Perez-Garcia’s bond payment was properly in the record. Yet, the BIA inexplicably declined to reinstate Perez-Garcia’s voluntary departure period on the basis that there was *no* evidence of this payment—a conclusion directly contradicted by the

record before it. The outcome under our case law is clear; we must remand to the BIA to consider the dispositive and highly probative evidence it ignored.

The Supreme Court’s precedent in this area does not compel a different conclusion. The Court has made clear that Section 1252(a)(2)(D) strips courts of jurisdictions to review sole “questions of fact.” *See Wilkinson v. Garland*, 601 U.S. 209, 221, 225 (2024) (even primarily factual mixed questions of law and fact are reviewable under Section 1252 but the “facts underlying any determination on cancellation of removal . . . remain unreviewable”); *Patel v. Garland*, 596 U.S. 328, 339, 347 (2022) (“Federal courts lack jurisdiction to review facts found as part of discretionary-relief proceedings under § 1255 and the other provisions enumerated in § 1252(a)(2)(B)(i).”); *Guerrero-Lasprilla v. Barr*, 589 U.S. 221, 234–35 (2020) (section 1252 excludes “agency fact-finding from review”). Accordingly, when agencies engage in fact-finding, their determinations are unreviewable in the discretionary relief context.¹ But an agency does not escape review when it completely fails to consider the evidence before it. That is legal, not factual, error.

¹ I also note that the BIA’s conclusion regarding the bond payment does not resemble, in any form, the factual determination found unreviewable by the Court in *Patel*. *Patel* ultimately involved a “credibility determination”—an assessment by the IJ that the petitioner was “an evasive and untrustworthy witness” based on weighing of the petitioner’s testimony, review of documents, and consideration of his history. 596 U.S. at 341; *see also Wilkinson*, 601 U.S. at 221, 225. Attempting to characterize the BIA’s conclusion that Perez-Garcia did not pay the bond—which was based on a dispassionate and binary review of the record—as a factual finding strains credulity.

It goes without saying that the stakes for noncitizen petitioners seeking discretionary relief often could not be higher. A court cannot, and should not, sit on its hands when faced with egregious legal error. This error *requires* remand to the BIA, and the government acts disingenuously by arguing otherwise. I therefore agree with granting the petition in part and remanding to the BIA to reconsider its voluntary departure determination.

COLLINS, Circuit Judge, concurring in part and dissenting in part:

I concur in the majority’s unpublished memorandum disposition denying Juan Antonio Perez-Garcia’s petition for review to the extent that it challenges the decision of the Board of Immigration Appeals (“BIA”) upholding the denial of cancellation of removal under § 240A(b)(1) of the Immigration and Nationality Act (“INA”). *See* 8 U.S.C. § 1229b(b)(1).¹ But we lack jurisdiction over the BIA’s decision denying voluntary departure, and I therefore dissent from the majority’s opinion granting Perez-Garcia’s petition for review with respect to that distinct form of relief.

¹ “Because title 8 of the United States Code has not been enacted as positive law, [I] will generally refer to the underlying provisions of the INA, while also supplying the corresponding citation to title 8.” *Mendoza-Linares v. Garland*, 51 F.4th 1146, 1149 n.1 (9th Cir. 2022). “The text of the INA, as amended, is available on the website of the U.S. Government Publishing Office.” *Id.*; *see* <https://www.govinfo.gov/content/pkg/COMPS-1376/pdf/COMPS-1376.pdf>; [<https://perma.cc/3KGC-K25H>].

