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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EVERADO VELAZQUEZ HERNANDEZ, AKA Everado Hernandez Velazquez, Petitioner, v. MERRICK B. GARLAND, Attorney General, Respondent.	No. 20-71151 Agency No. A208-308-238 MEMORANDUM*

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

Submitted December 7, 2022**
San Francisco, California

Before: BRESS and VANDYKE, Circuit Judges, and RESTANI,*** Judge.

Petitioner Everado Velazquez Hernandez seeks review of a Board of Immigration Appeals (BIA) decision dismissing the appeal of the Immigration

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Jane A. Restani, Judge for the United States Court of International Trade, sitting by designation.

Judge's (IJ's) denial of his applications for asylum, withholding of removal, and voluntary departure.[1] We have jurisdiction under 8 U.S.C. § 1252, and we deny the petition.

Petitioner is a native and citizen of Mexico. Petitioner alleges that, in October 2010, he was kidnapped and beaten in Tijuana, Mexico, by two armed men who took his phone and wallet containing information about his family, and released him after one day when a friend paid the kidnappers $2,500. He did not report the incident to Mexican authorities, or to the apprehending officers who caught him trying to cross into the U.S. He reentered the U.S. in November 2010, and remained undetected until he was arrested for—and pled guilty to—drunk driving in California.

Removal proceedings were initiated and, after more than six and a half years following his last reentry, Petitioner applied for asylum, withholding of removal, and protection under the Convention Against Torture (CAT). He sought to excuse his untimely asylum application on the basis that he feared being returned to Mexico, that the country conditions were so unfavorable that he was "afraid to apply for asylum," and that he didn't know his rights. Petitioner also claimed his kidnapping caused lingering trauma, but he didn't invoke trauma as a reason for the asylum application delay. He testified he had never been diagnosed with any mental illness

[1] Petitioner did not appeal the IJ's denial of his request for CAT protection.

or sought psychiatric help. When asked whether he specifically feared being returned to Tierra Blanca where he had previously lived, he answered that "the criminal organizations" in Mexico are "very big and they're extended all over the country," but he hadn't experienced any harm from criminals there.

In support of his applications, Petitioner proffered three different social group definitions: (i) "Mexican citizens returning to Mexico from the United States who are perceived as affluent and Americanized;" (ii) "Indigenous Mexican citizens returning to Mexico from the United States who are perceived to be affluent and Americanized;" and (iii) "Previously persecuted by domestic violence and on account of ethnicity, indigenous Mexican citizens returning to Mexico from the United States who are perceived as affluent and Americanized and who lack familial and societal protection from future persecution." When asked if Mexico's government had ever harmed Petitioner on account of his race, he answered that police harm indigenous people by not listening to them or tending to their necessities.

On May 21, 2018, the IJ denied Petitioner's application for relief in its entirety. On April 6, 2020, the BIA dismissed his appeal, including new arguments raised therein. Petitioner timely petitioned for review.[2]

[2] Also pending is Petitioner's motion to supplement the record. The motion is denied. Under 8 U.S.C. § 1252(b)(4)(A), our review is confined to the

"Whether a group constitutes a 'particular social group' … is a question of law we review de novo." *Perdomo v. Holder*, 611 F.3d 662, 665 (9th Cir. 2010). But whether an applicant has shown that his persecutor was or would be motivated by a protected ground—*i.e.*, whether the "nexus" requirement has been satisfied—is reviewed under the substantial evidence standard. *See Parussimova v. Mukasey*, 555 F.3d 734, 739 (9th Cir. 2009). Under this deferential standard, factual findings are "conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. § 1252(b)(4)(B). Thus, to reverse the BIA's finding under substantial evidence review, "we must find that the evidence not only *supports* that conclusion, but *compels* it." *INS v. Elias-Zacarias*, 502 U.S. 478, 481 n.1 (1992).

Petitioner makes four arguments, none of which succeeds.

First, he argues the agency lacks jurisdiction in the wake of *Pereira v. Sessions*, 138 S. Ct. 2105 (2018). That argument is directly foreclosed by *United States v. Bastide-Hernandez*, 39 F.4th 1187, 1193 (9th Cir. 2022) (en banc).

Second, Petitioner argues he was denied his due process right to a full and fair hearing because the IJ precluded witness testimony which Petitioner claims was probative of his request for asylum (and for a voluntary departure), and because the

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administrative record on which the order of removal is based, absent rare exceptions not applicable here. *Fisher v. INS*, 79 F.3d 955, 964 (9th Cir. 1996). We also deny Petitioner's request that we hold this case in abeyance while Petitioner pursues a motion to reopen before the BIA.

BIA didn't remand to correct an untranslated portion of the transcript where Petitioner had answered whether Mexico's government had persecuted him. Due process challenges are reviewed de novo. *Padilla v. Ashcroft*, 334 F.3d 921, 923 (9th Cir. 2003). "A petition for review will only be granted on due process grounds if '(1) the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case, and (2) the alien demonstrates prejudice, which means that the outcome of the proceeding may have been affected by the alleged violation.'" *Zetino v. Holder*, 622 F.3d 1007, 1013 (9th Cir. 2010) (quoting *Ibarra-Flores v. Gonzales*, 439 F.3d 614, 620–21 (9th Cir. 2006)).

Here, Petitioner was not prevented from reasonably presenting his case since the IJ admitted the written testimony of the witnesses, and both the IJ and BIA explicitly considered such evidence. Petitioner also fails to explain how oral testimony from these witnesses and the untranslated segment of the transcript could have changed the outcome of the agency's decision.

Third, Petitioner asserts that due process requires the agency to consider whether his post-traumatic stress disorder (PTSD) constituted an extraordinary circumstance excusing the lateness of his asylum application. *See* 8 C.F.R. § 208.4(a)(5)(i). Not only are we precluded from evaluating a factual issue recast as a due process issue, 8 U.S.C. § 1158(a)(3), but Petitioner fails to explain how fear, trauma, or his alleged PTSD constitutes such an extraordinary circumstance that it

can explain more than six years of delay in seeking medical attention or filing for asylum. *See* 8 C.F.R. § 208.4(a)(5).

Fourth, as to withholding of removal, Petitioner argues that the IJ "did not consider Petitioner's ethnicity as a separate protected ground for asylum and withholding of removal." To establish eligibility for withholding of removal, an alien must show that it is "more likely than not" that his "life or freedom would be threatened in th[e] [originating] country *because of* the alien's race, religion, nationality, membership in a particular social group, or political opinion." *Zehatye v. Gonzales*, 453 F.3d 1182, 1190 (9th Cir. 2006); 8 U.S.C. § 1231(b)(3)(A) (emphasis added). The BIA did not err in holding that Petitioner's three particular social groups are not cognizable because they are "amorphous, overbroad, and not defined with sufficient particularity." *See Delgado-Ortiz v. Holder*, 600 F.3d 1148, 1151–52 (9th Cir. 2010). Most importantly, the record does not compel a different conclusion from the BIA's determination that, since the kidnappers were extortionists, Petitioner failed to show any nexus between his indigenous background and any particular harm suffered (or feared). Thus, Petitioner's claim for withholding of removal reduces to a general fear of crime, which does not show a nexus to a protected ground. *See Zetino*, 622 F.3d at 1016.

To the extent Petitioner challenges the agency's denial of voluntary departure,

the denial is supported by substantial evidence.

PETITION DENIED.