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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

<p>SANTOS SANDOVAL, AKA Santos Gonzalez-Sandoval,</p> <p style="text-align: center;">Petitioner,</p> <p>v.</p> <p>LORETTA E. LYNCH, Attorney General,</p> <p style="text-align: center;">Respondent.</p>
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No. 14-73749

Agency No. A206-406-299

MEMORANDUM*

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

Argued April 15, 2016 Submitted August 9, 2016
San Francisco, California

Before: NOONAN, BEA, and CHRISTEN, Circuit Judges.

Santos Sandoval, a native and citizen of El Salvador, petitions for review of a final order of removal from the Board of Immigration Appeals (“BIA”). The BIA dismissed Sandoval’s appeal of an Immigration Judge’s (“IJ”) denial of his applications for asylum, withholding of removal, protection under the United

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

Nations Convention Against Torture (“CAT”), and voluntary departure. We have jurisdiction under 8 U.S.C. § 1252. We grant the petition as to voluntary departure; we dismiss in part and deny in part the petition as to asylum, withholding of removal, and relief under CAT.

1. Sandoval first argues that the IJ erred in dismissing his asylum claim as untimely under 8 U.S.C. § 1158(a)(2)(B) because the IJ failed to make express factual findings regarding Sandoval’s last date of entry. The IJ did not err because the statute does not require the IJ to make express findings, *see id.*, and Sandoval has not offered an alternate date of entry that would fall within the one-year bar. *Cf. Matter of F-P-R-*, 24 I. & N. Dec. 681, 684–85 (B.I.A. 2008) (holding that the IJ erred in calculating the one-year bar from the alien’s 1989 date of arrival when record evidence showed that the alien left the United States, returned in 2005, and filed his asylum application less than one year later). To the extent Sandoval challenges the IJ’s finding that Sandoval last entered the United States in 2003, this argument raises questions of fact that we lack jurisdiction to review. *See* 8 U.S.C. §§ 1158(a)(2)(B), 1252(a)(2)(D).

2. The IJ denied Sandoval’s application for withholding of removal based on an adverse credibility finding, and the BIA affirmed. Sandoval contends that the record compels reversal of the IJ’s adverse credibility finding because that

finding was based on contrived inconsistencies in Sandoval's testimony and immaterial omissions in his asylum application. We disagree.

Sandoval filed his petition after May 11, 2005, so the REAL ID Act governs. *See* 8 U.S.C. § 1158(b)(1)(B)(iii); *Shrestha v. Holder*, 590 F.3d 1034, 1040 (9th Cir. 2010). We review an IJ's adverse credibility finding under the deferential substantial evidence standard, *Ai Jun Zhi v. Holder*, 751 F.3d 1088, 1091 (9th Cir. 2014), and "only the most extraordinary circumstances will justify overturning an adverse credibility determination," *Shrestha*, 590 F.3d at 1041 (citation omitted).

Here, substantial evidence supports the IJ's conclusion that Sandoval testified inconsistently about the series of events that led him to flee from El Salvador in 2003. Sandoval first told the IJ that members of the Mara Salvatrucha gang started harassing him in 2000, but later told the IJ that the harassment did not begin until 2002, after a leader of the gang shot at him. The IJ was entitled to base his adverse credibility determination on this inconsistency because Sandoval's confrontations with the gang leader and the Maras "formed the crux of his application for relief." *Id.* at 1047; *see also id.* at 1046–47 (upholding an adverse credibility finding where the petitioner testified that "Maoists had inquired about him on two occasions, in 1998 and 2001," but wrote in his declaration that

“Maoists have been inquiring about [his] whereabouts frequently” (alteration in original)).

Substantial evidence also supports the IJ’s conclusion that Sandoval testified inconsistently about whether he had read a government report regarding his father’s death. *See* 8 U.S.C. § 1158(b)(1)(B)(iii) (an IJ may base a credibility determination on the “internal consistency” and truthfulness of the applicant’s oral testimony). Sandoval first told the IJ that he had read the report, but, when pressed, he admitted that he had not read it, but knew of its contents because his mother and brother had read the report.