I

In March 2019, the Department of Homeland Security (“DHS”) initiated these removal proceedings, alleging that Perez-Garcia, a citizen of Mexico, was removable because he had entered the country without being admitted or paroled by an immigration officer. *See* 8 U.S.C. § 1182(a)(6)(A)(i). Perez-Garcia admitted the charge of removability and requested cancellation of removal under INA § 240A(b)(1) and voluntary departure under INA § 240B. An Immigration Judge (“IJ”) found Perez-Garcia to be removable and set a hearing on Perez-Garcia’s requests for relief. That evidentiary hearing was held on November 14, 2019 before a different IJ, and at the conclusion of the hearing, the IJ denied Perez-Garcia’s application for cancellation of removal. The IJ, however, exercised his discretion to grant Perez-Garcia’s request for voluntary departure under INA § 240B(b).² The IJ stated that Perez-Garcia had to voluntarily depart within 60 days and “must post a \$500 bond within five business days.” The IJ “ordered that an alternate order of removal to Mexico be entered if [Perez-Garcia] fails to comply with voluntary departure.”

The day after the evidentiary hearing and the IJ’s ruling, Perez-Garcia posted the required \$500 bond by submitting a money order in that amount to a DHS official, who provided a written acknowledgment of receipt. One week later, Perez-

² Section 240B provides for two types of voluntary departure—namely, so-called “pre-conclusion” and “post-conclusion” voluntary departure. *See* 8 U.S.C. § 1229c(a) (stating that an IJ may permit an alien voluntarily to depart “in lieu of” removal proceedings or “prior to the completion of such proceedings”); *id.* § 1229c(b)(1) (stating that, “at the conclusion of a [removal] proceeding,” an IJ may “enter[] an order granting voluntary departure in lieu of removal”). Here, the IJ granted Perez-Garcia post-conclusion voluntary departure under § 240B(b).

Garcia timely appealed the IJ's denial of cancellation of removal. The filing of that appeal automatically stayed the execution of the IJ's order and tolled the running of the 60-day period for Perez-Garcia to voluntarily depart. *See In re A-M-*, 23 I. & N. Dec. 737, 743–44 & n.8 (BIA 2005) (noting, however, that the obligation to file a bond in connection with voluntary departure would not be stayed). In his brief on the merits before the BIA, Perez-Garcia argued that, for various reasons, the IJ had erred in denying cancellation of removal.

On February 9, 2024, the BIA issued its decision upholding the IJ's denial of cancellation of removal. The BIA concluded that, because Perez-Garcia had failed to show that his U.S.-citizen son would suffer “exceptional and extremely unusual hardship” as a result of his removal, Perez-Garcia was ineligible for that form of relief. *See* 8 U.S.C. § 1229b(b)(1)(D). Having disposed of the appeal, the BIA at that point, under its ordinary procedures, would typically “reinstate the 60 days of voluntary departure afforded by the Immigration Judge.” *In re A-M-*, 23 I. & N. Dec. at 744. However, the BIA stated that “[t]he record before the Board . . . does not reflect that the respondent submitted timely proof of having paid that bond,” and it therefore held that “the voluntary departure period will not be reinstated, and the respondent will be removed from the United States pursuant to the Immigration Judge’s alternate order.”

Perez-Garcia timely filed this petition for review, challenging both the denial of cancellation of removal and the BIA’s refusal to reinstate voluntary departure.

II

I agree with the majority that substantial evidence supports the BIA's determination that Perez-Garcia failed to establish that his son would suffer the requisite hardship as a result of his removal and that, as a result, Perez-Garcia's application for cancellation of removal was properly denied. But I would dismiss the remainder of Perez-Garcia's petition for review, because we lack jurisdiction to review the BIA's refusal to reinstate the 60-day period of voluntary departure granted by the IJ.³

A

Two separate provisions of the INA limit our jurisdiction to review agency decisions with respect to voluntary departure. First, § 242(a)(2) states that, "[n]otwithstanding any other provision of law, . . . and except as provided in subparagraph (D), . . . no court shall have jurisdiction to review . . . any judgment regarding the granting of relief under" five specified provisions of the INA, including INA

