NOT FOR PUBLICATION

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CARLOS MARTINEZ-AGUILAR, Petitioner, v. MERRICK B. GARLAND, Attorney General, Respondent.	No. 20-70192 Agency No. A205-718-050 MEMORANDUM*

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

Argued and Submitted November 15, 2022
San Francisco, California

Before: RAWLINSON and HURWITZ, Circuit Judges, and CARDONE,** District Judge.

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

** The Honorable Kathleen Cardone, United States District Judge for the Western District of Texas, sitting by designation.

Carlos Martinez-Aguilar petitions for review of a decision by the Board of Immigration Appeals ("BIA") dismissing his appeal from an order of an Immigration Judge ("IJ") denying asylum, withholding of removal, and protection under the Convention Against Torture ("CAT"). We deny the petition.

1. Martinez entered the United States in 1990 and applied for asylum in 2016. His asylum application was therefore facially untimely under 8 U.S.C. § 1158(a)(2)(B), and his counsel conceded before the IJ that there was nothing to excuse the untimeliness. On appeal, Martinez argued for the first time that his father's murder in 2015 was a changed circumstance that made the asylum application timely. The BIA did not err in treating this argument as waived. *See Honcharov v. Barr*, 924 F.3d 1293, 1297 (9th Cir. 2019) (per curiam); *In re J-Y-C*, 24 I. & N. Dec. 260, 261 n.l (BIA 2007).

2. Citing *Santiago-Rodriguez v. Holder*, 657 F.3d 820, 830–32 (9th Cir. 2011), Martinez argues that the BIA erred by not addressing his argument that his lawyer's concession of untimeliness should be revoked. But, we "will not usually overturn agency action unless there is a showing of prejudice to the petitioner," *Zamorano v. Garland*, 2 F.4th 1213, 1228 (9th Cir. 2021) (cleaned up), and may decline to remand if doing so would be futile, *see Najmabadi v. Holder*, 597 F.3d 983, 991 (9th Cir. 2010). Those principles apply here.

Martinez claimed that the death of his father was a changed circumstance

relevant to his claim of feared persecution as a member of a family-based particular social group ("PSG") and asserted that his uncle "now had reason to murder him if he is removed." But an applicant for asylum "does not have a well-founded fear of persecution if the applicant could avoid persecution by relocating to another part of the applicant's country of nationality . . . if under all the circumstances it would be reasonable to expect the applicant to do so." 8 C.F.R. § 1208.13(b)(2)(ii). In denying Martinez's withholding application, the IJ held that Martinez failed to show that internal relocation would be unreasonable to avoid persecution by members of his family, finding that "the siblings of [Martinez's] father, including [Martinez's uncle], all live in Tuxtla Gutierrez" and that the evidence does not "suggest that [Martinez's] family members would take an interest in him if he relocated." The BIA agreed, finding that "[t]here is no evidence that [Martinez's] uncle or other family members have the interest or means to locate or contact him outside the state of Chiapas." These factual findings are supported by substantial evidence. And while the agency made such findings in the withholding context, they unambiguously state that relocation can completely address any fear of family-based persecution that might otherwise give rise to an asylum claim. It follows that even if Martinez were successful in overturning his lawyer's concession on changed circumstances, he would not be entitled to asylum on his family-based claim, the only claim to which his father's murder was relevant.

3. Substantial evidence also supports the agency's denial of withholding of removal. A cognizable PSG must "be described in a manner sufficiently distinct that the group would be recognized, in the society in question, as a discrete class of persons." *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1091 (9th Cir. 2013) (cleaned up). The record does not compel the finding that Martinez's two proposed PSGs relating to "Mexican returnees" were sufficiently particular or socially distinct to be cognizable. *See Delgado-Ortiz v. Holder*, 600 F.3d 1148, 1151–52 (9th Cir. 2010). Substantial evidence also supports the IJ's conclusion that Martinez is not "more likely than not to be persecuted upon return on account of his Christian beliefs."

4. The record does not compel the conclusion that it is more likely than not that Martinez will be tortured if removed. Martinez did not claim past torture, and "generalized evidence of violence and crime" is insufficient to show that an applicant will be tortured in the future. *See Delgado-Ortiz*, 600 F.3d at 1152.

5. The IJ had jurisdiction over Martinez's proceedings despite any defects in the Notice to Appear. *United States v. Bastide-Hernandez*, 39 F.4th 1187, 1188 (9th Cir. 2022) (en banc).

PETITION DENIED.