

No. 09-60893

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

DELROY BANCROFT FORDE,
PETITIONER,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL,
RESPONDENT.

PETITION FOR REVIEW OF AN ORDER OF REMOVAL
BY THE BOARD OF IMMIGRATION APPEALS

**BRIEF OF AMICUS CURIAE,
AMERICAN IMMIGRATION LAWYERS ASSOCIATION,
IN SUPPORT OF PETITIONER'S PETITION FOR REHEARING
AND SUGGESTION FOR REHEARING EN BANC**

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The undersigned counsel of record certifies that the following persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal:

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Dated: November 8, 2011

/s/ Nicolas Chavez

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CORPORATE DISCLOSURE STATEMENT
Fed. R. App. P. 26.1

I, Nicolas Chavez, attorney for *amicus curiae*, certify that the American Immigration Lawyers Association is a non-profit organization that does not have any parent corporations or issue stock and consequently there exists no publicly held corporation which owns 10% or more of its stock.

Dated: November 8, 2011

/s/ Nicolas Chavez

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RULE 29(c)(5) CERTIFICATION
Fed. R. App. P. 29(c)(5)

Pursuant to Rule 29(c)(5), *amicus curiae* affirms that no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than amicus or its counsel, make a monetary contribution to the preparation or submission of this brief.

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INTRODUCTION

Before obtaining judicial review of a final removal order, an alien must exhaust all administrative remedies available as of right. 8 U.S.C. § 1252(d)(1). In interpreting the scope of exhaustion required under the statute, this Court has explained,

Petitioners fail to exhaust their administrative remedies as to an issue if they do not first raise the issue before the BIA, either on direct appeal or in a motion to reopen. The exhaustion requirement applies to all issues for which an administrative remedy is available ‘as of right.’ A remedy is available as of right if (1) the petitioner could have argued the claim before the BIA, and (2) the BIA has adequate mechanisms to address and remedy such a claim. Since exhaustion in this context is a statutory (rather than prudential) mandate, failure to exhaust an issue deprives this court of jurisdiction over that issue.

Omari v. Holder, 562 F.3d 314, 318-19 (5th Cir. 2009)(citations omitted). The exhaustion rule announced in *Omari* was applied by the Court in the present matter. *Forde v. Holder*, 2011 U.S. App. LEXIS 19278 (5th Cir. Sept. 19, 2011)(per curiam). *Amicus curiae*, the American Immigration Lawyers Association (“AILA”), appears in support of petitioner’s request for rehearing to explain that the circuit’s *Omari* rule is based on a questionable interpretation of the exhaustion requirement set forth in 8 U.S.C. § 1252(d).

The *Omari* exhaustion rule conflicts with the decisions of several other circuit courts and prior Fifth Circuit precedent, which indicate that motions to reconsider or reopen are not remedies available “as of right” within the scope of 8

U.S.C. § 1252(d). *Omari* also conflicts with agency regulations and decisions of the Board of Immigration Appeals (“BIA” or the “Board”) that have long recognized the BIA’s broad authority to grant or deny administrative motions. AILA respectfully submits that this Court should grant *en banc* rehearing to address the circuit split *Omari* has created, and to secure the uniformity of its own decisions. The Court should further clarify that there are no prudential bars to judicial review in cases involving unforeseeable BIA errors of law.

Alternatively, if the full Court declines to hear this case, AILA suggests that panel rehearing is otherwise warranted. An additional basis for rehearing lies in this Court’s affirmation of the so-called “departure bar” regulation, 8 C.F.R. § 1003.2(d), under which the BIA refuses to adjudicate a motion filed by an individual who is removed from the United States. *See Matter of Armendarez-Mendez*, 24 I. & N. Dec. 646 (BIA 2008)(holding that it lacks jurisdiction to review a motion to reopen if the alien has departed the United States after completion of administrative proceedings).¹ An alien may be removed based on an