³ Both the majority and the concurrence make much of the fact that the Government did not raise any jurisdictional objection until the Government's counsel did so at the oral argument in this case. *See* Opin. at 10; Concurrence at 11–12. But it is well settled that "[o]bjections to a tribunal's jurisdiction can be raised at any time, even by a party that once conceded the tribunal's subject-matter jurisdiction over the controversy." *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153 (2013). And both the majority and the concurrence fail to note that the Government did so only after this court itself issued an order advising the parties to be prepared to address at oral argument the issue of "our jurisdiction to review the BIA's decision declining to reinstate the voluntary departure period" in light of certain precedents we identified in our order. Under these circumstances, the concurrence's attack on the Government and its counsel as engaging "disingenuously" in "two-facedness" and "cynical maneuvering," *see* Concurrence at 12, 14, is wholly unwarranted and unfair.

§ 240B, which is the provision governing voluntary departure. 8 U.S.C. § 1252(a)(2)(B)(i) (citing “section . . . 1229c,” which corresponds to § 240B of the INA). Second, § 240B(f) separately provides that “[n]o court shall have jurisdiction over an appeal from denial of a request for an order of voluntary departure under subsection (b).” As noted earlier, subsection (b) addresses post-conclusion voluntary departure—*i.e.*, voluntary departure that is granted by the IJ in lieu of removal at the end of the removal hearing, as in Perez-Garcia’s case. *See supra* note 2. Because the BIA order challenged by Perez-Garcia is a “denial of a request” for post-conclusion voluntary departure, 8 U.S.C. § 1229c(f), and involves a “judgment *regarding* the granting” of voluntary departure, *id.* § 1252(a)(2)(B)(i) (emphasis added), both limitations on judicial review are implicated here.⁴ Given that the plain terms of both provisions apply and otherwise deprive us of jurisdiction to review the BIA’s denial of voluntary departure, we must dismiss this aspect of Perez-Garcia’s petition for review *unless* there is an applicable exception to these two prohibitions.

There is, in fact, a significant exception to both provisions. Specifically, INA § 242(a)(2)(D) provides that

⁴ There can be little doubt that § 240B(f)’s bar on “jurisdiction over an *appeal*” from a denial of voluntary departure, 8 U.S.C. § 1229c(f) (emphasis added), applies to review of such an order by way of a petition for review under INA § 242. Although proceedings on a “petition for review” in a court of appeals are not, strictly speaking, “appeals,” Congress has nonetheless “sometimes refer[red] to collateral judicial review of executive action as ‘an appeal,’” including elsewhere in the INA itself. *See Garland v. Ming Dai*, 593 U.S. 357, 366–67 (2021) (noting that, “at one point, the INA refers to dismissing ‘the appeal’ if an alien fails to file a timely brief in support of his petition for review, 8 U.S.C. § 1252(b)(3)(C)”).

“[n]othing in subparagraph (B) or (C), or in any other provision of [the INA] (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.” 8 U.S.C. § 1252(a)(2)(D). This “rule of construction for interpreting the INA’s prohibitions on judicial review,” *Mendoza-Linares v. Garland*, 51 F.4th 1146, 1161 (9th Cir. 2022), applies, by its terms, to both of the limitations on judicial review at issue here. “[S]ubparagraph (B)” —*i.e.*, § 242(a)(2)(B)—is expressly identified as being subject to § 242(a)(2)(D)’s rule, and § 240B(f) plainly counts as an “other provision of [the INA] (other than this section [*i.e.*, § 242])” that “limits or eliminates judicial review.” 8 U.S.C. § 1252(a)(2)(D); *see also Mendoza-Linares*, 51 F.4th at 1161–62 (holding that § 242(a)(2)(D) applies to any jurisdiction-limiting provision of the INA except for the expedited removal provisions contained in § 242(a)(2)(A) and § 242(e)).

The question, then, is whether § 242(a)(2)(D) preserves our jurisdiction over Perez-Garcia’s challenge to the BIA’s denial of voluntary removal. Under that section, we are not deprived of jurisdiction to review (1) “constitutional claims or questions of law” (2) so long as they are “raised upon a petition for review filed . . . in accordance with this section.” 8 U.S.C. § 1252(a)(2)(D). In addressing whether Perez-Garcia’s challenge satisfies these two requirements, I will consider them in reverse order.

