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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Hugo Rolando Gomez Osorio, Petitioner, v. Merrick B. Garland, Attorney General, Respondent.	No. 21-478 Agency No. A070-803-207 MEMORANDUM*

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

Submitted February 15, 2023**
San Francisco, California

Before: S.R. THOMAS, MILLER, and SANCHEZ, Circuit Judges.

Hugo Rolando Gomez Osorio, a native and citizen of Guatemala, petitions for review of a Board of Immigration Appeals ("BIA") decision dismissing his appeal from an Immigration Judge's ("IJ") denial of asylum, withholding of removal, cancellation of removal, and protection under the Convention Against

* 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).

Torture ("CAT"). We have jurisdiction pursuant to 8 U.S.C. § 1252. Where, as here, the BIA both conducted its own analysis and affirmed the IJ's reasoning on the relevant issues, we review both decisions. *Guerra v. Barr*, 974 F.3d 909, 911 (9th Cir. 2020). We review the agency's decision to admit documents into evidence for abuse of discretion. *See Sanchez v. Holder*, 704 F.3d 1107, 1109 (9th Cir. 2012). The agency's findings that Gomez Osorio lied when he applied for lawful status and that he is ineligible for relief from removal based on the "persecutor bar" are factual findings that we review for substantial evidence, upholding the decision unless "the evidence in the record compels a contrary conclusion." *Velasquez-Samayoa v. Garland*, 49 F.4th 1149, 1154 (9th Cir. 2022) (citation omitted); *see Ruiz-Colmenares v. Garland*, 25 F.4th 742, 748 (9th Cir. 2022); *Miranda Alvarado v. Gonzales*, 449 F.3d 915, 929 (9th Cir. 2006). Because the parties are familiar with the factual and procedural history of the case, we need not recount it here. We dismiss the petition in part and deny it in part.

I

The BIA did not err in concluding that the IJ properly admitted into evidence the judgment of the Guatemalan Criminal Court ("Guatemalan Judgment"), the Historical Archives of the National Police ("AHPN"), and the arrest warrant. Although the Department of Homeland Security ("DHS") did not authenticate the

Guatemalan Judgment, the AHPN records, and the arrest warrant pursuant to 8 C.F.R. § 1287.6, section 1287.6 sets forth a permissive, not mandatory, method of authentication, and DHS sufficiently authenticated the documents. *See Vatyan v. Mukasey*, 508 F.3d 1179, 1183 (9th Cir. 2007).

The sole test for the admission of evidence in removal proceedings is "whether the evidence is probative and its admission is fundamentally fair." *Sanchez*, 704 at 1109 (quoting *Espinoza v. Immigr. & Naturalization Serv.*, 45 F.3d 308, 310 (9th Cir. 1995)). To authenticate a record, a party "may resort to any recognized procedure for authentication of documents in general, including the procedures permitted under Federal Rule of Evidence 901." *Vatyan*, 508 F.3d at 1183. Under Rule 901, a party offering a document into evidence must simply "produce evidence sufficient to support a finding that the item is what the proponent claims it is." *See* Fed. R. Evid. 901(a). The party "need only make a prima facie showing of authenticity so that a reasonable juror could find in favor of authenticity." *See United States v. Estrada-Eliverio*, 583 F.3d 669, 673 (9th Cir. 2009) (internal quotation marks and citation omitted).

Here, several facts underlying the documents were either uncontested or otherwise established through unobjectionable evidence. DHS properly laid the foundation for the admission of these records through other evidence. *See United*

States v. Whitworth, 856 F.2d 1268, 1282–83 (9th Cir. 1988). The agency did not abuse its discretion in admitting the documents into evidence.

II

Substantial evidence supports the agency finding that Gomez Osorio is removable because he made willful misrepresentations when he applied for lawful status. A noncitizen is removable if he procured or sought to procure an immigration benefit through fraud or willful misrepresentation of a material fact. *See* 8 U.S.C. § 1227(a)(1)(A); *id.* § 1182(a)(6)(C)(i). Here, the IJ found, and the BIA agreed, that Gomez Osorio was removable under 8 U.S.C. § 1227(a)(1)(A) because he failed to disclose his participation in the political persecution of Edgar Fernando Garcia and Danilo Chinchilla when he applied for asylum and special rule cancellation of removal. The record does not compel a contrary conclusion. The Guatemalan Judgment alone provides substantial evidence for the conclusion that Gomez Osorio assisted or participated in the political persecution of Garcia and Chinchilla. The Guatemalan Judgment spans nearly one hundred pages and concludes that Gomez Osorio, along with three other individuals, participated in the disappearance of Garcia and the shooting of Chinchilla.

III

Substantial evidence also supports the agency's finding that Gomez Osorio is ineligible for asylum, withholding of removal, and cancellation of removal under the persecutor bar. An applicant bears the burden of proving his eligibility for asylum, withholding of removal, and cancellation of removal. *See* 8 U.S.C. § 1229a(c)(4)(A); 8 C.F.R. § 1240.8(d). The applicant must show that he is not subject to a mandatory bar to such relief. *See* 8 C.F.R. § 1240.8(d).

An applicant who has "assisted" or "otherwise participated" in the persecution of any person on account of political opinion is subject to a mandatory bar to asylum, withholding of removal, cancellation of removal, and CAT protection. *See* 8 U.S.C. § 1158(b)(2)(A)(i) (asylum); 8 U.S.C. § 1231(b)(3)(B)(i) (withholding); 8 U.S.C. § 1229b(c)(5) (cancellation); 8 C.F.R. § 1208.16(d)(2) (CAT protection).

Here, the IJ found, and the BIA agreed, that Gomez Osorio was ineligible for asylum, withholding of removal, CAT protection, or cancellation of removal because the evidence indicated that the persecutor bar may apply, and because Gomez Osorio failed to show that it did not. Substantial evidence, including the Guatemalan Judgment, supports that conclusion.

IV

We lack appellate jurisdiction over Gomez Osorio's procedural due process claims because he did not exhaust those claims before the agency. *See* 8 U.S.C. § 1252(d)(1); *Arsdi v. Holder*, 659 F.3d 925, 928–29 (9th Cir. 2011) (internal quotation marks and citation omitted) ("We have repeatedly held that failure to raise an issue in an appeal to the BIA constitutes a failure to exhaust remedies with respect to that question and deprives this court of jurisdiction to hear the matter.").

V

In sum, we dismiss the petition in part for lack of jurisdiction, and deny the petition in part. The motion for a stay of removal is denied. The temporary stay of removal is lifted. All remaining pending motions are denied as moot.

PETITION DISMISSED IN PART; DENIED IN PART.