NOT FOR PUBLICATION

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PEDRO DURAND, Petitioner, v. MERRICK B. GARLAND, Attorney General, Respondent.	No. 22-1747 Agency No. A206-035-742 MEMORANDUM*

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

Argued and Submitted January 11, 2024
Pasadena, California

Before: TALLMAN, CALLAHAN, and BENNETT, Circuit Judges.

Petitioner Pedro Durand petitions for review of the Board of Immigration Appeals' ("BIA") decision upholding the Immigration Judge's ("IJ") rejection of his motion to change venue and denial of his request for deferral of removal under the Convention Against Torture ("CAT"). He also challenges his removal order. We have jurisdiction under 8 U.S.C. § 1252. As to the first two issues, "[w]here,

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

as here, the BIA agrees with the IJ's reasoning, we review both decisions." *Garcia-Martinez v. Sessions*, 886 F.3d 1291, 1293 (9th Cir. 2018). We review "the [BIA's] legal conclusions de novo and its factual findings for substantial evidence." *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1059 (9th Cir. 2017) (en banc) (cleaned up). We deny the petition.

1. Although Durand filed a "Motion to Change Venue," the motion essentially requested that the IJ transfer him to a different detention center, though it also mentioned convenience to Durand's attorney and potential witnesses.[1] As both the IJ and BIA noted, immigration judges do not have the authority to order the Department of Homeland Security to transfer detainees to a different facility. And even if there were some ambiguities in the original motion to change venue, there were little or none in the appeal brief to the BIA, which discussed only the "conditions of confinement" at Durand's detention facility, in the context of "due process" violations. Given this, the BIA did not abuse its discretion in affirming the IJ's denial of Durand's motion to change venue. *See Baires v. I.N.S.*, 856 F.2d 89, 92 (9th Cir. 1988); *see also Singh v. Holder*, 349 F. App'x 216, 217 (9th Cir. 2009) ("We review for abuse of discretion the denial[] of . . . a motion to change venue.").

[1] Durand's attorney's statements before the IJ and Durand's appeal brief to the BIA also support that he was requesting a transfer to a different detention facility.

2. The agency's determination that Durand was not entitled to relief on his CAT claim is supported by substantial evidence. Durand never suffered past torture, as he came to the United States when he was three months old and never lived in Mexico. The agency correctly determined that Durand's fear of torture based on his sexual orientation, American identity, tattoos, and perceived wealth—as well as the country conditions and articles that Durand submitted—was insufficient to meet his burden of establishing a "*particularized*, ongoing risk of future torture." *Tzompantzi-Salazar v. Garland*, 32 F.4th 696, 707 (9th Cir. 2022) (emphasis added). The IJ and BIA properly considered all evidence in the aggregate and did not—as Durand suggests—base their decisions solely on Durand's lack of explanation for why he could not relocate to a safer location within Mexico. *Id.* at 705 ("[I]n deciding whether a petitioner has satisfied his or her burden, 'the IJ must consider all relevant evidence, including but not limited to the possibility of relocation within the country of removal.'" (quoting *Maldonado v. Lynch*, 786 F.3d 1155, 1164 (9th Cir. 2015))).

3. Because Durand did not challenge the IJ's removability determination before the IJ or BIA, he has failed to exhaust this issue. *See* 8 U.S.C. § 1252(d)(1); *Bare v. Barr*, 975 F.3d 952, 960 (9th Cir. 2020) ("Exhaustion requires a non-constitutional legal claim to the court on appeal to have first been raised in the administrative proceedings below, . . . and to have been sufficient to put the BIA

on notice of what was being challenged."). Durand argues that he was effectively foreclosed from raising the issue of removability because he was unrepresented at the time of the removability determination. But that is not a recognized exception to exhaustion. *See, e.g.*, *Sun v. Ashcroft*, 370 F.3d 932, 942-43 (9th Cir. 2004) (stating that the futility exception applies only when there are "issues [that are] so entirely foreclosed by prior BIA case law that no remedies are 'available . . . as of right' with regard to them before IJs and the BIA."). In any event, Durand was represented before the IJ at his merits hearing, and his attorney could have raised the removability issue at that hearing. Moreover, the IJ's removability determination was correct because Durand entered the United States without being admitted. 8 U.S.C. § 1182(a)(6)(A)(i) ("An alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible.").

PETITION DENIED.