B

To be filed “in accordance with this section,” a petition for review must fall within the jurisdictional *grant* contained

in § 242.⁵ As relevant here, that grant of jurisdiction extends only to a “final order of removal.” 8 U.S.C. § 1252(a)(1). Although the INA “does not define the term ‘order of removal,’ any statutory reference to ‘an order of removal’ is ‘deemed to include a reference to . . . an order of deportation,’” *Riley v. Bondi*, 606 U.S. 259, 267 (2025) (quoting Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, div. C, § 309(d)(2), 8 U.S.C. § 1101 note), and “[a]n ‘order of deportation,’ in turn, is defined as an order ‘concluding that the alien is deportable or ordering deportation,’” *id.* (quoting 8 U.S.C. § 1101(a)(47)(A)); *see also Nasrallah v. Barr*, 590 U.S. 573, 581 (2020). Under this definition, an order denying voluntary departure “is not *itself* a final order of removal because it is not an order ‘concluding that the alien is deportable or ordering deportation.’” *Nasrallah*, 590 U.S. at 582 (emphasis added).

But the Supreme Court has held that the grant of jurisdiction in § 242(a)(1) would nonetheless apply (subject, of course, to the above-described limitations on jurisdiction) if the relevant order is one that “merge[s] into [a] final order[] of removal in the same way as, say, an immigration judge’s evidentiary rulings merge into final orders of

⁵ That same conclusion follows from another aspect of § 242(a)(2)(D). That provision does not itself confer jurisdiction; it merely limits how broadly a provision that “*limits or eliminates* judicial review” may “be construed.” 8 U.S.C. § 1252(a)(2)(D) (emphasis added). The jurisdictional grant therefore must come from somewhere else, and the only possible source of jurisdiction here is a “petition for review” authorized elsewhere in § 1252. *See id.* § 1252(b)(9) (comprehensively stating that “[j]udicial review of all questions of law and fact . . . arising from any action taken or proceeding brought to remove an alien” under the INA “shall be available *only* in judicial review of a final order under this section” (emphasis added)).

removal.” *Nasrallah*, 590 U.S. at 582. On this score, the Court has stated that, because only those “matters on which the validity of the final order is contingent” merge into that order, § 242(a)(1)’s jurisdictional grant over “final orders of removal encompass[es] only the rulings made by the immigration judge or Board of Immigration Appeals that affect the validity of the final order of removal.” *Id.* Under this standard, the BIA’s order refusing to reinstate voluntary departure falls within the grant of jurisdiction in § 242(a)(1). Had the BIA *granted* Perez-Garcia’s request for reinstatement of voluntary departure, it would have entered an “order granting voluntary departure *in lieu of removal*.” 8 U.S.C. § 1229c(b)(1) (emphasis added). The validity of the BIA’s order directing that Perez-Garcia instead be “removed pursuant to the Immigration Judge’s alternate order” thus critically depends on the BIA’s decision that voluntary departure would *not* be reinstated. Under *Nasrallah*, the latter decision therefore merges into the final removal order and is within § 242(a)(1)’s grant of jurisdiction to review a “final order of removal.” *Id.* § 1252(a)(1).

It makes no difference that a grant of voluntary removal would only have *temporarily* affected the validity of the final order of removal. (The effect would be only temporary in the sense that, if Perez-Garcia did not depart within 60 days of such a grant of voluntary departure, the final order of removal would then automatically become effective.) This conclusion follows from the Supreme Court’s decision in *Monsalvo v. Bondi*, 604 U.S. 712 (2025). There, the petitioner was granted voluntary departure, but he did not in fact leave the United States and instead filed a motion to reopen with the BIA. *Id.* at 717. Under the applicable regulations, the motion had to be filed *before* the expiration

