FILED
United States Court of Appeals
Tenth Circuit

July 10, 2020

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JUN HUA HU,

Petitioner,

v.

WILLIAM BARR, United States Attorney General,

Respondent.

No. 19-9580
(Petition for Review)

ORDER AND JUDGMENT[*]

Before **TYMKOVICH**, Chief Judge, **HOLMES**, and **BACHARACH**, Circuit Judges.

Petitioner Jun Hua Hu, a native and citizen of the People's Republic of China, entered the United States without admission or parole on January 28, 2018. The Department of Homeland Security initiated removal proceedings against him shortly thereafter. Hu admitted the allegations against him and was found removable. He then sought relief in the form of asylum, withholding of removal, and protection

[*] 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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

under the United Nations Convention Against Torture (CAT). After a merits hearing, an Immigration Judge (IJ) denied Hu's applications for relief in August of 2018.

Hu appealed the denial to the Board of Immigration Appeals (BIA). His Notice of Appeal to the BIA was brief, stating only that "[t]the translation was inappropriate" and that, because he did not have the help of an attorney or someone to help him translate his evidence into English, his Due Process rights were violated. Admin. R. at 307. In its own review of the record, the BIA identified potential concerns regarding Hu's competency, and therefore it sua sponte remanded the case to the IJ for a competency evaluation. *See Matter of M-A-M-*, 25 I. & N. Dec. 474, 480 (BIA 2011) ("When there are indicia of incompetency, an Immigration Judge must take measures to determine whether a respondent is competent to participate in proceedings."). Following a hearing, the IJ found Hu competent and reaffirmed the prior denials of Hu's applications for relief.

Hu appealed this IJ decision to the BIA as well. His second Notice of Appeal was likewise brief, consisting of six sentences in which he again argued translation errors (and the lack of assistance of counsel) rendered the proceedings unfair. Although the second Notice indicated that a separate written brief or statement would follow, Hu did not file one. Hu did not challenge any aspect of the competency determination in this second appeal. The BIA affirmed the decision of the IJ and dismissed the appeal.

In his petition for review of the BIA decision, Hu raises two issues. First, he argues the IJ's findings regarding his credibility were marred by translation and other

errors. Second, he now challenges the IJ's determination that he was competent to proceed. Regarding the first issue, we conclude the IJ's credibility determinations were supported by substantial evidence, and therefore deny the petition in that respect. Regarding the second issue, we conclude these claims were not sufficiently exhausted and we lack jurisdiction to consider them. The petition for review is therefore denied.

The BIA affirmed the IJ decision in a detailed decision entered by a panel of three Board members, so we review the BIA decision as the final agency determination and limit our review to issues specifically addressed therein. *See Diallo v. Gonzales*, 447 F.3d 1274, 1279 (10th Cir. 2006). We review the agency's legal determinations de novo and its findings of fact for substantial evidence. *Yan v. Gonzales*, 438 F.3d 1249, 1251 (10th Cir. 2006). "The agency's findings of fact are conclusive unless the record demonstrates that 'any reasonable adjudicator would be compelled to conclude to the contrary.'" *Id.* (quoting 8 U.S.C. § 1252(b)(4)(B)).

Subject to exceptions not applicable here, we lack jurisdiction to consider arguments that were not first exhausted before the BIA. 8 U.S.C. 1252(d)(1); *Martinez-Perez v. Barr*, 947 F.3d 1273, 1282 (10th Cir. 2020). "[A]n alien must present the *same specific legal theory* to the BIA before he or she may advance it in court." *Garcia-Carbajal v. Holder*, 625 F.3d 1233, 1237 (10th Cir. 2010). "It is not enough . . . to make 'general statements in the notice of appeal to the BIA'. . . ." *Id.* (quoting *Torres de la Cruz v. Maurer*, 483 F.3d 1013, 1018 (10th Cir. 2007)). While we liberally construe the arguments of pro se parties, we "cannot take on the

responsibility of serving as the litigant's attorney in constructing arguments and searching the record." *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005).

In the first issue he raises in his petition, Hu challenges the translation of certain statements he made before the IJ. He identifies two statements: one related to his understanding of the purpose of the competency evaluation, and one related to a claim about his treatment in China that bolstered the IJ's findings that he lacked credibility. However, in both his first and second Notice of Appeal to the BIA, he never identified any specifically mistranslated statements. The BIA concluded Hu had "neither identified portions of the hearing transcript which reveal his confusion or difficulty understanding the court interpreter, nor . . . pointed to specific issues with the interpretation on appeal." Admin. R. at 2.

The "general statements in [Hu's] notice of appeal to the BIA are insufficient to constitute exhaustion of administrative remedies." *Torres de la Cruz*, 483 F.3d at 1018. To the extent Hu's petition for review identifies new or specific translation errors or other challenges to the findings of the IJ, we lack jurisdiction to consider them because they were not specifically raised before the BIA. To the extent Hu's petition asks this Court to review the agency's factual findings based upon arguments he *did* sufficiently exhaust, the agency record does not demonstrate that any reasonable factfinder would be compelled to reach a different conclusion than that reached by the BIA, so the petition is denied in that respect. *See Yan*, 438 F.3d at 1251.

While Hu attributes some aspects of the IJ's factual findings to translation issues, the IJ's credibility findings were based not only on the two statements that Hu claims were mistranslated, but also on numerous other inconsistencies and implausibilities in Hu's testimony, such as his claim that he was forced into hiding by the government even though he had been working openly as a mechanic for fifteen years, and his claim that he was fearful of returning to China even though he had voluntarily traveled there in 2017. There is no basis to set aside these findings, which are sufficient by themselves to support denial of his requests for relief.

As to the second issue raised in Hu's petition, the IJ's finding of competency was based on an examination by a healthcare provider at the detention facility, as well as Hu's responses to questions by the IJ at the hearing. In his appeal of that decision to the BIA, Hu did not challenge those findings. Indeed, his Notice of Appeal to the BIA makes no reference to competency whatsoever. We therefore lack jurisdiction to consider his challenges to that determination here. *See Martinez-Perez*, 947 F.3d at 1282.

For the foregoing reasons, the Petition for Review is **DENIED**. The motion to proceed in forma pauperis is granted.

Entered for the Court

Timothy M. Tymkovich
Chief Judge