¹ This Court has affirmed the application of the departure bar as it pertains to untimely motions but has declined to address whether it conflicts with the Immigration and Nationality Act. *See Ovalles v. Holder*, 577 F.3d 288 (5th Cir. 2009); *see also Toora v. Holder*, 603 F.3d 282, 285-86 (5th Cir. 2010)(favorably citing *Matter of Armendarez-Mendez* in upholding the departure bar without deciding its validity). Other circuits have invalidated the departure bar regulation as a violation of an alien’s statutory right to file a motion to reconsider or motion to reopen set forth at 8 U.S.C. § 1229a(c)(6), (7), reasoning that the agency may not abrogate by regulation a right Congress has granted an alien to pursue discretionary relief from a BIA final order. *E.g., Prestol Espinal v. AG of the United States*, 653 F.3d 213, 217 (3d Cir. 2011)(holding that the

administratively final removal order while a motion to reconsider is pending at the Board. Pursuant to the departure-bar rule, the Board dismisses a motion without adjudicating it. Such a dismissal would effectively preclude judicial review of a removal order under the *Omari* exhaustion rule. Accordingly, due to the application of the departure bar in this circuit, a motion to reconsider is not an “adequate mechanism” to address unforeseeable BIA errors, even accepting *Omari*’s controversial interpretation of 8 U.S.C. 1252(d).

STATEMENT OF INTEREST

The American Immigration Lawyers Association (“AILA”) is a national association with more than 11,000 members throughout the United States, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor and courtesy of those appearing in a representative capacity in immigration and naturalization matters. Members of

departure bar was invalid, as it conflicted with an alien’s statutory right to file a motion); *William v. Gonzales*, 499 F.3d 329 (4th Cir. 2007)(invalidating the departure bar as contrary to statute); *Pruidze v. Holder*, 632 F.3d 234, 235 (6th Cir. 2011)(holding that the BIA has jurisdiction to review motions to reopen filed by aliens who have departed the United States under an order of removal).

AILA practice regularly before the Department of Homeland Security (“DHS”) and the Executive Office for Immigration Review (including the BIA and immigration courts), as well as before the federal courts.

ARGUMENT

I. Other courts of appeals agree, and this Court has previously confirmed, that a motion to reconsider is not an administrative remedy available “as of right” under 8 U.S.C. § 1252(d).

The starting point in interpreting 8 U.S.C. is its text. *United States v. James*, 478 U.S. 597, 604 (1986). Statutes should be interpreted, whenever possible, to give every word and phrase some operative effect. *Walters v. Metro. Educ. Enters.*, 519 U.S. 202, 209 (1997). Here, the plain language of 8 U.S.C. § 1252(d) requires exhaustion of only those remedies that are available to the petitioner “as of right”:

A court may review a final order of removal only if – (1) the alien has exhausted all administrative remedies available to the alien *as of right*, and (2) another court has not decided the validity of the order, unless the reviewing court finds that the petition presents grounds that could not have been presented in the prior judicial proceeding or that the remedy provided by the prior proceeding was inadequate or ineffective to test the validity of the order.

8 U.S.C. § 1252(d)(emphasis added).

While 8 U.S.C. § 1229a(c) vests individuals with an unambiguous statutory

right to *file* motions to reconsider or reopen,² other courts of appeals have held that motions to reconsider or reopen cannot be properly classified remedies “as of right” for purposes of statutory exhaustion under 8 U.S.C. § 1252(d), or its predecessor statute. *See, e.g., Gebremichael v. INS*, 10 F.3d 28, 33 n.13 (1st Cir. 1993)(“While a petitioner must ‘exhaust[] the administrative remedies available to him as of right under the immigration laws and regulations,’ 8 U.S.C. § 1105a(c), a petitioner need not move for rehearing by the Board in order to fulfill the exhaustion requirement.”); *Arango-Aradondo v. INS*, 13 F.3d 610, 614 (2d Cir. 1994)(holding that a motion to reopen following the denial of a petitioner’s administrative appeal to the BIA is not required in order for the petitioner to have exhausted his administrative remedies as of right); *Rhoa-Zamora v. INS*, 971 F.2d 26, 33 (7th Cir. 1992)(same); *White v. INS*, 6 F.3d 1312, 1315 (8th Cir. 1993)(adopting the Seventh Circuit’s approach in finding that motions to reopen are discretionary remedies not available as of right for statutory exhaustion); *Arsdi v. Holder*, No. 10-72147, ___ F.3d ___, 2011 U.S. App. LEXIS 21482, at *9, n.4 (9th

