

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-1120

FRANCISCO ANTONIO CONTRERAS-MEJIA,

Petitioner,

v.

WILLIAM P. BARR, Attorney General,

Respondent.

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

Submitted: April 15, 2020

Decided: May 21, 2020

Before KING, KEENAN, and RUSHING, Circuit Judges.

Petition denied by unpublished per curiam opinion.

Hector I. Hernandez, Sr., LAW OFFICE OF HECTOR HERNANDEZ, Fredericksburg, Virginia, for Petitioner. Jody H. Hunt, Assistant Attorney General, Ernesto H. Molina, Jr., Deputy Director, Nancy N. Safavi, Office of Immigration Litigation, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Respondent.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Petitioner Francisco Antonio Contreras-Mejia (“Contreras”), a native and citizen of El Salvador, petitions for review of the January 4, 2019 decision and order of the Board of Immigration Appeals (the “BIA”) dismissing his appeal from the Immigration Judge’s (the “IJ”) decision denying his applications for asylum and withholding of removal. By way of this proceeding, Contreras challenges the BIA’s and the IJ’s rulings that he failed to establish a sufficient nexus between the persecution that he suffered or expected to suffer in El Salvador and a protected ground under the Immigration and Nationality Act (the “INA”). As explained below, we deny the petition for review.

I.

A.

We begin by summarizing several relevant aspects of the INA. We have explained that the INA renders deportable “[a]n alien who enters the United States without required documentation, and who remains present here.” *See Xing Yang Yang v. Holder*, 770 F.3d 294, 296 (4th Cir. 2014) (citing 8 U.S.C. §§ 1182(a)(7)(A)(i), 1227(a)(1)(A)). The INA, however, creates “several avenues by which such an alien may seek relief from deportation and lawfully remain in the United States.” *Id.*

Important here, the INA authorizes the Attorney General to confer asylum on an alien who is a “refugee” and thereby prevent his deportation. *See* 8 U.S.C. § 1158(b)(1)(A). A “refugee” is a person unwilling or unable to return to his native country “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.” *Id.* § 1101(a)(42)(A). An asylum applicant can establish refugee status and qualify for asylum by demonstrating past persecution in his native country on account of a protected ground or a well-founded fear of persecution in that country on such a ground. *See* 8 C.F.R. § 1208.13(b). When an applicant claims “persecution by a private actor,” he “must also show that the government in [his] native country is unable or unwilling to control [his] persecutor.” *See Orellana v. Barr*, 925 F.3d 145, 151 (4th Cir. 2019) (internal quotation marks omitted). We have characterized persecution as involving “the infliction or threat of death, torture, or injury to one’s person or freedom, on account of one of the enumerated grounds.” *See Li v. Gonzales*, 405 F.3d 171, 177 (4th Cir. 2005) (internal quotation marks omitted). The applicant “bear[s] the burden of proving eligibility for asylum.” *See Naizgi v. Gonzales*, 455 F.3d 484, 486 (4th Cir. 2006).

Additionally, the INA permits an alien to seek withholding of removal from the United States. *See* 8 U.S.C. § 1231(b)(3)(A). To qualify, the withholding of removal applicant must establish that his “life or freedom would be threatened” in a particular country “because of his race, religion, nationality, membership in a particular social group, or political opinion.” *Id.* Like eligibility for asylum, the applicant bears the burden of proving his eligibility for withholding of removal. *See Camara v. Ashcroft*, 378 F.3d 361, 367 (4th Cir. 2004) (“An applicant for withholding of removal must establish that if she were sent back, it is more likely than not that her life or freedom would be threatened because of her race, religion, nationality, membership in a particular social group, or political opinion.” (alterations and internal quotation marks omitted)). An applicant’s

“burden of proof for withholding of removal is higher than for asylum,” however, so “an applicant who is ineligible for asylum is necessarily ineligible for withholding of removal.”

Id.

B.

1.

