UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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ORDER

August 17, 2021

Before

ILANA DIAMOND ROVNER, *Circuit Judge*
MICHAEL B. BRENNAN, *Circuit Judge*
AMY J. ST. EVE, *Circuit Judge*

No. 21-2187	IRWIN MENCHACA-FLORES, Petitioner v. MERRICK B. GARLAND, Attorney General of the United States, Respondent
Originating Case Information:	
Agency Case No: A209-413-347 Board of Immigration Appeals	

The following are before the court:

1. **PETITION FOR REVIEW AND MOTION FOR STAY OF REMOVAL**, filed on June 25, 2021, by counsel for the petitioner.

2. **SUPPLEMENTAL FILING ON MOTION FOR STAY OF REMOVAL PURSUANT TO DOCKET ORDER OF JUNE 25, 2021**, filed on June 30, 2021, by counsel for the petitioner.

3. **RESPONDENT'S OPPOSITION TO PETITIONER'S REQUEST FOR A STAY OF REMOVAL**, filed on July 12, 2021, by counsel for the respondent.

IT IS ORDERED that the motion for stay of removal is **DENIED**.

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Rovner, *Circuit Judge*, dissenting.

I would grant Menchaca-Flores's motion to stay removal. A balance of the traditional factors that courts of appeals must apply compels a stay. Should we err in our assessment, our decision would be permanent and irrevocable, and, as Menchaca-Flores alleges, could risk his life. A stay is a prudent and conservative means to ensure a thorough consideration of the merits on which Menchaca-Flores has shown a likelihood of success; it would avoid irreparable harm to him—allegedly life-threatening harm—without unwarranted harm to the government, and it would serve the public interest. *See Nken v. Holder*, 556 U.S. 418, 421 (2009).

Menchaca-Flores presents a potentially meritorious argument: The Board of Immigration Appeals legally erred in ruling that he had not established membership in a particular social group and therefore did not qualify for withholding of removal. *See* 8 U.S.C. § 1231(b)(3). His motion and later supplement raise his fear of death if returned to Mexico and the risk posed to him by his tattoos, which identify him as a former gang member. As the Board itself recognized, the Immigration Judge failed to consider his credible testimony on those points. Nevertheless, the Board upheld the IJ's decision, concluding incorrectly that the IJ's failure to address his credible testimony was harmless. Because his tattoos could be removed or covered, the Board reasoned, they were not an "immutable" characteristic and could not establish his membership in a particular social group. But it is not a tattoo by itself that is the social group; it is his former membership in a gang that is signified by the tattoo, and this court has held that former gang membership is a recognizable social group. *See Arrazabal v. Lynch*, 822 F.3d 961, 965 (7th Cir. 2016). A member of a gang can quit and try to hide markers, like tattoos, of the former membership (although tattoo removal is costly, painful and usually not completely successful), but "being a former member of a group is a characteristic impossible to change." *Benitez Ramos v. Holder*, 589 F.3d 426, 429 (7th Cir. 2009); *see also Sepulveda v. Gonzales,* 464 F.3d 770, 772 (7th Cir. 2006) (ruling that petitioner, who belonged to a group of former employees of a Columbian agency, could never cease to be a former employee).

The risk of irreparable harm to Menchaca-Flores makes his arguments all the more compelling. Membership in a group of tattooed, former gang members can be dangerous, even fatal. *See Arrazabal*, 822 F.3d at 965. Quantification of risk in the immigration context can be difficult to establish: "there is no reliable data to show just how great an applicant's risk of torture is." *Id.* at 966. The immigration judge found Menchaca-Flores's testimony credible that he feared kidnapping or death if returned to

Mexico, and that immigration officers warned him that his tattoos marking him as a former gang member increased his risk.

Our decision will cause him irreparable harm in other ways. Because Menchaca-Flores was in "withholding-only" proceedings, his petition may become moot upon his removal. Two other circuits have held that petitions for review of withholding-only proceedings are mooted by the petitioner's removal. *Mendoza-Flores v. Rosen*, 983 F.3d 845, 846 (5th Cir. 2020); *Kaur v. Holder*, 561 F.3d 957, 959 (9th Cir. 2009). Although this court has yet to consider the issue, it has agreed to hear argument on it in a case similar to Menchaca-Flores's. *See Garcia-Marin v. Garland*, No. 20-3393 (7th Cir. May 17, 2021). Based on these two sources of harm (kidnapping or death and mootness), it is impossible to conclude anything other than that Menchaca-Flores meets the irreparable-harm requirement of *Nken*.

Finally, the last two *Nken* factors—the potential harm to the government if a stay is granted and the public interest—weigh in Menchaca-Flores's favor. *See* 556 U.S. at 421. The public has an interest in preventing the wrongful removal of non-citizens based on legal error. *Id.* at 436. And nothing in the record suggests that Menchaca-Flores has a history of violence or is otherwise dangerous, which minimizes the potential harm to the government. Justice requires that we take the time for full consideration on the merits under these circumstances.

I therefore respectfully dissent from the order denying the motion to stay.