of the 60-day period, but the BIA held that the motion was untimely because the 60-day period expired on a Saturday, and the motion was filed the following Monday. *Id.* The Government argued that this timeliness ruling fell outside the jurisdictional grant of § 242(a)(1), but the Supreme Court disagreed. *Id.* at 719–20. As the Court explained, the BIA’s initial order granting voluntary departure was, in effect, a *conditional* order of removal whose effective date would depend upon the calculation of the 60-day period (and whether a deadline that falls on Saturday extends to the following Monday), and the petitioner’s arguments concerning that calculation of the removal order’s effective date raised a “‘questio[n] of law . . . arising from’ [the order’s] terms.” *Id.* at 720 (quoting 8 U.S.C. § 1252(b)(9)). The Court also rejected, as unsupported by the statutory language, the Government’s further argument that § 242(a)(1)’s jurisdictional grant extends only to a substantive “challenge to [the petitioner’s] ‘removability’ from this country.” *Id.* at 721. The petitioner in *Monsalvo* plainly challenged the construction and legal effect of the “terms” of his conditional order of removal, the Court held, and that sufficed to bring his contentions within the statute’s grant of jurisdiction. *Id.* at 722.

So too here, Perez-Garcia challenges an essential legal predicate that affects the validity and effective date of his final order of removal. Indeed, if Perez-Garcia were to prevail in his challenge, then the BIA would have to revisit its denial of voluntary departure, and if that relief were granted on remand, then the BIA would need to enter a new order that would allow removal only under different conditions and with a different effective date. *Monsalvo* thus further confirms that the validity of the BIA’s denial of voluntary departure here is a “matter[] on which the validity

of the final order is contingent,” *Nasrallah*, 590 U.S. at 582 (citation omitted), and that denial therefore merges into Perez-Garcia’s final order of removal and is within § 242(a)(1)’s grant of jurisdiction.

Accordingly, Perez-Garcia has satisfied the second requirement of § 242(a)(2)(D)’s exception to jurisdiction-stripping, namely, that he is raising an issue “upon a petition for review” that is properly within the underlying jurisdictional grant of § 242(a)(1).

C

The remaining question is whether the challenge that Perez-Garcia raises to the BIA’s denial of voluntary removal satisfies the other requirement of § 242(a)(2)(D)’s exception to jurisdiction-stripping, which is that the issue must be a “constitutional claim[] or [a] question of law[.]” 8 U.S.C. § 1252(a)(2)(D). Under controlling Supreme Court precedent, the answer to that question is no.

In *Patel v. Garland*, 596 U.S. 328 (2022), the Supreme Court addressed the scope of § 242(a)(2)(D)’s exception to jurisdiction-stripping in the context of another form of discretionary relief (adjustment of status under INA § 245) that, like voluntary departure, is covered by the jurisdiction-stripping language in § 242(a)(2)(B). *Id.* at 336–37. In drawing the line between the prohibited review of “any judgment regarding the granting” of the enumerated discretionary forms of relief in paragraph (B) and the permitted review of “constitutional claims or questions of law” in paragraph (D), the Court noted that the “major remaining category” that was left within the prohibition “is questions of fact.” *Id.* at 339. The Court therefore held that “judicial review of fact determinations is precluded in the discretionary-relief context[s]” enumerated in

§ 242(a)(2)(B). *Id.* at 347; *see also Guerrero-Lasprilla v. Barr*, 589 U.S. 221, 234–35 (2020) (stating that the language in § 242(a)(2)(D) allowing for judicial review of “questions of law” includes “the application of a legal standard to established or undisputed facts” while still “forbid[ding] appeals of factual determinations—an important category in the removal context”). Accordingly, under *Patel*, we lack jurisdiction to review any factual determination made by the BIA in the course of its decision denying voluntary removal.

