[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-13401
Non-Argument Calendar

Agency No. A097-532-672

CARLOS ANDRES OROZCO HINCAPIE,
LEANI CATALINA BETANCUR LONDONO,
LAURA SOFIA OROZCO BETANCUR,

Petitioners,

versus

U.S. ATTORNEY GENERAL,

Respondent.

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

(July 16, 2019)

Before MARCUS, WILSON and HULL, Circuit Judges.

PER CURIAM:

Carlos Orozco Hincapie and his wife and daughter seek review of the Board of Immigration Appeals' ("BIA") order affirming the Immigration Judge's ("IJ")

denial of his application for asylum and withholding of removal under the Immigration and Nationality Act ("INA"). On appeal, Orozco Hincapie argues that the BIA erred in concluding that: (1) the IJ did not clearly err in finding that any future harm to Orozco Hincapie would be the result of retaliation because of his sister's testimony against a Columbian drug lord, not on account of membership in his proposed social group; and (2) Orozco Hincapie's proposed social group -- family members of witnesses brought to the United States to testify against Colombian drug lords who were successfully convicted -- was not a cognizable particular social group under the INA. After thorough review, we deny the petition.

When the BIA issues its own opinion, we review only the decision of the BIA, except to the extent that it expressly adopts the IJ's decision. Sanchez Jimenez v. U.S. Att'y Gen., 492 F.3d 1223, 1230-31 (11th Cir. 2007). Findings by the IJ not reached by the BIA are not properly before us. Donawa v. U.S. Att'y Gen., 735 F.3d 1275, 1279 (11th Cir. 2013).

We review factual findings under the substantial evidence test and review de novo conclusions of law. Gonzalez v. U.S. Att'y Gen., 820 F.3d 399, 403 (11th Cir. 2016). Whether a particular social group is cognizable under the INA is a legal issue we review de novo. Id. Under the substantial evidence test, 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. Sanchez Jimenez, 492 F.3d at 1230. We affirm

the BIA's decision if it is supported by "reasonable, substantial, and probative evidence on the record considered as a whole." Id. (quotations omitted). The mere fact that the record may support a different conclusion is not sufficient to justify a reversal; rather, the record must compel a contrary conclusion. Id.

An alien who is present in the United States may apply for asylum, which the Attorney General and Secretary of the Department of Homeland Security have discretion to grant if the alien meets the INA's definition of a "refugee." 8 U.S.C. § 1158(a)(1), (b)(1)(A). A "refugee" is a person who is unable or unwilling to avail himself of the protection of his home country because of persecution or a well-founded fear of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. 8 U.S.C. § 1101(a)(42). The alien bears the burden to establish that he is a refugee. Sepulveda v. U.S. Att'y Gen., 401 F.3d 1226, 1230 (11th Cir. 2005).

To establish asylum eligibility, the alien must establish (1) past persecution on account of a statutorily listed factor, or (2) a "well-founded" fear that the statutorily listed factor will cause future persecution. Diallo v. U.S. Att'y Gen., 596 F.3d 1329, 1332 (11th Cir. 2010). A well-founded fear means a reasonable possibility of future persecution. Li Shan Chen v. U.S. Att'y Gen., 672 F.3d 961, 965 (11th Cir. 2011). Further, "[a]n alien must establish a nexus between a statutorily protected ground and the feared persecution and can do so by presenting

specific, detailed facts showing a good reason to fear that he or she will be singled out for persecution on account of such ground." Mehmeti v. U.S. Att'y Gen., 572 F.3d 1196, 1200 (11th Cir. 2009) (quotations omitted). An alien can establish eligibility for asylum "as long as he can show that the persecution is, at least in part, motivated by a protected ground." Sanchez Jimenez, 492 F.3d at 1232 (quotations omitted). The alien must establish that one of the five protected grounds "was or will be at least one central reason for persecuting [him]." 8 U.S.C. § 1158(b)(1)(B)(i). "[E]vidence that either is consistent with acts of private violence . . . , or 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." Ruiz v. U.S. Att'y Gen., 440 F.3d 1247, 1258 (11th Cir. 2006).

A "particular social group" is not defined in the INA, but we've deferred to the BIA's formulation of criteria for deciding whether a particular group qualifies. Castillo-Arias v. U.S Att'y Gen., 446 F.3d 1190, 1196 (11th Cir. 2006). First, the group's members must have a "common characteristic other than their risk of being persecuted," and that characteristic must be either immutable or fundamental to a member's individual conscience or identity. Id. at 1193-94, 1196-97 (quotations omitted). "The risk of persecution alone does not create a particular social group within the meaning of the INA." Rodriguez v. U.S. Att'y Gen., 735 F.3d 1302, 1310 (11th Cir. 2013) (quotations omitted). Second, a group must have sufficient social

