

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

November 1, 2023

Christopher M. Wolpert
Clerk of Court

ISIS ONDINA VELASQUEZ-SIERRA,

Petitioner,

v.

MERRICK B. GARLAND, United States
Attorney General,

Respondent.

No. 22-9556
(Petition for Review)

ORDER AND JUDGMENT*

Before **TYMKOVICH, EID,** and **CARSON,** Circuit Judges.

Appearing pro se, Isis Ondina Velasquez-Sierra petitions for review of a decision by the Board of Immigration Appeals (BIA) affirming the adverse credibility determination by an Immigration Judge (IJ) and denying her applications for relief from removal. Exercising jurisdiction under 8 U.S.C. § 1252(a), we deny her petition for review.

* After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

I. Background

Ms. Velasquez-Sierra is a native and citizen of Honduras. She arrived at a port of entry into the United States in 2016.

A. Credible Fear Interview

An asylum officer interviewed Ms. Velasquez-Sierra and determined that she established a credible fear of persecution based upon her political opinion in opposition to the location of a project to install solar panels in her community in Honduras. She claimed that a masked man on a motorcycle had grabbed her by her hair as she was walking home and threatened to kill her if she continued to speak out about that project. The asylum officer referred Ms. Velasquez-Sierra to an IJ and issued a notice to appear charging her as removable based upon her lack of an entry document. She admitted the allegations in the notice to appear and applied for asylum, withholding of removal, and protection under the Convention Against Torture (CAT).

B. IJ Decision

Ms. Velasquez-Sierra testified at a hearing before the IJ, at which she was represented by counsel. The IJ found that she was not a credible witness. He concluded that, although the broad outlines of her story were consistent, the details regarding the manner in which she was threatened changed in a very important way over time. The IJ described inconsistencies in her various statements. In her interview with the asylum officer, Ms. Velasquez-Sierra did not mention the attacker being armed in any way and did not describe being physically harmed other than

having her hair pulled. In her asylum application form, prepared with the assistance of counsel, she claimed she was a victim of an attempted stabbing based on her active opposition to the solar project. She added additional details in her declaration supporting her application, again prepared with the assistance of counsel, including that the attacker on the motorcycle physically beat her and that men followed and threatened her if she continued her activism. Then, at the hearing, she testified that the attacker pointed a gun at her, after which men loitered by her home in what she perceived as a threatening manner. But she said she did not receive any other threats. The IJ noted that, when confronted with the inconsistencies, Ms. Velasquez-Sierra “was remarkably evasive and halting, sometimes including gaps of up to ten seconds before she answered simple questions as to whether she was confronted by a man with a gun versus a man with a knife.” R., Vol. 1 at 207. In response to the IJ’s questions, she “finally rested on the story that her assailant was armed with both a gun and a knife.” *Id.*

The IJ concluded these discrepancies went to the very heart of Ms. Velasquez-Sierra’s claims because the attack by the man on the motorcycle was the only physical harm she claimed. Yet her story changed from having her hair grabbed and being threatened with worse consequences, to a physical beating “leaving her with bruises on her arms and face, into an attempted stabbing, and finally, into having a gun pointed at her.” *Id.* The IJ found no “benign reason for why [she] would be so confused about the exact nature in which [s]he was threatened on this one pivotal occasion.” *Id.*

The IJ also found that Ms. Velasquez-Sierra's claims lacked corroboration and there appeared no reason why she could not have obtained corroborating evidence and submitted it to the court. Corroborating evidence was particularly important, according to the IJ, where her various statements were inconsistent.

The IJ denied Ms. Velasquez-Sierra's asylum claim because her initial statement to the asylum officer regarding an unarmed assault did not rise to the level of past persecution, her claims of being threatened with a knife or a gun and being beaten up were not credible, and she did not establish a well-founded fear of future harm with sufficient and reliable evidence.¹ Her withholding claim failed because she had not met the less stringent standard for an asylum claim. And the IJ denied her CAT claim because she was not a credible witness.²

C. BIA Decision

Ms. Velasquez-Sierra appealed the IJ's decision to the BIA. She argued the BIA's adverse credibility determination was clearly erroneous. The BIA disagreed, finding that the IJ's finding was based on specific and cogent reasons, including the inconsistencies within her testimony and between her testimony and the documentary

¹ The IJ also concluded that, even if her testimony regarding the threats she received were credible, Ms. Velasquez-Sierra's asylum claim failed for two additional reasons. She did not establish a well-founded fear of future persecution on account of her opposition to a local solar project because (1) it would be reasonable for her to relocate within Honduras, and (2) her claim that a government official was behind the attack was based on supposition.

