

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-13402
Non-Argument Calendar

Agency No. A202-066-831

LEANDRO GOMEZ DIAZ,

Petitioner,

versus

U.S. ATTORNEY GENERAL,

Respondent.

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

(August 6, 2019)

Before MARCUS, ROSENBAUM, and ANDERSON, Circuit Judges.

PER CURIAM:

Leandro Gomez Diaz, a native and citizen of Guatemala, seeks review of the Board of Immigration Appeals' ("BIA") dismissal of 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"). As to his asylum and withholding of removal claims, he argues that the BIA erred in determining that his proposed social group did not constitute a particular social group within the meaning of the Immigration and Nationality Act ("INA"). He contends that his proposed group—Guatemalan males who are victims of torture and subject to harm by those individuals who have threatened and harmed them in the past—has an immutable characteristic, is socially visible and distinct, and is not too amorphous or vague to be cognizable. As to his CAT claim, he argues that substantial evidence supported his claim for CAT relief, because the record showed that he was tortured with the acquiescence of the Guatemalan police force.

I.

Where the BIA agrees with the IJ's findings, and makes additional observations, we review both decisions. *Rodriguez v. U.S. Att'y Gen.*, 735 F.3d 1302, 1308 (11th Cir. 2013). We review all questions of law *de novo*, and whether an asserted group qualifies as a particular social group is a question of law.

Gonzalez v. U.S. Att’y Gen., 820 F.3d 399, 403 (11th Cir. 2016). We do not consider issues that were not reached by the BIA. *Id.*

An alien who is present in the United States may apply for asylum, which the Attorney General has discretion to grant if the alien meets the INA’s definition of a “refugee.” *See* INA § 208(a)(1), (b)(1)(A), 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 the country of his nationality or in which he last habitually resided because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. *See* INA § 101(a)(42), 8 U.S.C. § 1101(a)(42). The alien bears the burden of establishing that he is a refugee. *Sepulveda v. U.S. Att’y Gen.*, 401 F.3d 1226, 1230 (11th Cir. 2005). To establish asylum eligibility based on membership in a particular social group, the alien must demonstrate: (1) past persecution on account of membership in a particular social group, or (2) a “well-founded” fear that his membership in a particular social group will cause future persecution. *See id.* at 1230-31.

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 such country on account of race, religion, nationality, membership in a particular social group, or political opinion. INA § 241(b)(3), 8 U.S.C. § 1231(b)(3). The alien bears the

burden of showing either past persecution on account of a protected ground, or a clear probability, meaning more likely than not, that he will be persecuted or tortured on account of a protected ground upon being returned to his country. *See* 8 C.F.R. § 208.16(b); *Rodriguez Morales v. U.S. Att’y Gen.*, 488 F.3d 884, 891 (11th Cir. 2007); *Sepulveda*, 401 F.3d at 1232.

The BIA’s interpretation of “particular social group” is entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *See Gonzalez*, 820 F.3d at 404; *see also Chevron*, 467 U.S. at 842-43 (explaining that when a court reviews an agency’s construction of a statute that it administers, and that statute is silent or ambiguous regarding a particular issue, the court determines whether the agency’s interpretation is based on a permissible construction of the statute). The BIA has held that a “particular social group” refers to persons who “share a common, immutable characteristic . . . such as sex, color, or kinship ties, or in some circumstances . . . a shared past experience such as former military leadership or land ownership.” *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985), *overruled on other grounds by Matter of Mogharrabi*, 19 I. & N. 439, 447 (BIA 1987). A particular social group must be defined with particularity and be socially distinct within the society in question. *Gonzalez*, 820 F.3d at 404. To be defined with particularity, the group must be discrete and have

“definable boundaries—it must not be amorphous, overbroad, diffuse, or subjective.” *Id.* (quoting *Matter of W-G-R-*, 26 I. & N. Dec. 208, 214 (BIA 2014)).

