

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-10934
Non-Argument Calendar

Agency No. A206-236-418

PORFIRIO CORDERO CUATE,

Petitioner,

versus

U.S. ATTORNEY GENERAL,

Respondent.

Petition for Review of a Decision of the
Board of Immigration Appeals

(May 22, 2019)

Before JILL PRYOR, BRANCH and JULIE CARNES, Circuit Judges.

PER CURIAM:

Porfirio Cordero Cuate, a native and citizen of Mexico, seeks review of the Board of Immigration Appeals' ("BIA") final order dismissing his appeal from the Immigration Judge's ("IJ") denial of his application for asylum, withholding of removal, and relief under the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment ("CAT"). After careful review, we discern no error, dismiss the petition in part, and deny the petition in part.

I. FACTUAL BACKGROUND

In 1997, Cordero Cuate entered the United States from Mexico without inspection. At the time he entered the United States, Cordero Cuate was 12 years old and fleeing his abusive father. Upon his arrival in the United States, Cordero Cuate began working and used the money he earned to support his siblings who remained in Mexico.

In 2015, the Department of Homeland Security commenced removal proceedings against Cordero Cuate. Cuate conceded that he was removable but applied for asylum, withholding of removal, and CAT protection. He then received a hearing before the IJ.

At the hearing, Cordero Cuate testified that he feared for his life if he returned to Mexico due to gang violence there. He described how several months earlier gang members had severely beaten his cousin, and that as a result his cousin

remained in a coma for three months. Cordero Cuate's family reported the beating to the police, and he was worried that the gang would retaliate against his family for reporting the incident. He also described a separate incident in which a gang threatened his family members, demanding that they pay a fee in exchange for protection. Because his family was unable to pay, the gang continued to threaten them. Cordero Cuate also described how he heard from friends that individuals who returned to Mexico from the United States were kidnapped for ransom.

Cordero Cuate also submitted documentary evidence to the IJ about the conditions in Mexico. The materials that he submitted included the State Department's 2015 Human Rights Report for Mexico ("Country Report"). The Country Report discussed, among other things, how organized criminal groups orchestrated human rights abuses including unlawful killings, torture, and disappearances. He also submitted a magazine article that discussed the rise of violent crime in Mexico.

The IJ denied Cordero Cuate's application for asylum, withholding of removal, and CAT protection. The IJ denied the request for asylum as untimely because it was not filed within one year of Cordero Cuate's entry into the United States. The IJ also found that there were no extraordinary circumstances that justified Cordero Cuate's delay in applying for asylum. Regarding the application for withholding of removal, the IJ considered whether, if Cordero Cuate returned

to Mexico, it was more likely than not that he would be persecuted due to his membership in a particular social group. The IJ found that Cordero Cuate failed to show that he was a member of such a particular social group. The IJ also found Cordero Cuate ineligible for CAT protection because he failed to show that he feared torture by public officials.

Cordero Cuate appealed to the BIA, which dismissed his appeal. Regarding asylum, the BIA explained that Cordero Cuate had failed to contest the IJ's finding that the asylum application was untimely. Regarding withholding of removal, the BIA determined that the IJ "correctly concluded that the actions that [Cordero Cuate] fear[ed] [would] occur do not constitute persecution on account of" membership in a particular social group. A.R. at 4.¹ Although Cordero Cuate asserted that he was a member of two particularized social groups—individuals who had been victims of childhood abuse and people returning to Mexico after living in the United States—the BIA found that neither group qualified as a particular social group. Regarding CAT protection, the BIA "affirm[ed]" the IJ's determination that Cordero Cuate was ineligible for CAT protection because he provided insufficient evidence that he had ever been tortured or that government officials would seek to torture him or acquiesce in his torture upon his return to Mexico. *Id.*

¹ Citations to A.R. refer to the administrative record.

Cordero Cuate has now petitioned our Court for review of the BIA’s decision.

II. STANDARDS OF REVIEW

“We review only the BIA’s decision, except to the extent that it expressly adopts the IJ’s opinion or reasoning.” *Shi v. U.S. Att’y Gen.*, 707 F.3d 1231, 1234 (11th Cir. 2013) (alterations adopted) (internal quotation marks omitted). To the extent the BIA expressly adopted the IJ’s reasoning, we review the decisions of both the BIA and the IJ. *See Kazemzadeh v. U.S. Att’y Gen.*, 577 F.3d 1341, 1350 (11th Cir. 2009).

“[W]e review all legal conclusions *de novo*, including whether a group proffered by an . . . applicant constitutes a particular social group” under the Immigration and Nationality Act (“INA”). *Perez-Zenteno v. U.S. Att’y Gen.*, 913 F.3d 1301, 1306 (11th Cir. 2019) (citations omitted). “[T]his *de novo* review is further informed by the principles of deference set forth in *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).” *Perez-Zenteno*, 913 F.3d at 1306.