² The IJ concluded that even if she were credible, Ms. Velasquez-Sierra's CAT claim also failed for the two additional reasons he cited in denying her asylum claim.

evidence, as well as her evasive demeanor when confronted with the inconsistencies. Describing the inconsistencies the IJ cited, the BIA rejected Ms. Velasquez-Sierra's contention that the IJ erred because her broader narrative was wholly consistent. It noted that an adverse credibility determination may be supported by any inconsistency where the totality of the circumstances establishes the applicant is not credible—and that in Ms. Velasquez-Sierra's case the inconsistencies went directly to the heart of her claims. The BIA further held that a broadly consistent narrative does not preclude an adverse credibility finding.

Ms. Velasquez-Sierra also argued in her BIA appeal that the IJ should have continued the proceedings so she could submit corroborating evidence. Construing her contention as raising a due process claim, the BIA held that, even assuming the IJ erred in failing to continue the proceedings, she did not establish prejudice. She failed to demonstrate how her evidence sufficiently resolved the inconsistencies underlying the IJ's adverse credibility determination to show a reasonable likelihood of a different outcome in her case. *See United States v. Aguirre-Tello*, 353 F.3d 1199, 1209 (10th Cir. 2004) (en banc) (adopting "reasonable likelihood" prejudice standard for due process claims).

The BIA therefore affirmed the IJ's denial of asylum and withholding of removal. And because her CAT claim relied on the same testimony the IJ found not

credible, the BIA held that determination was likewise dispositive of her application for protection under the CAT.³

II. Discussion

On appeal, Ms. Velasquez-Sierra raises seven claims of error in the BIA's affirmance of the IJ's adverse credibility determination: (1) the IJ should have continued the proceedings and admitted additional evidence because the IJ has a duty to adequately develop the record; (2) the IJ erred by relying on pauses in her testimony as dispositive evidence of an evasive demeanor; (3) the IJ failed to give her a meaningful opportunity to explain inconsistencies in the evidence regarding a weapon wielded by the attacker; (4) the IJ erred in finding inconsistencies between her application form and her declaration rather than treating these documents as one asylum application; (5) the IJ erred in finding inconsistencies in her descriptions of the men who followed her and loitered outside her home; (6) the IJ erred in finding inconsistency between her statements that the attacker grabbed her hair and beat her;

³ The BIA also denied Ms. Velasquez-Sierra's motion to remand to the IJ, in which she argued that her former counsel provided ineffective assistance. She does not challenge that ruling in her petition for review.

and (7) the IJ failed to assess her credibility based on the totality of the circumstances.⁴

A. Standard of Review

We review the agency’s legal determinations de novo and its factual findings under the substantial evidence standard. *See Karki v. Holder*, 715 F.3d 792, 800 (10th Cir. 2013). In the immigration context, the substantial evidence standard means that “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); *see Karki*, 715 F.3d at 800. In applying this deferential standard, “[w]e do not weigh the evidence or evaluate the witnesses’ credibility.” *Sarr v. Gonzales*, 474 F.3d 783, 789 (10th Cir. 2007) (ellipsis and internal quotation marks omitted). This standard applies to the agency’s credibility determinations. *Id.*

Because a single member of the BIA affirmed the IJ’s decision in a brief order, we review the BIA’s opinion rather than the decision of the IJ. *See Uanreroro v. Gonzales*, 443 F.3d 1197, 1204 (10th Cir. 2006). “However, when seeking to understand the grounds provided by the BIA, we are not precluded from consulting the IJ’s more complete explanation of those same grounds.” *Id.*

⁴ Ms. Velasquez-Sierra also argues that, but for the adverse credibility determination, she established a prima facie claim for asylum and the BIA failed to consider her risk of future persecution in Honduras. Because we resolve her petition for review on the credibility issue, we need not address these additional contentions.

B. Liberal Construction of Pro Se Filings

Ms. Velasquez-Sierra filed her petition for review and appellate brief without any disclosed representation by counsel. Because she proceeds pro se, we liberally construe her filings, but we do not act as her advocate. *See James v. Wadas*, 724 F.3d 1312, 1315 (10th Cir. 2013).⁵

C. Exhaustion Requirement

Under 8 U.S.C. § 1252(d)(1) “[a] court may review a final order of removal only if . . . the alien has exhausted all administrative remedies available to the alien as of right.” “It is a fundamental principle of administrative law that an agency must have the opportunity to rule on a challenger’s arguments before the challenger may bring those arguments to court.” *Garcia-Carbajal v. Holder*, 625 F.3d 1233, 1237

⁵ Ms. Velasquez-Sierra’s pro se appellate brief is written in English, contains accurate citations to the record and legal authority, and is otherwise legally sophisticated. Yet she represents that she “does not speak English.” Pet’r’s Br. at 8. And she does not indicate that she is an attorney. It is clear that Ms. Velasquez-Sierra had assistance in drafting her brief, but she does not disclose by whom or whether that person is an attorney.