Although Perez-Garcia contends that the BIA’s “reasoning” for declining to reinstate voluntary removal “is unclear,” that is wrong. In the course of making the decision whether to reinstate the period of voluntary removal—a decision reserved exclusively to the BIA—the BIA necessarily had to determine whether, after the conclusion of proceedings before the IJ, Perez-Garcia had complied with the IJ’s instruction to file the requisite bond within five business days. Thus, although the BIA is ordinarily barred from making factual determinations under the regulations, *see* 8 C.F.R. § 1003.1(d)(3)(iv), *this* determination necessarily fell to it to make under the applicable regulations, *see id.* § 1240.26(c)(3)(ii) (“If the alien does not provide timely proof *to the Board* that the required voluntary departure bond has been posted with DHS, the Board will not reinstate the period of voluntary departure in its final order.” (emphasis added)). The BIA squarely held that the “record before the Board . . . does not reflect that [Perez-Garcia] submitted timely proof of having paid” the \$500 bond ordered by the IJ. That statement as to what the evidence of record did or did not show is quintessentially a factual determination, and it is therefore unreviewable under *Patel*. To be sure, it is a manifestly erroneous factual determination, and if it were reviewable, I would set it aside

under the demanding standard of review that applies to our consideration of reviewable factual determinations. Under that standard, “the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary.” 8 U.S.C. § 1252(b)(4)(B). I agree that, here, “any reasonable adjudicator would be compelled” to reject the BIA’s factual determination *if* it were reviewable. But the whole point of a jurisdictional bar is that the decision cannot be reviewed even if it is wrong. A jurisdictional bar that applies only if the relevant decision is correct would be no bar at all.

The majority purports to distinguish *Patel* on the ground that its prohibition on review of factual determinations applies only to those determinations that “involve[] weighing ‘conflicting evidence’ and exercising ‘judgment.’” *See* Opin. at 10 (quoting *Patel*, 596 U.S. at 341). This contention is refuted by *Patel*. There, the Government had argued for a narrower reading of the “judgment[s] regarding the granting of relief” that are unreviewable under § 242(a)(2)(B): according to the Government’s view, the bar only applied to “*discretionary* determinations,” and the factual points at issue in *Patel*—whether the alien had testified falsely and had “intentionally” misrepresented his citizenship on a government form—“were ‘nondiscretionary’ determinations to which the bar did not apply.” 596 U.S. at 335–36. In rejecting the Government’s proposed reading of the jurisdictional bar as unworkable and underinclusive, the Court noted that the particular factual determinations in that case reflected an evaluative weighing of testimony and evidence every bit as much as does the weighing of discretionary factors. *Id.* at 341. The Court therefore rejected, as untenable, the Government’s argument that the unreviewable “judgment[s]” only include those that

reflect an evaluative, discretionary consideration of the record. Rather, the Court held, the jurisdictional bar “does not restrict itself to certain kinds of decisions,” but instead “prohibits review of *any* judgment *regarding* the granting of relief under . . . [the] enumerated provisions,” including the provision governing voluntary departure. *Id.* at 338 (emphasis added). The majority’s effort to engraft a similar limitation—that the bar applies only to evaluative weighing of evidence and testimony—is thus flatly contrary to *Patel*.

The majority’s alternative ground for evading *Patel* fares no better. According to the majority, the BIA’s factual determination here is so obviously wrong that it amounts to a legal error. *See* Opin. at 9–10. Drawing on Ninth Circuit caselaw involving *reviewable* asylum eligibility determinations, *see* Opin. at 8, the majority holds that, by “misstating the record,” the BIA has indicated that it did “not consider all the evidence before it,” which “is legal error.” *Flores-Molina v. Garland*, 37 F.4th 626, 632 (9th Cir. 2022). But after the Supreme Court’s decision in *Patel*, we cannot simply transpose this sort of broadly phrased language from the context in which it was stated (in which there was no applicable jurisdictional bar) into the very different context presented here (in which there is a jurisdictional bar). By doing so, the majority effectively eviscerates *Patel*’s jurisdictional bar altogether. According to the majority, it is a “legal error” for the BIA, not only to “misstat[e] the record,” but also to “ignor[e] key evidence”; to “totally overlook[]” “important facts”; to “turn[] a blind eye to salient facts”; or to “completely overlook[] critical evidence.” *See* Opin. at 8–9 (simplified). Under these standards, there is nothing left to *Patel*’s bar on review of factual determinations involving discretionary relief. Indeed, all of these phrases are simply different ways of

