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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NELSON MELGAR-MELGAR, Petitioner, v. MERRICK B. GARLAND, Attorney General, Respondent.	No. 18-71129 Agency No. A206-096-915 MEMORANDUM*

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

Submitted December 7, 2022**
San Francisco, California

Before: NGUYEN and SANCHEZ, Circuit Judges, and BOUGH,*** District Judge.

Nelson Melgar-Melgar, a native and citizen of El Salvador, petitions for review of the denial by the Board of Immigration Appeals ("Board") of his motion

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

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Stephen R. Bough, United States District Judge for the Western District of Missouri, sitting by designation.

to reopen his removal proceedings. We have jurisdiction under 8 U.S.C. § 1252, and we deny the petition.

Ordinarily, a party may file only one motion to reopen removal proceedings and must do so within 90 days of the final administrative decision. 8 C.F.R. § 1003.2(c) (2018); *see also* 8 U.S.C. § 1229a(c)(7). Melgar-Melgar does not dispute his motion was time-barred. Yet motions to reopen are excused from number and time bars if new evidence shows materially changed conditions in the country of removal. *See* 8 C.F.R. § 1003.2(c)(3)(ii) (2018); *see also* 8 U.S.C. § 1229a(c)(7)(C)(ii). To merit this exception, the movant must produce evidence that (1) was previously unavailable, (2) is material, (3) shows changed conditions, *and that* (4) "when considered together with the evidence presented at the original hearing, would establish prima facie eligibility for the relief sought." *Agonafer v. Sessions*, 859 F.3d 1198, 1204 (9th Cir. 2017) (quoting *Toufighi v. Mukasey*, 538 F.3d 988, 996 (9th Cir. 2008)). Even where no exception applies, the Board may choose to grant reopening under its sua sponte authority. *See* 8 C.F.R. § 1003.2(a) (2018); *Bonilla v. Lynch*, 840 F.3d 575, 584–85 (9th Cir. 2016).

In his petition, Melgar-Melgar argues his new evidence showed materially changed conditions and a prima facie case for asylum or withholding. He does not argue it shows a prima facie case for relief under the Convention Against Torture, and so waives any challenge to the denial on this basis. *See, e.g.*, *Velasquez-*

Gaspar v. Barr, 976 F.3d 1062, 1065 (9th Cir. 2020). Nor does he point to legal error underlying the Board's reasoning for not using its sua sponte authority to reopen. Finding no "legal or constitutional error," we lack jurisdiction to review the Board's decision not to use its authority. *Bonilla*, 840 F.3d at 588. We review the Board's denial of the changed conditions exception for abuse of discretion. *Avagyan v. Holder*, 646 F.3d 672, 674, 678 (9th Cir. 2011).

The Board did not abuse its discretion. *See id.* at 678. The Board reasoned that Melgar-Melgar's submitted evidence, some pre-dating his removal hearings, showed not changed conditions, but continued conditions. Further, it reasoned that the evidence did not fill the gap in the prima facie case for relief: Melgar-Melgar still had not met his burden to show that he had suffered past persecution, or would more likely than not suffer future persecution, due to a protected ground. *See* 8 C.F.R. § 1208.16(b) (2018). The gangs wanted money—from Melgar, and from everybody else. Even if the evidence showed Melgar or others saw his opposition to the gangs as marked by political opinion, religion, or even a particular social group, the evidence did not show (and indeed Melgar failed to argue specifically and meaningfully) that the gangs saw his opposition that way, or cared. As a result, the Board determined that the record, including the newly proffered evidence, was insufficient to meet the nexus requirement for asylum or withholding. *See Garcia v. Wilkinson*, 988 F.3d 1136, 1146–47 (9th Cir. 2021)

(explaining nexus standard for each). The Board's decision was therefore not "arbitrary, irrational, or contrary to law." *Avagyan*, 646 F.3d at 678 (quoting *Ontiveros–Lopez v. INS*, 213 F.3d 1121, 1124 (9th Cir. 2000)).

PETITION DENIED.