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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

OSCAR ARMANDO RIOS-ANARIBA AVILA-BANEGA, Petitioner, v. MERRICK B. GARLAND, Attorney General, Respondent.	No. 21-70603 Agency No. A094-923-299 MEMORANDUM[*]

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

Submitted November 9, 2022[**]
Pasadena, California

Before: MURGUIA, Chief Judge, and PARKER[***] and LEE, Circuit Judges.

[*] 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 Barrington D. Parker, Jr., United States Circuit Judge for the U.S. Court of Appeals for the Second Circuit, sitting by designation.

Oscar Armando Rios-Anariba,[1] a native and citizen of Honduras, petitions for review of a decision of the Board of Immigration Appeals ("Board"). Rios-Anariba first entered the United States in 1993 but left in 2005. Using an alias, Rios-Anariba attempted to re-enter the country in 2006, but he was ordered removed and deported. In 2017, Rios-Anariba entered the country a third time, and the Department of Homeland Security reinstated his 2006 removal order. Rios-Anariba—who had previously testified against members of the purported Honduran gang Banda del Gato—expressed a fear of returning to Honduras based on the gang's death threats and his interactions with the Honduran police and sought withholding of removal and relief under the Convention Against Torture ("CAT").

The Immigration Judge ("IJ") denied relief. On appeal to the Board, Rios-Anariba did not file a brief or state his reasons for appeal. In a two-paragraph decision, the Board *sua sponte* summarily addressed the merits of some of Rios-Anariba's claims, affirmed the IJ's denial of withholding and CAT relief, and dismissed the appeal.

We have jurisdiction under 8 U.S.C. § 1252. To the extent "the [Board] adopts the decision of the IJ, we review the IJ's decision as if it were that of the [Board]." *Hoque v. Ashcroft*, 367 F.3d 1190, 1194 (9th Cir. 2004). We review the Board's

[1] The record establishes that the petitioner's name is "Oscar Armando Rios-Anariba," so this disposition refers to him that way.

denials of withholding of removal for substantial evidence. *INS v. Elias-Zacarias*, 502 U.S. 478, 481, 483–84 (1992); *Guo v. Sessions*, 897 F.3d 1208, 1212 (9th Cir. 2018). A denial is unsupported by substantial evidence, and must be reversed, only if "the evidence [the petitioner] presented was so compelling that no reasonable factfinder could fail to find [in his favor]." *Elias-Zacarias*, 502 U.S. at 483–84. We deny the petition.

1. We lack jurisdiction over any claims for relief that were not exhausted before the Board. 8 U.S.C. § 1252(d)(1) ("A court may review a final order of removal only if . . . the [noncitizen] has exhausted all administrative remedies available to [him] as of right . . . ."); *Bare v. Barr*, 975 F.3d 952, 960 (9th Cir. 2020); *Honcharov v. Barr*, 924 F.3d 1293, 1296 n.2 (9th Cir. 2019) (per curiam). "A petitioner cannot satisfy the exhaustion requirement by making a general challenge to the IJ's decision, but, rather, must specify which issues form the basis of the appeal." *Zara v. Ashcroft*, 383 F.3d 927, 930 (9th Cir. 2004). But "[w]e do not employ the exhaustion doctrine in a formalistic manner," so a petitioner may have exhausted a general argument even if the specific legal issue raised on appeal was not raised before the Board. *Bare*, 975 F.3d at 960 (quoting *Diaz-Jimenez v. Sessions*, 902 F.3d 955, 959 (9th Cir. 2018)). And "[i]t is well-established that we may review any issue addressed on the merits by the [Board], regardless of whether

the petitioner raised it before the agency." *Parada v. Sessions*, 902 F.3d 901, 914 (9th Cir. 2018).

The first two issues Rios-Anariba raises on this appeal—relating to his alleged membership in particular social groups and inability to internally relocate within Honduras—were not raised in his notice of appeal or briefing before the Board, nor did the Board reach them *sua sponte*. Rios-Anariba's failure to exhaust these issues deprives this court of jurisdiction to consider them. *See Zara*, 383 F.3d at 930.

The third issue Rios-Anariba raises on this appeal—whether he had shown a clear likelihood of future persecution—is properly exhausted because the Board, of its own accord, cited to the IJ's decision and addressed her finding that Rios-Anariba had not shown a clear probability of future persecution: "Likewise, even though he may genuinely fear the Honduran police and a group known as [Banda del Gato] he has not established a clear probability that, upon his removal, he will be subjected to future persecution" This section of the Board's decision cited to specific portions of the IJ's decision and follows a sentence that begins "[a]s held by the [IJ]." The Board thus incorporated the IJ's determination into its own affirmance, properly exhausting the issue. *See Parada*, 902 F.3d at 914 (holding that claims are exhausted if the Board has addressed them on the merits).

2. The IJ's finding that Rios-Anariba had not shown a clear probability of future persecution is supported by substantial evidence. The IJ found that

"anonymous, unfulfilled threats" Rios-Anariba "received in letters left outside the gate to his property" could not provide the basis for a clear probability of future persecution. A petitioner establishes such a clear probability if it is "more likely than not" that he will be persecuted by the government or forces it is unable or unwilling to control. 8 C.F.R. § 1208.16(b)(2); *Tamang v. Holder*, 598 F.3d 1083, 1095 (9th Cir. 2010). "[P]ersecution is an extreme concept, marked by the infliction of suffering or harm in a way regarded as offensive." *Li v. Ashcroft*, 356 F.3d 1153, 1158 (9th Cir. 2004) (en banc) (cleaned up). Although death threats alone can constitute persecution, *Kaur v. Wilkinson*, 986 F.3d 1216, 1227 (9th Cir. 2021), they rarely do, *Hussain v. Rosen*, 985 F.3d 634, 647 (9th Cir. 2021). The crux of analyzing threats is "whether the group making the threat has the will or the ability to carry it out." *Aden v. Wilkinson*, 989 F.3d 1073, 1083 (9th Cir. 2021) (cleaned up); *see Hoxha v. Ashcroft*, 319 F.3d 1179, 1182 (9th Cir. 2003) (holding that the unfulfilled threats constituted "harassment rather than persecution").

The IJ noted that those threatening Rios-Anariba "clearly knew where [he] resided" but "never harmed or killed him at any point during the two-year period of time" during which he was being threatened. Rios-Anariba testified that "two members of [Banda del Gato] that he had testified against were released from prison either on weekends or entirely as early as 2015," but neither "ever came to his residence or tried to speak to [Rios-Anariba] at any point before" he fled Honduras.

In *Kaiser v. Ashcroft*, this court stated that it did "not hold that threats can never compel a finding of a clear probability of persecution," but nevertheless found that they did not in that case. 390 F.3d 653, 660 (9th Cir. 2004). In *Kaiser*, the petitioner was placed on a hit list, threatened, and followed by assassins, and people who faced similar threats were murdered. *Id.* at 659–60. Even then, this court held that the petitioner had not met his burden to show a clear probability of persecution because he had lived "without harm for over ten years." *Id.* at 660. Although threats are "uniformly unpleasant," *Hoxha*, 319 F.3d at 1182 (quoting *Lim v. INS*, 224 F.3d 929, 936 (9th Cir. 2000)), the facts of this case are much tamer than *Kaiser*, in which this court ultimately denied withholding of removal. The IJ's decision to do the same here was supported by substantial evidence.

PETITION DENIED.