saying that “any reasonable adjudicator would be compelled” to reject the agency’s factfinding, 8 U.S.C. § 1252(b)(4)(B)—*i.e.*, that the agency’s factfinding was defective under the standards for *reviewable* factual determinations. But if every factual finding that would be set aside under the ordinary standards that would apply if that finding were reviewable *becomes reviewable by virtue of that very fact*, then *Patel* is a dead letter.

The BIA’s error here was a factual one, not a legal one. The BIA correctly identified and recited the applicable legal rule, which required Perez-Garcia to post a \$500 bond in accordance with the IJ’s order. *See* 8 U.S.C. § 1229c(b)(3) requiring the positing of a voluntary departure bond; 8 C.F.R. § 1240.26(c)(3)(i) (requiring that the bond be set at no less than \$500). The BIA simply misapprehended the facts and mistakenly concluded that Perez-Garcia had not posted the bond.⁶ He had done so, and were the BIA’s factual determination reviewable, I would vote to set it aside

⁶ The majority is therefore wrong in claiming that *Zamorano v. Garland*, 2 F.4th 1213 (9th Cir. 2021), supports treating all obvious factual errors as legal errors. *See* Opin. at 9 n.3. In *Zamorano*, we granted the alien’s petition for review as to voluntary departure because we were unable to discern from the IJ’s decision whether, in denying voluntary departure, the IJ had applied the correct *legal* standard, which required consideration of mitigating factors (none of which were mentioned in the IJ’s decision). *Zamorano*, 2 F.4th at 1221–22. Here, in contrast to *Zamorano*, the BIA plainly applied the correct legal standard; it simply got the facts wrong. Nor did the agency here “refuse to consider any evidence in the record,” *see* Opin. at 11, which might have counted, under *Zamorano*, as the legal error of failing to *apply* the correct legal standards. Again, the BIA recited and applied the correct legal standard in this case, but it incorrectly determined the underlying facts. Finally, the concurrence’s reliance upon inapposite case authority predating the enactment of both jurisdiction-stripping provisions, *see* Concurrence at 12 (citing cases from 1991 and 1994), is obviously unavailing.

on the ground that the record “compel[s]” a contrary conclusion. 8 U.S.C. § 1252(b)(4)(B). But a prohibition on reviewing factual determinations is meaningless if it is inapplicable whenever the factual determination is reversibly unsupported.

Coupled with the Supreme Court’s expansive reading of reviewable “questions of law” as embracing mixed questions of law and fact concerning an alien’s eligibility for discretionary relief, *see Wilkinson v. Garland*, 601 U.S. 209 (2024) (construing the scope of INA § 242(a)(2)(D)), today’s expansive reading of that same phrase as embracing clearly erroneous factual determinations concerning such eligibility leaves little left to § 242(a)(2)(B)’s (and § 240B(f)’s) prohibition of judicial review. The only determination that remains effectively unreviewable is the ultimate exercise of discretion *after* the determination of eligibility has been made. That was the position of the petitioner in *Patel*, *see* 596 U.S. at 343 (noting that “Patel interprets § 1252(a)(2)(B)(i) [INA § 242(a)(2)(B)(i)] to prohibit review of only the ultimate grant or denial of relief, leaving *all* eligibility determinations reviewable”), but the Supreme Court squarely rejected that view. With today’s decision, however, it is nonetheless apparently now the law in this circuit.

I would dismiss Perez-Garcia’s challenge to the BIA’s denial of voluntary departure for lack of jurisdiction. To the extent that the majority does otherwise, I respectfully dissent.