We now recount the facts and procedural history relevant to Contreras’s petition for review. Contreras illegally entered the United States as a minor on May 7, 2015. That day, the Department of Homeland Security (“DHS”) issued a Notice to Appear, charging Contreras with removability as an alien present in the United States without being admitted or paroled. On February 18, 2016, Contreras filed applications for asylum and withholding of removal, alleging that gangs in El Salvador had threatened and “assaulted” him. *See* A.R. 399.¹ The same day, the IJ administratively closed Contreras’s case.

On September 13, 2017, Contreras was arrested in Virginia for simple assault. An immigration officer interviewed Contreras at the jail, and Contreras confessed that he had entered the United States without being admitted or paroled. As a result of that and other information, DHS moved to recalendar Contreras’s immigration case in October 2017. The IJ granted the motion and scheduled a November 16, 2017 hearing. During that hearing, Contreras’s lawyer conceded that Contreras was removable and explained that Contreras

¹ Citations herein to “A.R. ___” refer to the contents of the Administrative Record filed in this proceeding.

would pursue his previously filed applications for asylum and withholding of removal. The IJ continued the proceedings and scheduled a later hearing on those applications.

In January 2018, Contreras filed updated asylum and withholding of removal applications. Therein, Contreras claimed that his older brother, Edwin, was “assassinated by a group of organized criminals” in December 2005 “because he did not want to integrate into the group.” *See* A.R. 384. Additionally, Contreras asserted that another brother, Jose Luis, was “abducted by the criminal group” in December 2014 and has never been found. *Id.* According to Contreras, Jose Luis “also did not want to integrate into the group which made th[e] group very angry.” *Id.* Contreras also recounted the group attempting to recruit him, emphasizing that he “was afraid of the consequences if [he] did not accept, [and] feared [group members] would do the same thing to [him] as they did with [his] brothers[,] which is why [he] decided to come to the United States to save [his] life.” *Id.* He also explained that members of the criminal group had threatened to kill him if he returned to El Salvador.

2.

At the April 10, 2018 hearing before the IJ, Contreras testified that he was seven years old when Edwin was brutally killed by gang members in El Salvador. Contreras asserted that Edwin was killed because of “[e]nvy.” *See* A.R. 94. He then explained that “there is a resentment” or “hatred[] due to the fact that [Edwin] worked for the government.” *Id.* at 94-95. Contreras did not know which gang killed Edwin, but he believed it was the “18th Street gang or the MS[-13] gang.” *Id.* at 95. Additionally, Contreras testified that his other brother, Jose Luis, disappeared in 2014 and had not been

seen since. Contreras and his sister suspected that the disappearance of Jose Luis was gang related.

After Jose Luis went missing, MS-13 gang members began threatening Contreras, and they offered him three choices: (1) to join the gang, (2) to “leave [his] home” and never return, or (3) to die at their hands. *See* A.R. 89.² When Contreras was asked if the gangsters said “anything about [his] brother” when threatening him, he responded, “[O]nly that what happened to him, that was what was going to happen to me.” *Id.* at 90.³ On one occasion, MS-13 members beat Contreras and put a gun to his mouth. Immediately thereafter, Contreras fled to the United States.

Contreras testified that the MS-13 members targeted and threatened him because he refused to join their ranks. According to Contreras, “rather than join in the gang, [he] decided it was best to leave” El Salvador and come to the United States. *See* A.R. 97. Contreras’s sister also testified that “the problem [Contreras] had with the gangs was related to his refusal to join them.” *Id.* at 121. Contreras’s father likewise testified that he believed the gang members threatened Contreras because they “wanted to recruit him.” *Id.*

² La Mara Salvatrucha — perhaps better known in the United States as “MS-13” — is a violent “street gang” that has “active ‘cliques,’ or local chapters with varying levels of autonomy, operating throughout the United States and several Central American countries.” *See United States v. Zelaya*, 908 F.3d 920, 924 (4th Cir. 2018). Some of the gang’s leadership resides in El Salvador. *Id.*

³ Although the record is unclear, Contreras was apparently referencing his brother Edwin when describing the gang members’ threats.

at 150. Contreras told his father that MS-13 members once threatened that Contreras “would run the same luck as his other brothers” if he did not join the gang. *Id.* at 143.

