

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

DEC 1 2022

FOR THE NINTH CIRCUIT

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

JOSE MARCO ANTONIO GARIBALDI
GARIBAY,

Petitioner,

v.

MERRICK B. GARLAND, Attorney
General,

Respondent.

No. 20-73764

Agency No. A096-367-677

MEMORANDUM*

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

Submitted November 17, 2022**
San Francisco, California

Before: McKEOWN and PAEZ, Circuit Judges, and SESSIONS,*** District Judge.

* 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 William K. Sessions III, United States District Judge for the District of Vermont, sitting by designation.

Jose Marco Antonio Garibaldi Garibay petitions for review of the Board of Immigration Appeals' ("BIA") final removal order affirming an Immigration Judge's denial of his motion to terminate removal proceedings and his application for asylum, withholding of removal, and protection under the Convention Against Torture ("CAT"). We deny the petition. Because the parties are familiar with the facts, we need not recount them here.

Jurisdiction. Garibaldi Garibay argues that the omission of the date and time from his initial Notice to Appear prevented jurisdiction over his removal proceedings from vesting with the Immigration Judge. This argument is foreclosed by our holding in *United States v. Bastide-Hernandez*, 39 F.4th 1187, 1192–93 (9th Cir. 2022) (en banc), that failure to include the date and time of a hearing in an NTA does not deprive the immigration court of jurisdiction.

Asylum and Withholding of Removal. The BIA did not err in finding that Garibaldi Garibay failed to establish eligibility for asylum or withholding of removal. Substantial evidence supports the BIA's conclusion that Garibaldi Garibay's membership in a particular social group was neither "one central reason" nor "a reason" for the harm he suffered or fears. *Barajas-Romero v. Lynch*, 846 F.3d 351, 356–58 (9th Cir. 2017). Instead, substantial evidence supports that Garibaldi Garibay was a target of "indiscriminate violence" and generalized criminal activity. *Delgado-Ortiz v. Holder*, 600 F.3d 1148, 1151 (9th Cir. 2010)

(citing *Ochave v. INS*, 254 F.3d 859, 865 (9th Cir. 2001) (“Asylum is not available to victims of indiscriminate violence, unless they are singled out on account of a protected ground.”)).

Garibaldi Garibay’s evidence of persecution—that armed men approached him and his friends collectively for recruitment into a criminal organization, that his mother had been anonymously extorted for money, and that his uncle was forced to work for a criminal organization after being kidnapped and tortured—does not establish that Garibaldi Garibay was or will be singled out for recruitment by or retaliation from a criminal organization.

Nor did the BIA err in finding that Garibaldi Garibay’s political opinion did not motivate the criminal organizations’ actions against him and his family. No nexus exists between forced recruitment or violence and a political opinion where there is no evidence the persecutor believed political opinion motivated the applicant’s refusal to join them, and no evidence that the organization would have harmed them for having that opinion. *Compare Gonzales-Neyra v. I.N.S.*, 122 F.3d 1293, 1296 (9th Cir. 1997) (finding nexus to a political opinion where applicant presented evidence “that he had a political opinion, that he expressed it to his persecutors, and that they threatened him only after he expressed his opinion”), *with Barrios v. Holder*, 581 F.3d 849, 856 (9th Cir. 2009) (finding no nexus where applicant failed to present evidence, other than his refusal to join the gang, that he

was politically or ideologically opposed to gangs or that the gang imputed any particular belief to him), *abrogated in part on other grounds by Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1093 (9th Cir. 2013) (en banc).

Garibaldi Garibay did not communicate any political opposition or neutral political opinion to either criminal organization and did not express an “outspoken political opinion.” *Borja v. I.N.S.*, 175 F.3d 732, 736 (9th Cir. 1999). Thus, the BIA’s conclusion that the criminal organizations were not motivated by a protected ground is supported by substantial evidence. As the BIA did not err when it concluded that Garibaldi Garibay is a victim of generalized conditions of upheaval in Mexico, the BIA did not err in finding that Garibaldi Garibay failed to establish his eligibility for asylum or withholding of removal.

Due Process. The Immigration Judge did not deprive Garibaldi Garibay of due process when it determined that the telephonic testimony of Garibaldi Garibay’s uncle, whose declaration was in the record, was unnecessary. Garibaldi Garibay cannot “demonstrate[] prejudice . . . by the alleged violation.” *Pangilinan v. Holder*, 568 F.3d 708, 709 (9th Cir. 2009) (quoting *Ibarra-Flores v. Gonzales*, 439 F.3d 614, 620–21 (9th Cir. 2006)). As the decision of the BIA turned on its nexus analysis, the proposed testimony concerning the severity of the uncle’s injuries would have no bearing the denial of asylum or withholding of removal.

CAT Protection. Finally, the record does not compel a finding that Garibaldi

Garibay is more likely than not to be tortured by or at the acquiescence of the Mexican government. The BIA applied the correct standard of review—the clearly erroneous standard—to the factual determination of whether Garibaldi Garibay is more likely than not to be tortured if removed. *See Guerra v. Barr*, 974 F.3d 909, 915 (9th Cir. 2020). Garibaldi Garibay failed to produce compelling evidence that he faces a “*particularized threat*” of torture. *Dhital v. Mukasey*, 532 F.3d 1044, 1051 (9th Cir. 2008) (emphasis in original). Thus, the BIA did not err in denying Garibaldi Garibay protection under CAT.

The Court declines to consider any additional issues Garibaldi Garibay raised that did not form the basis of the BIA’s opinion. *Guerra*, 974 F.3d at 911 (noting that this Court’s “review is limited to the BIA’s decision, except to the extent the IJ’s opinion is expressly adopted”).

PETITION DENIED.