² A petitioner has a statutory right to file a motion to reopen or reconsider, 8 U.S.C. § 1229a(c)(6), (7); but agency regulations provide the BIA with the discretion to deny it. *See* 8 C.F.R. § 1003.2(a). Furthermore, a petitioner has a right to request that a U.S. circuit court review an agency’s denial of a motion to reopen. *See Kucana v. Holder*, 130 S. Ct. 827 (U.S. 2010)(holding that the proscription of judicial review under 8 U.S.C. § 1252(a)(2)(B) applied only to the agency’s determinations made discretionary by statute, not to determinations declared discretionary through regulations). Here, however, we consider a different question of whether an alien *must* file a post-decision motion under 8 U.S.C. § 1252(d) before petitioning for appellate review in order to raise an issue that arose as the result of the BIA’s decision.

Cir. Oct. 24, 2011)(O’Scannlain, C.J.) (“Because these motions are not remedies available to the alien, as ‘of right,’ an alien need not use them in order to exhaust his claim [under section 1252(d)].”); *Alcaraz v. INS*, 384 F.3d 1150, 1158 (9th Cir. 2004) (“[A]s of right” requires “an alien to exhaust his or her claims by raising them on *direct appeal* to the BIA.”); *Noriega-Lopez v. Ashcroft*, 335 F.3d 874, 881 (9th Cir. 2003) (“It follows that motions to reconsider, like motions to reopen, are not ‘remedies available ... as of right’ within the meaning of 8 U.S.C. § 1252(d)(1).”).

This Court has explicitly embraced the same position in past precedents, holding that “a motion to reopen is not a remedy available by right” for purposes of statutory exhaustion. *James v. Gonzales*, 464 F.3d 505, 513 (5th Cir. 2006)(finding that petitioner did not have to exhaust his administrative remedies where he was not given advanced notice of the issues); *see also Goonsuwan v. Ashcroft*, 252 F.3d 383, 388 (5th Cir. 2001) (“Given the broad discretion in the Attorney General to grant or deny a motion to reopen, it cannot be characterized as a remedy available ‘as of right.’”).³ On the other hand, this Court has specifically

³ In the instant case, Mr. Forde presented a legal issue which arose as the result of the BIA’s decision, namely, that the BIA engaged in impermissible fact finding in the process of rendering a final decision. Notably, this Court has accepted jurisdiction to review such legal issues notwithstanding the fact that the petitioner did not raise them first with the BIA in a motion to reconsider. *See Delgado-Reynua v. Gonzales*, 450 F.3d 596, 600 (5th Cir. 2006)(this Court found jurisdiction under 8 U.S.C. § 1252 to inquire into petitioner’s argument as to whether the BIA exceeded its authority when it issued a removal order, a question of law which arose after

regarded a direct appeal to the BIA as an administrative remedy available as of right. *United States v. Gonzalez-Parra*, 438 F.2d 694, 697 (5th Cir. 1971)(stating that an alien ordered deported “has an administrative remedy available as of right in the form of an appeal to the Board of Immigration Appeals.”). It is therefore puzzling why this Court would deviate from its sister circuits’ decisions by imposing a requirement that a petitioner file a motion to reconsider, when it has previously considered that such motion is not an administrative remedy “as of right.” Not only does such requirement conflict with its own precedent, but it also creates a circuit split on the vitally important issue of jurisdiction to review final orders of removal.

The Court’s decision further conflicts with agency regulations and decisions that have long recognized broad BIA authority to adjudicate motions to reconsider or reopen. Under the regulations, the BIA possesses authority to grant or deny such motions, and it is not bound to grant reconsideration or reopening upon satisfaction of any specified criteria.⁴ The BIA has long understood that the motion

the BIA rendered its order); *see also Alvarez v. Gonzales*, 191 Fed. Appx. 286, 286 (5th Cir. 2006)(this Court found jurisdiction to review the BIA’s denial of immigration relief based on its impermissible fact finding despite the fact that the petitioner had not filed a motion to reconsider). These decisions demonstrate that the Court has previously-and correctly-exercised its jurisdiction to determine questions of law under 8 U.S.C. § 1252(a)(2)(D) without requiring a motion to reconsider, particularly for those cases where the issue had surfaced from the BIA’s final decision.