3.

On July 12, 2018, the IJ issued the decision denying Contreras’s applications for asylum and withholding of removal. The IJ first found that Contreras presented credible testimony in support of his claims and established that he suffered past harm rising to the level of persecution. The IJ further found that the Salvadoran government is unable or unwilling to control the gangs in its country, such as MS-13.

The IJ next assessed whether Contreras proved that he had been persecuted on account of a protected ground. The IJ acknowledged that Contreras claimed persecution on account of the particular social group consisting of “male family members of the Contreras[-]Mejia family.” *See* A.R. 53. And the IJ found that the group is cognizable and that Contreras is a member thereof. The IJ also determined, however, that Contreras failed to establish that he was targeted by MS-13 on account of his particular social group. Specifically, the IJ found that the evidence indicated that Contreras “was targeted by MS-13 for recruitment because he was a young male,” and not because of his membership in his family. *Id.* at 54.

The IJ further explained that, “[a]lthough [Contreras] testified the gang [members] told him he would suffer the same fate as his brother, they prefaced the threat stating the same would befall him *if he did not join them.*” *See* A.R. 54. According to the IJ, “[i]t was not a statement that they would harm him because he was related to his brother; instead, his brother’s suffering was used as an example of what happens to those who do not join

the gang.” *Id.* The IJ emphasized Contreras’s own testimony that the gang members threatened to kill him because he refused to join them. Finally, the IJ found it “unlikely that [Contreras] would not have been targeted and harmed by the gang but for his relationship to his brothers.” *Id.* Because Contreras failed to establish the required nexus between his past persecution or fear of future persecution and his particular social group, the IJ concluded that Contreras was not entitled to asylum or withholding of removal and ordered him removed to El Salvador.

4.

On January 4, 2019, the BIA issued the decision and order dismissing Contreras’s appeal from the IJ’s decision. The BIA ruled that the IJ had correctly determined that Contreras had not satisfied his burden of establishing the necessary nexus between the persecution he suffered or expects to suffer in El Salvador, on the one hand, and his particular social group, on the other. In particular, the BIA discerned no clear error in the IJ’s finding as to the motive of the MS-13 members in threatening Contreras and concluded that Contreras “was threatened because the gang members wanted him to join their gang, not because of his membership in a particular social group.” *See* A.R. 4. According to the BIA, Contreras failed to establish that “he was threatened because the gang members had any particular animus towards his family.” *Id.* The BIA therefore upheld the IJ’s denial of asylum and withholding of removal. Contreras thereafter timely filed his petition for review in our Court.

II.

Because the BIA adopted the IJ's decision denying Contreras's applications for asylum and withholding of removal in a decision of its own, we review and assess both decisions. *See Salgado-Sosa v. Sessions*, 882 F.3d 451, 456 (4th Cir. 2018). We will affirm the BIA's and the IJ's determinations regarding eligibility for asylum and withholding of removal if they are supported by substantial evidence. *See INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992). Substantial evidence has been defined as less than a preponderance but "more than a mere scintilla" of evidence. *See Shively v. Heckler*, 739 F.2d 987, 989 (4th Cir. 1984) (internal quotation marks omitted). In conducting our substantial evidence review, we treat administrative findings of fact as "conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." *See Ai Hua Chen v. Holder*, 742 F.3d 171, 178 (4th Cir. 2014) (quoting 8 U.S.C. § 1252(b)(4)(B)). On the other hand, we review de novo any legal rulings of the BIA and the IJ. *See Salgado-Sosa*, 882 F.3d at 456.

