NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

DEC 12 2022

FOR THE NINTH CIRCUIT

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U.S. COURT OF APPEALS

ANTONIO TOMAS ANDRES, AKA Evitelio Perez Vazquez; TOMAS ANTONIO PEDRO, AKA Tomas Antonio Tomas Pedro,

Petitioners,

v.

MERRICK B. GARLAND, Attorney General,

Respondent.

No. 20-70503

Agency Nos. A075-476-279;
A208-926-993

MEMORANDUM*

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

Submitted December 7, 2022**
Pasadena, California

Before: M. SMITH, COLLINS, and LEE, Circuit Judges.

Petitioners Antonio Tomas Andres ("Tomas Andres") and his son, Tomas Antonio Tomas Pedro ("Tomas Pedro"),[1] citizens and natives of Guatemala,

* 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)(C).

[1] The administrative record reflects substantial confusion as to the Petitioners' names, which is understandable given that all of the surnames involved also happen to be common male first names. Petitioners' birth certificates indicate that their surnames are as shown in the parentheticals.

petition for review of the decision of the Board of Immigration Appeals ("BIA") upholding the order of the Immigration Judge ("IJ") denying their applications for asylum, withholding of removal, and protection under the Convention Against Torture ("Torture Convention"). We have jurisdiction under § 242 of the Immigration and Nationality Act. *See* 8 U.S.C. § 1252. We review the agency's legal conclusions *de novo* and its factual findings for substantial evidence. *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1059 (9th Cir. 2017) (en banc). Under the substantial evidence standard, "administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. § 1252(b)(4)(B). We deny the petition.

1. Tomas Andres challenges the agency's adverse credibility finding as to him, but we need not decide this issue. Substantial evidence supports the agency's alternative conclusion that, even assuming that Tomas Andres's testimony was credible, Petitioners failed to establish eligibility for asylum or withholding of removal. On this point, the BIA formally adopted the IJ's ruling, pursuant to *Matter of Burbano*, 20 I & N Dec. 872, 874 (BIA 1994), and so we "review the IJ's decision as if it were that of the BIA." *Abebe v. Gonzales*, 432 F.3d 1037, 1039 (9th Cir. 2005) (en banc).

In contending that Petitioners established a well-founded fear or likelihood of persecution based on "race, religion, nationality, membership in a particular

social group, or political opinion," *see* 8 U.S.C. §§ 1101(a)(42)(A), 1231(b)(3)(A), Petitioners' opening brief relies on the proposed social group of their "family" and notes that we have held that "the family remains the quintessential particular social group." *Rios v. Lynch*, 807 F.3d 1123, 1128 (9th Cir. 2015).[2] Substantial evidence supports the IJ's conclusion that the harms experienced or feared by Petitioners were due, not to Petitioners' status as members of their particular family, but to the gang's desire to recruit additional gang members and extort money. Indeed, Petitioners' own evidence established that the gang made similar recruitment efforts towards another bus driver who was not related to them. Given the lack of any nexus to Petitioners' proposed social group of their family, Petitioners failed to

[2] The opening brief also states that Petitioners "actively refused gang recruitment" and cites our decision in *Pirir-Boc v. Holder*, 750 F.3d 1077, 1079, 1084 (9th Cir. 2014) (remanding to agency to "perform the required evidence-based inquiry as to whether the relevant society recognizes Pirir-Boc's proposed social group," which was Guatemalans "taking concrete steps to oppose gang membership and gang authority"). This remark invokes the other proposed social groups that Petitioners raised before the IJ, which focused on Guatemalans who resist forced gang recruitment and who resist payment of extortion to avoid such recruitment. However, the IJ held that these alternative proposed social groups were not cognizable because they did not satisfy either the particularity or social distinction requirements. *See Diaz-Torres v. Barr*, 963 F.3d 976, 980 (9th Cir. 2020). Petitioners' mere citation of *Pirir-Boc*, without any further explanation as to why the IJ's detailed analysis was substantively incorrect, is insufficient to preserve this issue, which we deem to be forfeited. *See Iraheta-Martinez v. Garland*, 12 F.4th 942, 959 (9th Cir. 2021) ("[B]y failing to develop the argument in his opening brief, [Petitioner] forfeited it."). As a result, Petitioners cannot rely on such proposed social groups in challenging the BIA's holding that Petitioners failed to show a nexus between any asserted harm and a protected ground.

establish their eligibility for either asylum or withholding of removal. *See Singh v. Barr*, 935 F.3d 822, 827 (9th Cir. 2019).

2. Substantial evidence also supports the agency's alternative conclusion that, even assuming that Tomas Andres's testimony was credible, Petitioners failed to establish that they would "more likely than not be tortured, with the consent or acquiescence of" the Guatemalan government, and that they were therefore ineligible for relief under the Torture Convention. *Xochihua-Jaimes v. Barr*, 962 F.3d 1175, 1183 (9th Cir. 2020). As to this issue, the BIA again adopted the IJ's decision and cited *Matter of Burbano*, and so we review the IJ's analysis.

Petitioners contend that the "documentary evidence" establishes that the Guatemalan government is unable to protect them and that "there is no part of Guatemala" where they can be safe from an asserted likelihood of torture. But other family members remain safely in Guatemala, and Petitioners' claims that the gangs would be motivated to find them in other parts of the country are speculative. Although Petitioners presented evidence that there is corruption and inefficiency in the Guatemalan government, Tomas Andres also stated that Petitioners did not report their mistreatment to the police, and he acknowledged that the Guatemalan government did conduct an investigation into his sister-in-law's disappearance, although he asserted that it was inept and unsuccessful. On this record, the agency permissibly found that Petitioners had failed to show that it

was more probable than not that they, in particular, would be tortured with the acquiescence of the Guatemalan government. *See Andrade-Garcia v. Lynch*, 828 F.3d 829, 836 (9th Cir. 2016) (stating that "a general ineffectiveness on the government's part to investigate and prevent crime will not suffice to show acquiescence").

3. The BIA properly concluded that, even assuming that the IJ erred in concluding that Tomas Pedro had waived his separate application for relief and that he should therefore be deemed to be merely a rider on his father's application, Tomas Pedro failed to show prejudice. Both Petitioners testified at the hearing and relied on the same evidence. The analysis we have set forth above as to nexus and as to the Torture Convention applies to both Petitioners, and so any error was not prejudicial. *See Cruz Rendon v. Holder*, 603 F.3d 1104, 1109 (9th Cir. 2010) (explaining that prejudice requires showing that the outcome of the proceedings may have been affected by the due process violation). For the same reasons, the BIA properly concluded that there was no prejudicial error in the consolidation of Tomas Andres's and Tomas Pedro's cases.

4. We agree with the BIA's conclusion that the transcript and record do not disclose that the IJ exhibited bias in these proceedings. Although the transcript reveals impatience and occasional frustration on the part of the IJ, Petitioners have not shown that "the IJ had a deep-seated favoritism or antagonism that would make

fair judgment impossible." *Vargas-Hernandez v. Gonzales*, 497 F.3d 919, 926 (9th Cir. 2007) (citation omitted).

The petition for review is **DENIED**.