⁴ *E.g.*, 8 C.F.R. § 1003.2(a)(“The Board has discretion to deny a motion to reopen even if the party moving has made out a *prima facie* case for relief.”).

regulations impose no such duty and that it is free as an agency to deny otherwise meritorious motions as a matter of discretion alone. *See, e.g., Matter of Rodriguez-Vera*, 17 I. & N. Dec. 105, 106 (BIA 1979)(the granting or denying of a motion is itself a discretionary determination). Indeed, decades of Board decisions applying the motion regulations emphasize that there is simply no such thing as a *right* to reconsideration or reopening at all.

The *Omari* interpretation of 8 U.S.C. § 1252(d) departs from the interpretation of other circuits by requiring a petitioner to first file a motion to reconsider—even to challenge an unforeseeable error of law arising for the first time in the BIA’s own decision. *Omari* reads “as of right” to describe any issue for which a “petitioner could have argued the claim before the BIA, [] and the BIA has adequate mechanisms to address and remedy such a claim.” *Omari*, 562 F.3d at 318-19. In so doing, the Court appears to have conflated exhaustion of remedies “as of right” with language in section 1252(d)(2) pertaining to the petitioner’s ability to present a claim or seek an adequate remedy in prior judicial proceedings. The result is a confounding interpretation, because whether a petitioner has obtained effective judicial review is conceptually distinct from whether or not an administrative remedy can be properly construed as one of right. Furthermore, the Court has made no attempt to reconcile its interpretation with earlier decisions which indicate that a remedy “as of right” does not include administrative motions.

See James, 464 F.3d at 513 (a motion to reopen is not an administrative remedy by right for purposes of statutory exhaustion); *see also Goonsuwan*, 252 F.3d at 388 (same).

II. There are no prudential reasons to require a motion to reconsider the BIA's unforeseeable violation of 8 C.F.R. § 1003.1(d)(3)(iv).

If the full Court overturns *Omari* and holds that there is no statutory obligation to seek reconsideration, it will then need to consider whether any prudential bars to judicial review exist. Circuit courts typically do require exhaustion of all issues before the agency as a prudential matter, even where there is no statutory rule, and in most cases it makes no practical difference whether the general duty to exhaust is statutory or judicial in origin. *See, e.g., Etchu-Njang v. Gonzales*, 403 F.3d 577, 583-84 (8th Cir. 2005); *Noriega-Lopez*, 335 F.3d at 881 (noting that the Court could require the petitioner to file a motion to reconsider as a matter of prudential exhaustion).⁵

The primary justification for judicial exhaustion rules is to ensure that parties to adversarial administrative proceedings will fully develop their evidence and arguments below, thereby permitting the agency to exercise its delegated authority and unique expertise in resolving all disputed issues. *See Sims v. Apfel*, 530 U.S. 103, 110 - 11 (2000); *McKart v. United States*, 395 U.S. 185, 193 - 95

⁵ Indeed, prudential exhaustion principles would almost certainly have led to the same outcome in *Omari*.

(1969); *Hormel v. Helvering*, 312 U. S. 552, 556 (1941). When a party's failure to exhaust prevents the agency from making an evidentiary record, exercising its assigned discretion, or applying administrative expertise, courts are right to deny judicial review in the absence of a statutory bar. *McKart*, 395 U.S. at 194. But the exhaustion doctrine must be tailored to fit the peculiarities of the specific administrative scheme in question, and in a narrow class of cases exceptions to the general rule will support judicial review of issues not presented to the agency below. *Id.* at 195.

For example, where a petitioner develops a full evidentiary record and presents all arguments for relief during adversarial immigration court proceedings, then presses all those claims again before the BIA on appeal, only to have the BIA engage in unlawful fact finding, the agency's legal error is an unforeseeable surprise to both parties. A circuit court's correction of such legal error does not impinge agency expertise or discretion in any way whatsoever, but instead promotes both judicial and administrative economy. And because the specific regulatory scheme governing BIA appeals makes clear that the agency generally *lacks* authority with respect to this type of error, no identifiable purpose is served if the circuit court imposes a rigid exhaustion rule.

III. Because the agency imposes a departure bar, a motion to reconsider is not an “adequate mechanism” to address and remedy legal errors committed by the BIA.

