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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CLAUDIO LOPEZ YANEZ, Petitioner, v. MERRICK B. GARLAND, Attorney General, Respondent.	No. 21-414 Agency No. A206-408-252 MEMORANDUM*

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

Submitted November 14, 2023**
Seattle, Washington

Before: McKEOWN and GOULD, Circuit Judges, and BAKER, International Trade Judge.***

Claudio Lopez Yanez, a Mexican citizen, petitions for review of the Board of Immigration Appeals' affirmance of an Immigration Judge's (IJ's) order denying

* 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 M. Miller Baker, Judge for the United States Court of International Trade, sitting by designation.

him statutory withholding of removal and protection under the Convention Against Torture. Having appellate jurisdiction under 8 U.S.C. § 1252, we deny the petition.

The Board "adopt[ed] and affirm[ed] the [IJ's] . . . determination that the respondent did not establish eligibility for either withholding of removal under the [Immigration and Nationality] Act or for protection under the CAT," citing *Matter of Burbano*, 20 I. & N. Dec. 872, 874 (BIA 1994). "When the BIA adopts and affirms an IJ's decision and cites its *Burbano* decision, we will review the IJ's decision as if it were that of the BIA." *Tista v. Holder*, 722 F.3d 1122, 1125 (9th Cir. 2013) (cleaned up). We review legal conclusions de novo. *Plancarte Sauceda v. Garland*, 23 F.4th 824, 831 (9th Cir. 2022). We review factual findings for substantial evidence, which requires the petitioner to "show that the evidence not only supports, but compels[,] the conclusion that these findings and decisions are erroneous." *Id.* (quoting *Davila v. Barr*, 968 F.3d 1136, 1141 (9th Cir. 2020)).

1. To be eligible for statutory withholding of removal, "an applicant must demonstrate that [his] life will be threatened in [the country of removal] because of [his] race, religion, nationality, membership in a particular social group, or political opinion." *Id.* at 832 (cleaned up) (quoting 8 U.S.C. § 1231(b)(3)(A)). The applicant may establish a presumption of future persecution by showing he was subject to past persecution, or he may independently show a clear probability of future persecution. *Gutierrez-Alm v. Garland*, 62 F.4th 1186, 1197 (9th Cir. 2023). Lopez Yanez seeks

statutory withholding of removal based on membership in either of two proposed particular social groups: (1) "Mexican males with long term medical conditions" and (2) "Mexican males returning to Mexico after [a] prolonged period in the United States." In addition, he now raises a new proposed particular social group in his opening brief: "those with medical conditions returning to La Noria, Jalisco[,] after sixteen years, unable to hide or [change] their past experiences." Because Lopez Yanez failed to raise this argument before the IJ, we decline to consider it. *See Santos-Zacaria v. Garland*, 143 S. Ct. 1103, 1113–14 (2023) (holding that § 1252(d)(1) is a non-jurisdictional claim-processing rule). Accordingly, we consider only the two particular social groups proposed to the IJ.

As to the first proposed group,[1] Lopez Yanez has failed to show past persecution. He argues that the administrative record shows that he "was persecuted and harmed" because he has epilepsy. The administrative record shows the opposite. The IJ cited Lopez Yanez's declaration stating that he left Mexico as a teenager to seek a better life in the United States and to find a job that would help pay for epilepsy medication. The declaration further stated that he had never been harmed or threatened in Mexico and was not fleeing the country. Lopez Yanez also cites no

[1] The IJ appears to have presumed that the first proposed social group is a recognized one and based his ruling on the lack of either past persecution or a clear probability of future persecution. Because our decision rests on the lack of evidence of past or future persecution, we assume, without deciding, that the IJ's implicit finding as to the first proposed social group was correct.

evidence (as opposed to speculative argument) to support his contention that he will face persecution in the future. On cross-examination, he stated that if he returned to Mexico, he would live with his father in a small town in the state of Jalisco and fears that he would have difficulty finding and paying for his epilepsy medication and that he would become a victim of generalized crime.[2] The IJ found that there was no evidence in the record that Lopez Yanez would face future persecution or harm because of his medical condition and cited the country condition reports in the record showing that the Mexican government is aware of, and making efforts to alleviate, hardships that come with epilepsy. The record simply does not compel a finding contrary to the IJ's.

As to the second proposed social group, the IJ correctly found it foreclosed by *Delgado-Ortiz v. Holder*, 600 F.3d 1148 (9th Cir. 2010). "[T]he key to establishing a particular social group is ensuring that the group is narrowly defined." *Id.* at 1151. "Petitioners' proposed social group, 'returning Mexicans from the United States,' . . . is too broad to qualify as a cognizable social group" because it includes people with "a plethora of different lifestyles, varying interests, diverse cultures, and contrary political leanings." *Id.* at 1151–52 (quoting *Ochoa v. Gonzales*, 406 F.3d 1166, 1171 (9th Cir. 2005), *abrogated on other grounds by Henriquez-Rivas v.*

[2] Lopez Yanez also argues that his case should be remanded for fact finding related to the COVID-19 virus. But he does not explain how the COVID-19 pandemic bears on his fear of persecution.

Holder, 707 F.3d 1081 (9th Cir. 2013) (en banc)). While Lopez Yanez frames his proposed group slightly more narrowly—"Mexican *males* returning to Mexico *after [a] prolonged period* in the United States"—that is a distinction without a difference. Likewise, his effort to distinguish *Delgado-Ortiz* on the basis that his hometown in Jalisco is a small town of about 300 people is unavailing. Whether a proposed particular social group is cognizable depends on the nature of the group, not the circumstances of a petitioner's return. *See Reyes v. Lynch*, 842 F.3d 1125, 1135 (9th Cir. 2016) (discussing the requirements of a particular social group).

2. Lopez Yanez argues that the IJ "acknowledged" that "he will suffer certain death and torture upon returning to Mexico." The IJ in fact found no such thing, and Lopez Yanez fails to support his argument by citation to any record evidence aside from a single broadly sweeping reference to human rights abuses in Mexico. A claim for relief under the Convention Against Torture, however, requires that "[t]he torturer, whether a public official or a private party acting with the government's consent or acquiescence, must have the specific intent to inflict severe harm." *Cole v. Holder*, 659 F.3d 762, 771 (9th Cir. 2011); *see also* 8 C.F.R. § 1208.18(a)(5) ("In order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering."). Lopez Yanez points to no evidence of specific intent to inflict harm. The record does not compel a contrary conclusion.

PETITION DENIED.