

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

FEB 22 2023

FOR THE NINTH CIRCUIT

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

PHIRIBERT MONESTIME,

Petitioner,

v.

MERRICK B. GARLAND, Attorney
General,

Respondent.

No. 19-72196

Agency No. A209-383-933

MEMORANDUM*

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

Submitted February 14, 2023**

Before: FERNANDEZ, FRIEDLAND, and H.A. THOMAS, Circuit Judges.

Phiribert Monestime, native and citizen of Haiti, petitions pro se for review of the Board of Immigration Appeals' ("BIA") order dismissing his appeal from an immigration judge's ("IJ") decision denying his applications for asylum, withholding of removal, 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).

(“CAT”), and voluntary departure. 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 review de novo questions of law. *Mohammed v. Gonzales*, 400 F.3d 785, 791-92 (9th Cir. 2005). 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 these findings. Substantial evidence does not support the agency’s determination that Monestime’s asylum application and testimony were inconsistent regarding his role with the MEDH party because he was not provided an opportunity to explain the alleged inconsistency. *See Rizk v. Holder*, 629 F.3d 1083, 1088 (9th Cir. 2011) (applicant must have the opportunity to explain an inconsistency), *overruled on other grounds by Alam v. Garland*, 11 F.4th 1133, 1135-36 (9th Cir. 2021) (en banc). Substantial evidence does not support the agency’s determination that his asylum application and testimony were inconsistent regarding when he fled Haiti, and his return in 2004 to renew a visa. *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 also does not support the agency’s determination that Monestime’s testimony is inconsistent with his documentary evidence as to who killed his cousin. *See Barseghyan v. Garland*, 39 F.4th 1138, 1143 (9th Cir. 2022) (alleged inconsistency did not support an adverse credibility determination because it was not, in fact, inconsistent). Further, the BIA erred when it made its own credibility findings on appeal. *See* 8 C.F.R. § 1003.1(d)(3); *Rodriguez v. Holder*, 683 F.3d 1164, 1170 (9th Cir. 2012) (BIA may not make its own factual findings).

Because we cannot be confident that the BIA would have upheld the adverse credibility determination absent these errors, we grant the petition and remand for the BIA to reconsider Monestime’s credibility and for any necessary further proceedings consistent with this decision. *See Kumar v. Garland*, 18 F.4th 1148, 1156 (9th Cir. 2021) (remand appropriate for the BIA to determine whether the adverse credibility determination is supported in the totality of the circumstances).

As to voluntary departure, we remand where the agency did not have the benefit of our decision in *Posos-Sanchez v. Garland*, 3 F.4th 1176, 1185 (9th Cir. 2021), holding that a statutorily deficient notice to appear does not trigger the voluntary departure stop-time provision. *See also Vasquez-Rodriguez v. Garland*, 7 F.4th 888, 896 (9th Cir. 2021) (exhaustion not required where resort to the

agency would be futile).

The government must bear the costs for this petition for review.

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

PETITION FOR REVIEW GRANTED; REMANDED.