3. Sandoval next argues that the proceedings before the IJ violated his due-process rights. Again, we disagree. The IJ gave Sandoval ample opportunity to testify about the past harassment he claimed to have suffered at the hands of the Maras and his fear of future persecution. Therefore, Sandoval’s hearing was not “so fundamentally unfair that [he] was prevented from reasonably presenting his case.” *Padilla-Martinez v. Holder*, 770 F.3d 825, 830 (9th Cir. 2014) (citation omitted); *cf. Cruz Rendon v. Holder*, 603 F.3d 1104, 1109 (9th Cir. 2010) (finding violation of due process where the IJ prevented the petitioner from testifying about her experiences and denied her a continuance to collect additional evidence).

4. Sandoval has not shown that “it is more likely than not” he will be tortured upon his return to El Salvador, so he has not established eligibility for relief under CAT. *See* 8 C.F.R. § 1208.16(c)(2).

5. Sandoval exhausted his petition for voluntary departure because the IJ discussed this form of relief, and the BIA affirmed the IJ’s decision by citing *Matter of Burbano*, 20 I. & N. Dec. 872, 874 (B.I.A. 1994). *See Chuen Piu Kwong v. Holder*, 671 F.3d 872, 877 (9th Cir. 2011) (when the BIA cites *Matter of Burbano*, “the IJ’s discussion of [an] issue is sufficient, in and of itself, to overcome [an] exhaustion challenge”).

The IJ denied Sandoval voluntary departure after concluding that his conviction under Cal. Penal Code § 273.5 was for a crime involving moral turpitude (“CIMT”). *See* 8 U.S.C. § 1229c(b)(1)(B) (an alien is eligible for voluntary departure only if “the alien is, and has been, a person of good moral character for at least 5 years”); *see also id.* §§ 1101(f)(3), 1182(a)(2)(A) (an alien is not of good moral character if he was convicted of a CIMT). The IJ determined that section 273.5 is broader than the generic federal definition of CIMT. *See Morales-Garcia v. Holder*, 567 F.3d 1058, 1064–65 (9th Cir. 2009). The IJ then decided that section 273.5 is divisible, and he denied relief after noting that “the

complaint[] clearly reflect[s] that the victim was the mother of the respondent’s child.”

The IJ did not have the benefit of recent case law that may bear on the question whether section 273.5 is categorically a CIMT and whether the statute is divisible. *See Mathis v. United States*, 136 S. Ct. 2243, 2256–57 (2016) (clarifying how to determine whether a statute is divisible and, thus, susceptible to the application of the modified categorical approach); *Carrillo v. Holder*, 781 F.3d 1155, 1158–59 (9th Cir. 2015) (finding that section 273.5 is categorically a crime of domestic violence); *People v. Burton*, 196 Cal. Rptr. 3d 392, 395–99 (Ct. App. 2015) (disagreeing with our conclusion in *Morales-Garcia v. Holder*, 567 F.3d 1058, 1064–67 (9th Cir. 2009), that section 273.5 is not categorically a CIMT). Accordingly, we grant Sandoval’s petition for review with respect to his claim for voluntary departure and remand this case to the BIA to reconsider that claim. *See Ceron v. Holder*, 747 F.3d 773, 784 (9th Cir. 2014) (en banc) (“[T]he prudent course of action is to remand this case to the BIA to consider the issue in the first instance. . . . That first opportunity to decide is especially important because . . . we ordinarily defer to the BIA’s determination whether a state statute categorically constitutes a crime involving moral turpitude.”).

PETITION GRANTED in part, DENIED in part, and DISMISSED in part; REMANDED. Each party shall bear its own costs.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)

Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
 - ▶ A material point of fact or law was overlooked in the decision;
 - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
 - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
 - ▶ Thomson Reuters; 610 Opperman Drive; PO Box 64526; St. Paul, MN 55164-0526 (Attn: Jean Green, Senior Publications Coordinator);
 - ▶ and electronically file a copy of the letter via the appellate ECF system by using “File Correspondence to Court,” or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

This form is available as a fillable version at:

<http://cdn.ca9.uscourts.gov/datastore/uploads/forms/Form%2010%20-%20Bill%20of%20Costs.pdf>.

Note: If you wish to file a bill of costs, it MUST be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

v. 9th Cir. No.

The Clerk is requested to tax the following costs against:

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* *Costs per page:* May not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

** *Other:* Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to 9th Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

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Name of Counsel:

Attorney for:

(To Be Completed by the Clerk)

Date

Costs are taxed in the amount of \$

Clerk of Court

By: , Deputy Clerk