“We do not allow . . . ghostwritten briefs.” *Duran v. Carris*, 238 F.3d 1268, 1273 (10th Cir. 2001). We require disclosure of attorney ghostwriting because an attorney’s provision of substantial legal assistance to a pro se party both inappropriately shields the attorney from accountability for his actions and affords the pro se party the unwarranted benefit of a liberal construction of her filings. *See id.* at 1271-72. “[T]he participation by an attorney in drafting an appellate brief is per se substantial, and must be acknowledged by signature.” *Id.* at 1273. Consequently, if any attorney has assisted in the drafting of Ms. Velasquez-Sierra’s brief, the attorney must disclose such participation to this court in an appropriate filing.

(10th Cir. 2010), *abrogated on other grounds by Santos-Zacaria v. Garland*, 598 U.S. 411, 413 (2023) (holding “§ 1252(d)(1) is not jurisdictional”).

“[I]n the immigration context, . . . [i]t is not enough to go through the procedural motions of a BIA appeal, or to make general statements in the notice of appeal to the BIA, or to level broad assertions in a filing before the Board.”

Garcia-Carbajal, 625 F.3d at 1237 (internal quotation marks omitted). Rather, “[t]o satisfy § 1252(d)(1), an alien must present the *same specific legal theory* to the BIA before he or she may advance it in court.” *Id.* (noting prior holding that a petitioner failed to exhaust the theory raised in this court when he had “urged the same conclusion [in his BIA appeal], but changed his argument”).

D. Analysis

The government argues that Ms. Velasquez-Sierra did not exhaust in her BIA appeal the first six of her seven arguments challenging the BIA’s affirmance of the IJ’s adverse credibility determination. We agree, in part, and hold that certain of her contentions are unexhausted. Consequently, we address only those arguments that she exhausted pursuant to § 1252(d)(1).⁶

1. Unexhausted Contentions

In her BIA appeal, Ms. Velasquez-Sierra broadly asserted that the IJ’s adverse credibility determination was clearly erroneous. Acknowledging the IJ’s decision

⁶ We have recognized a “rare exception” to a petitioner’s failure to exhaust. *Garcia-Carbajal*, 625 F.3d at 1238. “[T]hree preconditions must be met to qualify”: “the BIA’s ruling must: (1) clearly identify a claim, issue, or argument not presented
(continued)

hinged on whether her statements were consistent with regard to the weapon, if any, wielded by the attacker, she argued her testimony and statements, as well as her broader narrative, were largely consistent. She also proffered potential explanations for any inconsistency.⁷

We conclude that Ms. Velasquez-Sierra's arguments to the BIA did not exhaust her second through sixth contentions in this court regarding the agency's adverse credibility determination. In her BIA appeal, she did not challenge the IJ's reliance on the long pauses in her hearing testimony or claim that he failed to give her a meaningful opportunity to explain any inconsistencies. She did not contend the IJ erred by treating her application form and her declaration as separate documents rather than a single application for relief. She asserted no error related to the IJ's finding of inconsistencies in her descriptions of the men who followed her and loitered outside her home. Nor did she contend that the IJ erred in finding that her statements about the attacker grabbing her by the hair and beating her were

by the petitioner; (2) demonstrate that the agency chose to exercise its discretion to entertain that matter; and (3) explicitly decide that matter in a full explanatory opinion or substantive discussion." *Id.* at 1238-39. Ms. Velasquez-Sierra does not contend that any of her contentions were exhausted by the BIA in this manner.

⁷ Ms. Velasquez-Sierra described the content of her asylum application form as lacking detail, stating that she and her counsel "[p]resumably" intended to supplement it with documentation and testimony. *R.*, Vol. 1 at 107. She acknowledged her declaration similarly lacked detail and stated she did not draft it. She theorized that "[p]erhaps" her declaration omitted mentioning a knife or a gun because the drafter failed to ask questions to obtain these details. *Id.* at 108. She also pointed to her counsel's failure to ask follow-up questions at the removal hearing to explain any omission.

inconsistent. Because Ms. Velasquez-Sierra did not present these same specific legal theories in her BIA appeal, she failed to satisfy the exhaustion requirement in § 1252(d)(1) and she may not raise these contentions in this court. *See Garcia-Carbajal*, 625 F.3d at 1237.⁸

We conclude, however, that Ms. Velasquez's BIA appeal sufficiently exhausted her seventh contention: that the BIA's decision is not supported by substantial evidence because it failed to consider the totality of the circumstances.