Moreover, the “risk of persecution alone does not create a particular social group within the meaning of the INA” and cannot be the defining characteristic of the group. *See Castillo-Arias v. U.S. Att’y Gen.*, 446 F.3d 1190, 1198 (11th Cir. 2006); *see also Rodriguez v. U.S. Att’y Gen.*, 735 F.3d 1302, 1310 (11th Cir. 2013) (rejecting a proposed particular social group—members of a family targeted by a drug trafficking organization because a family member sought criminal justice against a member of that organization—because its defining attribute was its persecution by the drug trafficking organization).

Here, as an initial matter, to the extent that Gomez Diaz argues that he experienced past persecution and had a well-founded fear of future persecution, we do not review those arguments because the BIA declined to reach them. Because the BIA dismissed his appeal based on its finding that his proposed particular social group was not cognizable under the INA, we review that issue alone and under a *de novo* standard of review.

The BIA did not err in determining that Gomez Diaz’s proposed group, to the extent one was identified with particularity, did not constitute a particular social group. His proposed group’s defining attribute is its persecution by criminal organizations or private actors, and the risk of persecution, by itself, does not

create a particular social group. Further, the proposed group is not distinct within Guatemalan society and it is too broad and amorphous. Members of this group are not recognizable unless they disclose to society what has happened to them, and because of the widespread corruption, extortion, and kidnapping in Guatemala, this group is too broad, because virtually everyone in Guatemalan society is at risk of persecution by criminal organizations. Accordingly, we deny his petition for review of the BIA's decision on asylum and withholding of removal.

II.

Factual determinations are reviewed under the substantial-evidence test, which requires us to “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, 1026-27 (11th Cir. 2004) (*en banc*). We must affirm the BIA’s decision “if it is supported by reasonable, substantial, and probative evidence on the record considered as a whole.” *D-Muhumed v. U.S. Att’y Gen.*, 388 F.3d 814, 818 (11th Cir. 2004) (quotation marks omitted). To reverse the IJ’s findings, we must find that the record not only supports reversal but also compels it. *Mendoza v. U.S. Att’y*, 327 F.3d 1283, 1287 (11th Cir. 2003).

To establish CAT eligibility, the burden of proof is on the alien to establish that it is more likely than not that he would be tortured if removed to the proposed country of removal. 8 C.F.R. § 208.16(c)(2). The CAT does not require that the

alien prove that he would be tortured because of race, religion, nationality, membership in a particular social group, or political opinion. *Compare* 8 C.F.R. § 208.16(c)(2) *with* 8 C.F.R. § 208.16(b).

“Torture” is:

any 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 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). To obtain CAT relief, the alien must demonstrate that the torture would be inflicted by the government or that the government was aware of the torture and failed to intervene. *Reyes-Sanchez v. U.S. Att’y Gen.*, 369 F.3d 1239, 1242 (11th Cir. 2004). Acquiescence “requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity.” 8 C.F.R. § 208.18(a)(7).

Here, as an initial matter, we do not review Gomez Diaz’s argument that the mistreatment he experienced rose to the level of torture because the BIA did not reach that issue. As to his other argument, substantial evidence supports the finding that the Guatemalan government did not acquiescence to his torture. He

never experienced mistreatment at the hands, or with the acquiescence, of the government in the past, and he did not produce any evidence suggesting that he would be targeted upon his return to Guatemala, or that he otherwise would be likely to experience torture in Guatemala three years after he left. His testimony regarding his kidnapping, without further evidence of who was responsible for it, and the extent of the government's involvement or acquiescence, does not suggest a likelihood that he would be subject to torture under CAT.

Further, substantial evidence supports the finding that the police did not show willful blindness to the kidnapping because Gomez Diaz admitted that he did not have much information to give the police about the identities of the three men who kidnapped him and he did not notify the police that he had been kidnapped; thus, there was nothing they could do. Accordingly, we deny the petition with respect to CAT relief.

PETITION DENIED.