We review findings of fact under the substantial evidence standard. *Antipova v. U.S. Att’y Gen.*, 392 F.3d 1259, 1261 (11th Cir. 2004). Under the substantial evidence standard, we must affirm the BIA’s decision “if it is supported by reasonable, substantial, and probative evidence on the record considered as a

whole.” *Id.* (internal quotation marks omitted). We “view the record evidence in the light most favorable to the agency’s decision and draw all reasonable inferences in favor of that decision.” *Adefemi v. Ashcroft*, 386 F.3d 1022, 1027 (11th Cir. 2004) (en banc). Accordingly, we will not reverse unless the evidence compels a reasonable factfinder to find otherwise. *Antipova*, 392 F.3d at 1261.

III. ANALYSIS

Cordero Cuate challenges the BIA’s decision denying his application for asylum, withholding of removal, and CAT protection. We consider each argument in turn.

A. The Asylum Application

Under the INA, a person generally must apply for asylum within one year of arriving in the United States. 8 U.S.C. § 1158(a)(1), (a)(2)(B). The Attorney General may consider an untimely application if he finds changed or extraordinary circumstances. *Id.* § 1158(a)(2)(D). But we lack jurisdiction to review the Attorney General’s determination that an application is untimely or that the untimeliness should not be excused. *Id.* § 1158(a)(3); *see Chacon-Botero v. U.S. Att’y Gen.*, 427 F.3d 954, 957 (11th Cir. 2005). We further lack jurisdiction to consider claims raised in a petition for review unless the petitioner has exhausted his administrative remedies with respect to the claim. *See Amaya-Artunduaga v. U.S. Att’y Gen.*, 463 F.3d 1247, 1250 (11th Cir. 2006). Accordingly, if the

petitioner failed to raise an issue before the BIA, we lack jurisdiction to address it. *See id.*; 8 U.S.C. § 1252(d)(1).

We lack jurisdiction to review the BIA and IJ's determinations that Cordero Cuate's asylum application was untimely and that he failed to demonstrate extraordinary circumstances to excuse that untimeliness. *See* 8 U.S.C. § 1158(a)(3). We lack jurisdiction to review the BIA's decision for a second reason as well: Cordero Cuate failed to exhaust his administrative remedies with respect to this issue because he failed to argue to the BIA that his asylum petition was timely. *See id.* § 1252(d)(1). Accordingly, we dismiss the asylum portions of Cordero Cuate's petition.

B. The Withholding of Removal Application

To qualify for withholding of removal, an applicant must establish that his "life or freedom would be threatened in [his] country because of [his] race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1231(b)(3)(A). "The applicant must demonstrate that he would more likely than not be persecuted upon being returned to his country of origin." *Rodriguez v. U.S. Att'y Gen.*, 735 F.3d 1302, 1308 (11th Cir. 2013) (internal quotation marks omitted). An applicant may satisfy this burden of proof by establishing that either he was subject to "past persecution based on a protected ground" or "it is more likely than not that he would face a future threat to his life

or freedom upon removal due to a protected ground.” *Id.*; see 8 C.F.R.

§ 208.16(b). But we have cautioned that evidence that “merely shows that a person has been the victim of criminal activity[] does not constitute evidence of persecution based on a statutorily protected ground.” *Rodriguez*, 735 F.3d at 1310 (internal quotation marks omitted).

We have previously addressed how we interpret the meaning of “particular social group” in the INA. Because the INA does not define the term “particular social group” and the term is ambiguous, we generally afford deference to three-member BIA decisions. *Gonzalez v. U.S. Att’y Gen.*, 820 F.3d 399, 403-04 (11th Cir. 2016). The BIA has recognized that a “particular social group” has three defining characteristics: (1) immutability; (2) social distinction; and (3) particularity. *See id.* at 404 (summarizing BIA decisions). Regarding “immutability,” the group’s members must share a common characteristic—other than risk of persecution—that group members “either cannot change[] or should not be required to change because it is fundamental to their individual identities or consciences.” *Castillo-Arias v. U.S. Att’y Gen.*, 446 F.3d 1190, 1193 (11th Cir. 2006) (quoting *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985), *overruled on other grounds by Matter of Mogharrabi*, 19 I. & N. Dec. 439, 447 (BIA 1987)). For a group to have “social distinction,” according to the BIA, it must be perceived as a group by society in general, not by the persecutors in particular. *See Matter of*

W-G-R-, 26 I. & N. Dec. 208, 217-18 (BIA 2014); *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 242 (BIA 2014). Finally, regarding the “particularity” requirement, the proposed group must “be discrete and have definable boundaries—it must not be amorphous, overbroad, diffuse, or subjective.” *Gonzalez*, 820 F.3d at 404 (quoting *Matter of W-G-R-*, 26 I. & N. Dec. at 214).²

Cordero Cuate asserts that he is entitled to withholding of removal based on his affiliation with two social groups: (1) individuals who suffered physical and psychological abuse for an extended period during their childhood and (2) Mexican males who have lived in the United States for over 10 years.