distinction. Castillo-Arias, 446 F.3d at 1194, 1197–98. Social distinction requires a group to be socially distinct within the society in question, meaning it must be perceived as a group by society. Matter of W-G-R-, 26 I.&N. Dec. 208, 216 (BIA 2014). Whether a group is socially distinct is determined by the perception of the society as a whole. Matter of M-E-V-G-, 26 I.&N. Dec. 227, 242 (BIA 2014). Third, a group must be "defined with particularity," meaning it must "be discrete and have definable boundaries," and not be "amorphous, overbroad, diffuse, or subjective." Perez-Zenteno v. U.S. Att'y Gen., 913 F.3d 1301, 1309 (11th Cir. 2019) (quotations omitted); see Matter of W-G-R-, 26 I.&N. Dec. at 214 (providing that a proposed social group must be discrete and not overly broad, having "characteristics that provide a clear benchmark for determining who falls within the group"). Whether a claim based on family membership is sufficiently particular depends "on the nature and degree of the relationships involved and how those relationships are regarded by the society in question." Matter of L-E-A-, 27 I.&N. Dec. 40, 43 (BIA 2017); see also Matter of S-E-G-, 24 I.&N. Dec. 579, 585 (BIA 2008) (concluding that a group comprised of "'family members,' which could include fathers, mothers, siblings, uncles, aunts, nieces, nephews, grandparents, [and] cousins" of adolescents recruited by MS-13 was too amorphous to constitute a cognizable particular social group under the INA).

In Castillo-Arias, we concluded that non-criminal informants working against the Cali cartel were not a particular social group. 446 F.3d at 1199. Similarly, in Rodriguez, we held that a family targeted by a drug trafficking organization was not a particular social group where a member of the family sought criminal justice against a member of the organization. 735 F.3d at 1310. We also decided in Rodriguez that substantial evidence supported the agency finding that, even if the particular social group were cognizable, the petitioner's fear was not on account of group membership since, according to the record, family members were harmed due to a failure to cooperate with the drug trafficking organization or were the victims of criminal activity. Id. at 1310-11.

Under the withholding-of-removal provision of the INA, an alien shall not be removed to a country if his life or freedom would be threatened in that country on account of race, religion, nationality, membership in a particular social group, or political opinion. 8 U.S.C. § 1231(b)(3)(A). The alien bears the burden of showing it is "more likely than not" he will be persecuted or tortured upon being returned to his home country. Sepulveda, 401 F.3d at 1232. The standard is more stringent than the standard for asylum. Id. If an alien cannot meet the well-founded fear standard for asylum, he cannot meet the standard for withholding of removal. Id. at 1232-33.

Here, the only issues addressed by the BIA and properly before us are whether Orozco Hincapie established a nexus between his fear of persecution and

membership in a particular social group, and whether his proposed social group is cognizable under the INA.[1] As for the nexus determination, the record reflects that Orozco Hincapie stated in his asylum application and testified at the merits hearing that he feared retaliation from Patiño Restrepo, or Patiño Restrepo's cartel, specifically because Orozco Hincapie's sister testified against Patiño Restrepo. Notably, there was no evidence that he feared persecution from anyone unaffiliated with Patiño Restrepo merely because he was related to a witness who testified against a Colombian drug lord in a foreign criminal proceeding. Instead, the evidence demonstrates that Orozco Hincapie feared personal retribution for his sister's testimony against Patiño Restrepo specifically, which is consistent with acts of private violence. See Ruiz, 440 F.3d at 1258; Rodriguez, 735 F.3d at 1310. On this record, substantial evidence supports the BIA's determination that any future harm to Orozco Hincapie would be the result of personal retribution, not membership in his proposed social group, and thus that he failed to establish that membership in his proposed particular social group would be at least one central reason for the persecution he fears. See 8 U.S.C. § 1158(b)(1)(B)(i); Sanchez Jimenez, 492 F.3d at 1230, 1232.

[1] While both parties raise arguments about whether Orozco Hincapie had a well-founded fear of persecution, the BIA did not make a finding with respect to whether he had a well-founded fear, so those arguments are not properly before us. See Donawa, 735 F.3d at 1279.

Nor did the BIA err in determining that Orozco Hincapie's proposed social group is not cognizable under the INA. See Castillo-Arias, 446 F.3d at 1194, 1197–98. While there was some evidence that witnesses in criminal proceedings in Colombia are at risk of persecution, there was no evidence that family members of witnesses brought to the United States to testify in criminal proceedings against Colombian drug lords are at risk of persecution and, thus, could be considered a socially distinct group in Colombia. See Matter of W-G-R-, 26 I.&N. Dec. at 216; Matter of M-E-V-G-, 26 I.&N. Dec. at 242. Moreover, while the group is based on an immutable characteristic other than the risk of persecution, the "family member" portion of the group definition is amorphous and subjective -- the boundaries of "family members" are not objectively defined and, therefore, are subject to reasonable disagreement. See Perez-Zenteno, 913 F.3d at 1309; Matter of S-E-G-, 24 I.&N. Dec. at 585; Matter of W-G-R-, 26 I.&N. Dec. at 214; Matter of L-E-A-, 27 I.&N. Dec. at 43. Accordingly, the BIA did not err in concluding that Orozco Hincapie's putative social group is not cognizable, and properly found that he was ineligible for asylum and withholding of removal.

PETITION DENIED.