In her BIA appeal, Ms. Velasquez-Sierra also challenged the IJ's determination that she failed to corroborate her claims. She argued the IJ did not give her an opportunity to explain that failure and neglected to remind her of the corroboration requirement at previous hearings. She asserted the IJ should have either accepted the corroborating evidence she brought to the hearing or continued the proceedings for its submission. We conclude these contentions were sufficient to exhaust Ms. Velasquez-Sierra's argument before this court that the IJ erred in failing to continue the proceedings. But she now asserts for the first time that the IJ had a duty to develop the record. She did not raise this specific contention with the BIA. It is therefore unexhausted and we do not consider it. *See id.*

⁸ Ms. Velasquez also failed to exhaust other specific contentions underlying these claims of error, including that the IJ did not explain the context of her long pauses in testifying, neglected to define what a declaration is, relied on speculation in determining inconsistency, failed to explain his conclusion regarding inconsistencies in her evidence, and misstated when she first claimed she was beaten.

2. Adverse Credibility Determination

Ms. Velasquez-Sierra contends that “[t]he totality of the evidence in [her] case simply does not support the BIA’s decision to uphold the IJ’s adverse credibility determination.” Pet’r’s Br. at 28. As relevant to the BIA’s analysis, 8 U.S.C. § 1158(b)(1)(B)(iii) instructs that

[c]onsidering the totality of the circumstances . . . , a trier of fact may base a credibility determination on the demeanor, candor, or responsiveness of the applicant . . . , the consistency between the applicant’s . . . written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), [or] the internal consistency of each such statement . . . , without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant’s claim.

But rather than demonstrating that the BIA failed to consider the totality of the circumstances, Ms. Velasquez-Sierra instead challenges the evidentiary support for the specific inconsistencies the BIA relied upon. *See* Pet’r’s Br. at 27-28.

The question for this court is whether the agency’s adverse credibility determination is supported by substantial evidence, and more specifically, whether any reasonable adjudicator would be compelled to reach a conclusion contrary to the agency’s. § 1252(b)(4)(B). Ms. Velasquez-Sierra fails to satisfy this standard. First, we give deference to an IJ’s conclusion regarding demeanor. *See Elzour v. Ashcroft*, 378 F.3d 1143, 1153 (10th Cir. 2004). And here the record does not compel a conclusion contrary to the IJ’s finding that her testimony was evasive and unresponsive when confronted with inconsistencies in her statements. Second, the record also does not compel a conclusion contrary to the IJ’s finding that

Ms. Velasquez-Sierra's various statements were inconsistent with regard to whether the attacker was armed, whether he beat her,⁹ and what sort of additional threats she received after the attack—issues that go to the very heart of her claims. Ultimately, Ms. Velasquez-Sierra's contentions improperly ask this court to reweigh the evidence and accept her alternative interpretation of the record. This we cannot do. *See Sarr*, 474 F.3d at 789.

3. Failure to Continue Removal Proceedings

Ms. Velasquez-Sierra argues the IJ erred in failing to continue her removal proceedings so that she could submit corroborating evidence. She maintains it was clear at the hearing that she had provided documents to her attorney, which her attorney did not submit to the court.

Ms. Velasquez-Sierra attached to her BIA appeal the evidence she contended corroborated her claims. The BIA assumed without deciding that the IJ erred in failing to continue the proceedings but rejected her contention on the basis that she failed to demonstrate prejudice. *See Aguirre-Tello*, 353 F.3d at 1209.

In this court, Ms. Velasquez-Sierra describes the additional evidence as including “a photo of her murdered colleague’s body, multiple letters from members of her organization stating that she was a leader of their organization, a photo of her

⁹ Ms. Velasquez-Sierra contends that, contrary to the IJ’s finding, she did tell the asylum officer that the attacker beat her. But the IJ focused on the inconsistency between that initial statement, in which she did not claim physical harm other than having her hair pulled, and her later claim of having been physically beaten, “leaving her with bruises on her arms and face.” R., Vol. 1 at 207.

speaking into a microphone at what appears to be a press conference, and articles about the environmental impact of the solar panel installation.” Pet’r’s Br. at 18-19. But she does not expressly address the BIA’s no-prejudice finding. Instead, she simply characterizes this evidence as “corroborating her story.” *Id.* at 18; *see id.* at 19 (stating “[t]his evidence corroborated many of [her] claims”). These assertions do not demonstrate that her evidence sufficiently resolved the inconsistencies underlying the IJ’s adverse credibility determination to show a reasonable likelihood of a different outcome in her case. Ms. Velasquez-Sierra therefore does not establish that the BIA erred in concluding she failed to show she was prejudiced by the IJ’s failure to continue the proceedings.

III. Conclusion

We deny Ms. Velasquez-Sierra’s petition for review. We grant her application to proceed in this matter without prepayment of fees and costs. We deny as moot her second motion seeking the appointment of counsel.

Entered for the Court

Allison H. Eid
Circuit Judge