We begin by considering whether Cordero Cuate is entitled to relief based on his membership in the group of individuals who suffered childhood abuse. The BIA rejected this claim on the basis that the group Cordero Cuate identified failed to constitute a particular social group within the meaning of the INA. We agree. Although we are sympathetic to Cordero Cuate’s concerns about returning to Mexico based on his father’s abusive actions, “[e]vidence that . . . is consistent

² It is clear that we give deference to the BIA’s decisions discussed in the text above, which were rendered by three-member BIA panels. *See Gonzalez*, 820 F.3d at 403-04. A more difficult question is whether we must afford deference to the BIA’s single-member decision here. “[S]ingle-member, non-precedential BIA decisions,” like the one in this case, are entitled to deference only if the decision “relied on” an earlier, precedential BIA decision. *Perez-Zenteno*, 913 F.3d at 1307-08 (alteration adopted) (internal quotation marks omitted). We have explained that a decision can be said to rely on a precedential decision only if the precedential decision compelled the result. *Id.* We need not decide the issue because the result would be the same whether we afforded deference directly to the BIA’s single-member decision in this case or only the BIA’s earlier three-member decisions. *See id.* at 1309.

with acts of private violence . . . does not constitute evidence of persecution based on a statutorily protected ground.” *Rodriguez*, 735 F.3d at 1310 (internal quotation marks omitted). Thus, Cordero Cuate cannot be entitled to withholding of removal based on the abuse he suffered at the hands of his father.

Cordero Cuate also contends that he is entitled to relief due to his membership in a social group consisting of Mexican males who have lived in the United States for over 10 years. He says that because members of this group are presumed to have money, criminal organizations target them for extortion, kidnapping, and torture. This group is perceived as distinct, according to Cordero Cuate, because members of the group are visually easy to identify (they wear American clothes) and services (such as shelters) are set up specifically to serve them. We cannot say that the BIA erred in rejecting this argument. True, Cordero Cuate submitted the Country Report, but he offered no argument that this report indicates that human rights abuses have been perpetrated against Mexican nationals reentering the country from the United States. *See Perez-Zenteno*, 913 F.3d at 1309. The only evidence in the record that potentially supports Cordero Cuate’s claim is his testimony that friends told him that when their relatives returned from the United States, they were kidnapped and forced to pay ransoms. But this general testimony was insufficient to establish that his specific proposed group was perceived as distinct. The BIA did not err in concluding that

Mexican males who have lived in the United States for over 10 years do not constitute a particular social group. *See also id.* (rejecting argument that Mexican citizens targeted by criminal groups because they have traveled to and had families living in the United States qualified as a particular social group because the petitioner failed to offer any evidence showing that the group was recognized as distinct).³

For these reasons, the BIA did not err in concluding that Cordero Cuate was ineligible for withholding of removal.

C. The CAT Application

As a signatory to the CAT, the United States has agreed not to “expel, return or extradite a person to another State where there are substantial grounds for believing he would be in danger of being subjected to torture.” Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100–20 (1988), 1465 U.N.T.S. 85, art. 3, § 1. To be entitled to CAT protection, an applicant must establish that it is more likely than not that he would be tortured if removed to the proposed country of removal. *See Reyes-Sanchez v. U.S. Att’y Gen.*, 369 F.3d 1239, 1242 (11th Cir. 2004) (citing 8 C.F.R. § 208.16(c)(2). “Torture” is:

³ Because we hold that Cordero Cuate’s proposed social group—Mexican males who lived in the United States for over 10 years—lacked social distinction, we do not address whether this proposed group met the BIA’s immutability and particularity requirements.

fany act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

8 C.F.R. § 208.18(a)(1).

Substantial evidence supports the BIA's finding that Cordero Cuate was ineligible for CAT protection because the record does not compel a finding that it is more likely than not that he would be subjected to mistreatment by, or with the acquiescence of, the government if he returned to Mexico. There is no evidence that Cordero Cuate experienced past mistreatment at the hands of, or with the acquiescence of, the government. Certainly, Cordero Cuate presented evidence that his cousin had been attacked in Mexico. But without evidence of why the attack was committed, who was responsible for the attack, or the extent of the government's involvement, the fact of the attack alone does not suggest a likelihood that Cordero Cuate would be subject to torture by, or with the acquiescence of, the government. The record here does not compel reversal of the agency's denial of CAT protection.

IV. CONCLUSION

For the reasons set forth above, we dismiss the petition in part and deny it in part.

PETITION DISMISSED IN PART AND DENIED IN PART.