**NOT FOR PUBLICATION**

FILED

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| KAI HONG PHONG,<br><br>Petitioner,<br><br>v.<br><br>MERRICK B. GARLAND, Attorney General,<br><br>Respondent. | No. 21-70095<br><br>Agency No. A213-198-622<br><br>MEMORANDUM* |

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

Submitted November 18, 2022**
San Francisco, California

Before: S.R. THOMAS and BENNETT, Circuit Judges, and DORSEY,*** District Judge.

* 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 Jennifer A. Dorsey, United States District Judge for the District of Nevada, sitting by designation.

Petitioner Kai Hong Phong seeks review of the Board of Immigration Appeals ("BIA") summary dismissal of his appeal from an Immigration Judge's ("IJ") determination that Phong is ineligible for asylum, protection under the Convention Against Torture, or withholding of removal. After reviewing an audio recording of Phong's hearing before the IJ, the BIA concluded that because Phong orally waived his right to appeal the IJ's decision during the hearing, it lacked jurisdiction to consider the substance of his appeal. We have jurisdiction under 8 U.S.C. § 1252, and we remand to the BIA to develop the record on whether Phong waived his right to appeal.

We review BIA summary dismissals for abuse of discretion. *Nolasco-Amaya v. Garland*, 14 F.4th 1007, 1012 (9th Cir. 2021). When an IJ issues an order of removal, the IJ must "inform the alien of the right to appeal that decision." 8 U.S.C. § 1229a(c)(5). If the alien affirmatively waives his right to appeal, the IJ's decision becomes final. 8 C.F.R. §§ 1003.39, 1241.1(c).[1] "A Notice of Appeal [to the BIA] may not be filed by any party who has waived appeal pursuant to § 1003.39." 8 C.F.R. § 1003.3(a)(1). The BIA may summarily dismiss an

[1] Phong argues that these regulations are inconsistent with the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(47)(B), and therefore invalid. Although this view has been adopted by some members of this court, we have never so held in a published opinion. *See Garcia v. Lynch*, 786 F.3d 789, 796–801 (9th Cir. 2015) (Berzon, C.J., concurring); *Orellana v. Sessions*, 736 F.App'x 635, 638 (9th Cir. 2018) (S.R. Thomas, C.J., concurring). For the reasons discussed below, we decline to reach this issue here.

appeal that is "barred by an affirmative waiver of the right of appeal that is clear on the record." 8 C.F.R. § 1003.1(d)(2)(i)(G). But "a party wishing to challenge the validity of an appeal waiver may file either a motion to reconsider with the [IJ] or an appeal directly with the" BIA. *In re Patino*, 23 I. & N. Dec. 74, 75 (BIA 2001). To be valid, an appellate waiver must be "considered or intelligent." *United States v. Mendoza-Lopez*, 481 U.S. 828, 840 (1987). The government "bears the burden to establish a valid waiver by clear and convincing evidence." *Garcia v. Lynch*, 786 F.3d 789, 792 (9th Cir. 2015).

Here, the government contends that the BIA did not abuse its discretion in summarily dismissing Phong's appeal because Phong entered a knowing and intelligent verbal waiver of his right to appeal before the IJ. Phong argues that there is no evidence in the record to support the BIA's finding that he waived his appellate rights before the IJ, and in the alternative, any waiver was invalid or otherwise unenforceable. The BIA based its waiver determination primarily on an audio recording of Phong's hearing before the IJ.[2] There is no evidence that the BIA also considered a transcript of the hearing, and the audio recording is not in the record before us. Rather, the government seeks to supplement the record with

[2] The BIA's order also notes that it reviewed "a summary of the [IJ's] oral decision dated September 8, 2020." But in that summary, the IJ merely checked a box indicating that both parties had waived appeal. The IJ did not provide any summary or discussion of the exchange leading him to find waiver.

what it says are transcripts of Phong's hearing before the IJ and the IJ's oral decision ("the transcripts").

We decline to consider the transcripts because they were not in the record before the BIA. When faced with a petition for review of a removal order, this court "shall decide the petition only on the administrative record on which the order of removal is based." 8 U.S.C. § 1252(b)(4)(A). "We may review out-of-record evidence only where (1) the [BIA] considers the evidence; or (2) the [BIA] abuses its discretion by failing to consider such evidence upon the motion of an applicant." *Fisher v. Immigr. & Naturalization Serv.*, 79 F.3d 955, 964 (9th Cir. 1996) (en banc).[3]

The transcripts were not in the record before the BIA, and no party moved the BIA to consider the transcripts. Despite the government's unsupported assertion that the transcripts are admissible because they are exact replicas of the audio recording, we have no way to verify that the transcripts accurately capture the contents of the recording or whether we would interpret the recording as the BIA did. Nor do we know the precise evidence before the BIA, and our affirming

[3] We have since recognized "that *Fisher* does not prevent us from taking judicial notice of the agency's own records." *Dent v. Holder*, 627 F.3d 365, 371 (9th Cir. 2010). But we have only applied this exception to agency records that could not have been introduced during BIA proceedings. *See id.* at 371–72; *Lising v. Immigr. & Naturalization Serv.*, 124 F.3d 996, 998–99 (9th Cir. 1997). Here, there is no indication that the government could not have produced transcripts for BIA review.

the BIA's finding of waiver based on evidence that may not have been before it would be inconsistent with our holding the government to its "burden to establish a valid waiver by clear and convincing evidence." *Garcia*, 786 F.3d at 792. Accordingly, we deny the government's motion to supplement the record.

Without record evidence that Phong orally waived his right to appeal before the IJ, we decline to address his alternative arguments that any waiver was unconsidered, unintelligent, or otherwise unenforceable. Rather, we remand to the BIA to develop the record on the waiver issue and, if it deems it appropriate, to consider Phong's remaining arguments in the first instance. *See Aguilar-Osorio v. Garland*, 991 F.3d 997, 1000 (9th Cir. 2021) (remanding where we lacked "an adequate basis on which to evaluate [petitioner's] claim").

The government's motion to supplement the record is **DENIED**, the petition is **GRANTED IN PART,** proceedings are **REMANDED**, and all other pending motions are **DENIED AS MOOT**.