

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

NOV 23 2022

FOR THE NINTH CIRCUIT

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

JAZMIN FABIOLA CHAVEZ-PINA,

No. 17-70987

Petitioner,

Agency No. A202-157-191

v.

MEMORANDUM\*

MERRICK B. GARLAND, Attorney  
General,

Respondent.

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

Submitted November 15, 2022\*\*

Before: CANBY, CALLAHAN, and BADE, Circuit Judges.

Jazmin Fabiola Chavez-Pina, a native and citizen of Mexico, petitions pro se for review of the Board of Immigration Appeals' ("BIA") order dismissing her appeal from an immigration judge's ("IJ") decision denying her applications for asylum, withholding of removal, and protection under the Convention Against

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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).

Torture (“CAT”). We have jurisdiction under 8 U.S.C. § 1252. 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 grant the petition for review and remand.

The BIA found no clear error in three factual findings the IJ relied on in support of an adverse credibility determination. Substantial evidence does not support two of these findings. Substantial evidence does not support the agency’s determination that Chavez-Pina’s testimony is inconsistent with her asylum application related to a shooting involving a relative other than her father, where she was not provided an opportunity to explain. *See Rizk v. Holder*, 629 F.3d 1083, 1088 (9th Cir. 2011) (petitioner must have an opportunity to explain inconsistencies), *overruled in part on other grounds by Alam v. Garland*, 11 F.4th 1133 (9th Cir. 2021) (en banc). Substantial evidence also does not support the agency’s determination that Chavez-Pina’s testimony is inconsistent with her asylum application as to whether police vehicles were present when cartel members removed her father from her house, where the agency failed to provide a specific and cogent reason for rejecting Chavez-Pina’s explanation for the perceived inconsistency. *See Munyuh v. Garland*, 11 F.4th 750, 758 (9th Cir. 2021) (“[T]he agency has a duty to consider a petitioner’s explanation for a

perceived inconsistency[, and i]f that explanation is reasonable and plausible, then the agency must provide a specific and cogent reason for rejecting it.” (internal quotation marks and citations omitted)). Substantial evidence does support the single remaining finding that Chavez-Pina’s testimony is inconsistent with a news article as to the circumstances of her father’s arrest. *Shrestha*, 590 F.3d at 1040 (inconsistency may be considered in assessing credibility under the totality of circumstances).

Because we cannot be confident that the BIA would have upheld the adverse credibility determination based on this inconsistency alone, we grant the petition and remand on an open record. Upon remand, the BIA may determine in the first instance whether the one supported inconsistency is sufficient to support the adverse credibility determination in the totality of circumstances, conduct further proceedings to correct the unsupported credibility findings, address the IJ’s alternative merits determinations, and conduct any other necessary further proceedings consistent with this decision. *See Kumar v. Garland*, 18 F.4th 1148, 1156 (9th Cir. 2021) (remand appropriate for BIA to determine whether remaining factors support determination); *see also Alam*, 11 F.4th at 1137 (9th Cir. 2021) (single-factor rule for adverse credibility determinations overruled).

We do not address Chavez-Pina’s contentions as to the IJ’s alternative asylum and withholding of removal determinations because the BIA did not deny

relief on these grounds. *See Santiago-Rodriguez v. Holder*, 657 F.3d 820, 829 (9th Cir. 2011) (“In reviewing the decision of the BIA, we consider only the grounds relied upon by that agency.” (citation and internal quotation marks omitted)).

Because Chavez-Pina does not challenge the BIA’s determination that she waived challenge to the IJ’s denial of CAT protection, this issue is waived. *See Lopez-Vasquez v. Holder*, 706 F.3d 1072, 1079-80 (9th Cir. 2013) (issues not specifically raised and argued in a party’s opening brief are waived).

The parties must bear their own costs on appeal.

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

**PETITION FOR REVIEW GRANTED; REMANDED.**