In this proceeding, Contreras contests the BIA's adoption of the IJ's finding that he did not establish a sufficient nexus between his past persecution or fear of future persecution and his particular social group, that is, male family members of the Contreras-Mejia family.⁴ Whether Contreras satisfies the nexus requirement for asylum is a question of fact. *See Cortez-Mendez v. Whitaker*, 912 F.3d 205, 209 (4th Cir. 2019). As we have

⁴ The Attorney General does not dispute the IJ's findings that Contreras suffered past persecution and that the Salvadoran government is unable or unwilling to control the gangs in its country.

explained, an asylum applicant establishes the required nexus if his “[p]ersecution occurs ‘on account of’ a protected ground.” See *Crespin-Valladares v. Holder*, 632 F.3d 117, 127 (4th Cir. 2011) (quoting 8 U.S.C. § 1101(a)(42)(A)). And that standard is met if the protected ground “serves as ‘at least one central reason for’” the persecution. *Id.* (quoting 8 U.S.C. § 1158(b)(1)(B)(i)). A “central reason” is one that is more than “incidental, tangential, superficial, or subordinate to another reason for harm.” See *Quinteros-Mendoza v. Holder*, 556 F.3d 159, 164 (4th Cir. 2009) (internal quotation marks omitted).

Having thoroughly reviewed the record, we are satisfied that substantial evidence supports the BIA’s and the IJ’s rulings that Contreras has not established the required nexus for asylum. See *Elias-Zacarias*, 502 U.S. at 481 (explaining substantial evidence standard). More specifically, substantial evidence supports their conclusions that Contreras’s membership in his family is not a “central reason” for his past persecution or fear of future persecution. See *Crespin-Valladares*, 632 F.3d at 127.

To the contrary, the record illustrates that Contreras’s past persecution was linked only to his refusal to join the MS-13 gang, and not to his family membership. For example, Contreras testified that he was targeted by MS-13 members because he declined to join their gang, not because he is a male member of the Contreras-Mejia family. See *Velasquez v. Sessions*, 866 F.3d 188, 196 (4th Cir. 2017) (concluding that BIA’s and IJ’s decisions denying asylum were supported by substantial evidence where applicant failed to produce evidence that motive for persecution was her “familial status”). Importantly, Contreras said that his problems with the MS-13 members began when he refused to join them and that he left El Salvador because he feared the consequences of that refusal. And Contreras’s

sister and father both confirmed that Contreras was targeted by the gang members because they hoped to recruit him. For those reasons, substantial evidence supports the BIA's and the IJ's conclusions that there is an insufficient nexus between Contreras's past persecution or fear of future persecution and a protected ground. *See Cortez-Mendez*, 912 F.3d at 210 (“Flight from gang recruitment is not a protected ground under the INA.”).

Contreras resists our ruling, emphasizing that MS-13 members “referenced his two dead brothers” when threatening and “beating” him. *See* Br. of Pet'r 14. We have no cause, however, to disturb the IJ's findings that the gang members' cruel language “was not a statement that they would harm him because” of his membership in his family, and that it is “unlikely that [Contreras] would not have been targeted and harmed by the gang but for his relationship to his brothers.” *See* A.R. 54.⁵

Despite the sad circumstances of Contreras's case, we are constrained to affirm the denial of his asylum claim. And because Contreras has not satisfied his burden on that

⁵ Contreras also contends in this proceeding that the BIA and the IJ failed to assess his relationship with his brother-in-law, who is a police sergeant tasked with combatting gang activities in El Salvador. Contreras did not claim in his asylum and withholding of removal applications, however, that his particular social group depended on his relationship to a police officer. Additionally, neither Contreras nor his family members testified that he was personally targeted by MS-13 members on that ground or that Contreras has a fear of future persecution predicated thereon. Contreras's repeated claims in his opening brief to the contrary — that he testified before the IJ that “everything changed when the gangs found out that he was related to [a] police officer” — are unsupported by the record. *See* Br. of Pet'r 15; *see also id.* at 14 (making similar claim without record support). Moreover, the speculation of Contreras's lawyer that MS-13 members began to threaten Contreras more severely after discovering his brother-in-law's profession is not evidence. *See INS v. Phinpathya*, 464 U.S. 183, 188 n.6 (1984) (explaining that unsupported assertions in briefs are not evidence).

claim, he “is necessarily ineligible for withholding of removal.” *See Camara v. Ashcroft*, 378 F.3d 361, 367 (4th Cir. 2004).

III.

Pursuant to the foregoing, we deny the petition for review. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this Court and argument would not aid the decisional process.

PETITION DENIED