Section 1252(d) “requires that a petitioner exhaust all administrative remedies available as of right for this court to have jurisdiction over an issue.”

Omari, 562 F.3d at 316. As previously indicated, “a remedy is available as of right if (1) the petitioner could have argued the claim before the BIA, and (2) the BIA has *adequate mechanisms* to address and remedy such a claim.” *Id.* at 317-18 (emphasis added), citing *Toledo-Hernandez v. Mukasey*, 521 F.3d 332, 334 (5th Cir. 2008); *Falek v. Gonzales*, 475 F.3d 285, 291 (5th Cir. 2007). While a petitioner might file a motion for reconsideration with the Board, presenting a claim that the Board has committed legal error by conducting a *de novo* review of the immigration judge’s factual findings, such a filing would not be an adequate mechanism for addressing the claim where existing Board regulations do not: (1) guarantee actual administrative review; or (2) preserve the statutory right to judicial review of a final order of removal.

An alien has a statutory right to seek one motion for reconsideration of a BIA decision, filed within 30 days of the entry of a final, administrative order of removal, and specifying the errors of law or fact in the previous order. 8 U.S.C. § 1229a(c)(6). Except in limited circumstances, however, the filing of a motion to reconsider with the BIA will not automatically stay the execution of the underlying

removal order. 8 C.F.R. § 1003.2(f). Any departure from the U.S. of a person who has filed a motion to reconsider, including the involuntary removal of that person, shall constitute a withdrawal of such motion. 8 C.F.R. § 1003.2(d); *Toora*, 603 F.3d at 286 (holding that an alien forfeits his opportunity to file a motion upon his departure following an order of removal); *Ovalles*, 577 F.3d at 295 (declining to find § 1003.2(d) invalid).

The continued validity of the departure bar within the Fifth Circuit demonstrates the inadequacy of a motion to reconsider as a mechanism for addressing and remedying a legal error committed by the Board in its review of an immigration judge's decision. Imagine a situation in which a non-citizen's *sole* basis for seeking judicial review of an administratively final order of removal concerned legal errors committed by the Board in the course of its analysis on direct review. Under the Fifth Circuit's interpretation of section 1252(d), that individual would be barred from immediately filing a petition for review. *Omari*, 562 F.3d at 321 (concluding that where the petitioner never raised the issue of impermissible fact finding before the Board, section 1252(d) jurisdictionally barred the Court from addressing the claim). Instead, the non-citizen would be forced to initiate an administrative process—reconsideration—with the knowledge that his claim might never be considered on the merits, but instead dismissed on purely

jurisdictional grounds, if he happened to be removed from the U.S. during the pendency of his motion. *See* 8 C.F.R. § 1003.2(d).

It is true that some individuals facing such a situation would be spared removal as a matter of luck, if immigration authorities didn't have the time or resources to immediately execute removal. Other individuals might find themselves the beneficiaries of administrative stays of removal issued by Immigration and Customs Enforcement, or the Board itself, in the exercise of administrative discretion. 8 C.F.R. § 1003.2(f) (“Execution of such decision shall proceed unless a stay of execution is specifically granted by the Board, the Immigration Judge, or an authorized officer of the Service.”). However, a proper assessment of the adequacy of a procedural mechanism should not depend on fortuitous accidents or the possibility of administrative grace, but should instead involve a forward-looking assessment of whether petitioners can reliably exercise their rights and obtain review of agency error. The current system does not protect these rights, but instead contains a Court-sanctioned mechanism that will deprive many aliens of any reconsideration of their claims. This cannot be considered an adequate remedy.⁶

⁶ Another way to frame the issue would be to consider the “as of right” language in section 1252(d) as properly encompassing both the *right to file* a request for reconsideration along with a *right to stay* in the U.S. during the pendency of such a motion. The two are inexorably intertwined, since without the right to stay, the right to file is an empty right—capable of being taken away involuntarily at any moment prior to a decision on the merits.

The non-citizen forced down the blind alley of reconsideration could also end up losing his right to *any* subsequent judicial review of his legal claims, if his motion at the Board is dismissed by operation of the departure bar. Under 8 U.S.C. § 1252(a)(1), a non-citizen has a right to review of a final order of removal. *Moreira v. Mukasey*, 509 F.3d 709, 712 (5th Cir. 2007). The Board's denial of a motion to reconsider, however, is a separate order, requiring its own petition for review. *Guevara v. Gonzales*, 450 F.3d 173, 176 (5th Cir. 2006).

