

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

NOV 23 2022

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

JOSE GUTIERREZ, AKA Jose Gutierrez-
Mendoza, AKA Jose Mendoza,

Petitioner,

v.

MERRICK B. GARLAND, Attorney
General,

Respondent.

No. 17-70190

Agency No. A075-631-134

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 that 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.

Jose Gutierrez, a native and citizen of El Salvador, petitions for review of an order from the Board of Immigration Appeals (BIA) dismissing his appeal from an Immigration Judge's denial of his applications for withholding of removal and relief under the Convention Against Torture (CAT). We have jurisdiction under 8 U.S.C. § 1252. Gutierrez argues that he will likely face persecution and torture if he is removed to El Salvador because he refused to join a gang when he was last in El Salvador. We deny Gutierrez's petition for review.

1. The BIA did not err in concluding that Gutierrez is ineligible for withholding of removal. The withholding claim that Gutierrez presented to the BIA was based on the proposed particular social group of "long-time residents of the United States who are deported to El Salvador and subject to gang recruitment." But a petitioner's general fear of gang violence cannot sustain a withholding claim, *Zetino v. Holder*, 622 F.3d 1007, 1016 (9th Cir. 2010), and Gutierrez's proposed particular social group is not cognizable, *see Delgado-Ortiz v. Holder*, 600 F.3d 1148, 1151–52 (9th Cir. 2010).

On appeal to this court, Gutierrez presents a withholding claim based on a different particular social group: his family. This family-based withholding claim must fail because it is unexhausted. *See Bare v. Barr*, 975 F.3d 952, 960 (9th Cir. 2020). However, even if the claim were properly exhausted, it would fail because the record does not support the conclusion that Gutierrez is at risk of persecution

because of his family membership. *See Barajas-Romero v. Lynch*, 846 F.3d 351, 357 (9th Cir. 2017). Instead, the record suggests that Gutierrez’s past persecutors were motivated by a desire to punish him for refusing to join their gang.

2. The BIA did not err in determining that Gutierrez is ineligible for protection under CAT. Substantial evidence supports the conclusion that Gutierrez does not face a likelihood of torture in El Salvador. The gang members who Gutierrez fears never physically harmed him, and they threatened him on only one occasion. Although the death of Gutierrez’s stepfather at the hands of gang members may provide some support for Gutierrez’s CAT claim, the record does not compel the conclusion that Gutierrez will likely be tortured in El Salvador. *See Diaz-Reynoso v. Barr*, 968 F.3d 1070, 1076 (9th Cir. 2020). Under that standard of review, the BIA’s decision must stand. *Id.*

Substantial evidence also supports the conclusion that the government of El Salvador would not acquiesce in any torture that Gutierrez might face. The record demonstrates that El Salvador’s government has acted to control gangs. Although these measures have been ineffective, general ineffectiveness in controlling criminal organizations does not constitute government acquiescence in torture. *Garcia-Milian v. Holder*, 755 F.3d 1026, 1034 (9th Cir. 2014).

PETITION DENIED.