In the case of a non-citizen who *only* seeks review of a new issue flowing from the Board's analysis on direct appeal, where the issue was not previously raised at the Board, his only route to judicial review would be through a timely petition for review submitted following the Board's dismissal of a motion for reconsideration. *Omari*, 562 F.3d at 321. If, however, that same individual is removed during the pendency of motion, then the motion will never be addressed on the merits, but simply dismissed through an invocation of the departure bar. *See* 8 C.F.R. § 1003.2(d).

The fact that the non-citizen had been removed from the U.S. would not prevent him from subsequently filing a petition for review challenging the denial of his motion for reconsideration. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Div. C of Pub. L. No. 104-208, § 306(b), 110 Stat. 3009-546, 3009-607 (effective Sept. 30, 1996) (repealing 8 U.S.C. § 1105a).

However, the only *substantive* issue that could be raised at the circuit court would be the lawfulness of the departure bar, an issue which has not been fully addressed by the Court and thereby causing substantial uncertainty in the outcome of the proceedings.⁷ In other words, the original legal issue, forced by *Omari* into a detour through the Board, could ultimately be lost altogether, with no recourse to judicial review. Such an outcome can hardly be characterized as an adequate remedy that recognizes an individual's right to judicial review of a final removal order under 8 U.S.C. § 1252.

CONCLUSION

For all of the reasons stated above, *amicus curiae* respectfully urges the Court to grant Petitioner's Petition for Rehearing or Rehearing *En Banc*.

Respectfully submitted,

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Dated: November 8, 2011

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⁷ See footnote 1, *supra*.

CERTIFICATE OF SERVICE

Undersigned counsel certifies that this Brief was electronically filed through the Court's electronic docketing system ("CM/ECF") on November 8, 2011. I further certify that all participants in this case are registered CM/ECF users. As such, all participants were automatically served as a participant filer of the CM/ECF system. 5th Cir. R. 25.2.5.

/s/ Nicolas Chavez

Nicolas Chavez
Attorney for Amicus

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements
and Type-Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7) because this brief contains 3,413 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and it is not more than 15 pages excluding said exempted portions.
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 2007 in 14 point Times New Roman.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED

September 19, 2011

No. 09-60893

Lyle W. Cayce
Clerk

DELROY BANCROFT FORDE, also known as Delroy G Forde, also known as Denuy Ford, also known as Donovan P Ford, also known as Dulnoy Farde, also known as Danny Ford, also known as Coral G Ford, also known as Forde P Delroy, also known as Gilroy B Forde, also known as Delroy D Ford, also known as Delory B Ford, also known as Delroy Forge,

Petitioner

v.

ERIC H. HOLDER, JR., U. S. ATTORNEY GENERAL,

Respondent

On Petition for Review
from the Board of Immigration Appeals
A035 959 726

Before JOLLY, DeMOSS, and PRADO, Circuit Judges.

PER CURIAM:*

Delroy Forde seeks review of an order by the Board of Immigration Appeals denying him relief under the Convention Against Torture. Because we

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

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do not have jurisdiction to review two of Forde's claims and we affirm his third, his petition is denied.

I.

Forde, a native and citizen of Jamaica, was admitted into the United States as a lawful permanent resident on May 7, 1979. Following convictions for an aggravated felony and a controlled substance offense, Forde was charged with removal pursuant to 8 U.S.C. § 1227(a)(2)(A)(iii) and § 1227(a)(2)(B)(i). The Immigration Judge (IJ) found Forde was removable, but that Forde was eligible for relief under the Convention Against Torture (CAT). Because Forde was HIV positive, the IJ concluded that he would be perceived as a homosexual in Jamaica, where homosexuals are subject to torture and homosexual conduct is criminalized.

The Department of Homeland Security (DHS) appealed to the Board of Immigration Appeals (BIA). The BIA vacated the IJ's grant of relief, finding that Forde failed to establish a clear probability of torture. The BIA held that Forde did not demonstrate that an HIV positive person would be targeted for physical attacks or arrested under Jamaican laws criminalizing homosexual acts. Finally, the BIA denied a motion to remand to the IJ for consideration of previously unavailable evidence, finding that the evidence was cumulative and that Forde failed to establish that the evidence was previously unavailable. Forde timely filed a petition for review.

II.

On appeal, Forde asserts that the BIA erred by: (1) engaging in a de novo review of the IJ's factual findings; (2) finding that Forde was not entitled to relief

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under the CAT; and (3) denying his motion to remand for consideration of previously unavailable evidence. We address each in turn.

A.

Forde's contention that the BIA conducted a de novo review of the IJ's factual findings challenges an alleged legal error in the BIA's decision, which Forde was required to raise before the BIA by filing a motion for reconsideration. *See Omari v. Holder*, 562 F.3d 314, 319–20 (5th Cir. 2009) (finding that an alien did not exhaust his claim of impermissible fact finding by the BIA when he failed to raise it in a motion for reconsideration). Because Forde failed to file a motion for reconsideration, he did not exhaust his remedies and we lack jurisdiction to review this claim. *See Roy v. Ashcroft*, 389 F.3d 132, 137 (5th Cir. 2004) (“Failure to exhaust an issue creates a jurisdictional bar as to that issue.”).

B.

Forde also contends that the BIA erred in vacating the IJ's grant of relief under the CAT, asserting that the evidence compels a finding that Forde would be subject to torture if removed to Jamaica due to his HIV positive status.

When an alien is found removable for having committed controlled substance offenses, aggravated felonies, or crimes involving moral turpitude, this court lacks jurisdiction to review the BIA's final order of removal. *See* 8 U.S.C. §§ 1182(a)(2)(A)(i)(I), 1227(a)(2)(A)(ii) & (B)(i); 8 U.S.C. § 1252(a)(2)(C); *Brieva-Perez v. Gonzales*, 482 F.3d 356, 359 (5th Cir. 2007). We do, however, have jurisdiction to review constitutional claims or questions of law raised in a petition for review. *See* 8 U.S.C. § 1252(a)(2)(D); *Brieva-Perez*, 482 F.3d at 359.

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Forde does not challenge the legal standard applied by the BIA.¹ Rather, Forde asserts that the BIA erred as a matter of law in reversing the IJ's grant of relief under the CAT. Despite this framing of the issue, Forde's argument on appeal essentially challenges the BIA's finding that, because Forde is not a homosexual, his threat of torture was not established. Thus, Forde's argument challenges whether the BIA's decision was supported by substantial evidence, which presents a factual question. *See, e.g., Hakim v. Holder*, 628 F.3d 151, 155 (5th Cir. 2010) (finding that the court did not have jurisdiction to consider whether the BIA's denial of relief was supported by substantial evidence); *Cruz v. Holder*, 398 F. App'x 17, 18 (5th Cir. 2010); *Ahmed v. Mukasey*, 300 F. App'x 324, 328 (5th Cir. 2008); *Zhang v. Gonzales*, 432 F.3d 339, 344 (5th Cir. 2005) ("We use the substantial evidence standard to review the IJ's factual conclusion that an alien is not eligible for . . . relief under the Convention Against Torture." (quotations and citations omitted)). Forde's argument that the evidence established that he would be subject to torture for his HIV positive status is a factual question we do not have jurisdiction to consider.

C.

In his final point of error, Forde asserts that the BIA erred in denying his motion to remand to the IJ for consideration of previously unavailable evidence. Forde's argument focuses solely on whether the evidence was actually unavailable and the standard applied by the court in making such determination. Forde fails to address the BIA's finding that the evidence was

¹ To the extent that Forde did challenge the legal standard applied by the BIA, he failed to exhaust this issue before the BIA by filing a motion for reconsideration and we do not have jurisdiction to review the claim. *See Omari*, 562 F.3d at 319; *Roy*, 389 F.3d at 136.

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cumulative to other evidence already in the record. As such, Forde has forfeited his challenge to this alternative holding on appeal, which we affirm. *See Singh v. Holder*, 568 F.3d 525, 529 (5th Cir. 2009) (finding that petitioner's failure to raise an issue with a BIA's determination waives the argument on appeal).

PETITION DENIED.