

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

DEC 14 2022

FOR THE NINTH CIRCUIT

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

JOSUE OSMEL ARGUETA-CABALLERO,

No. 21-70331

Petitioner,

Agency No. A209-223-673

v.

MEMORANDUM*

MERRICK B. GARLAND, Attorney
General,

Respondent.

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

Submitted December 9, 2022**
San Francisco, California

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

Petitioner seeks review of a Board of Immigration Appeals (BIA) decision dismissing the appeal of the IJ's denial of his applications for asylum, withholding of removal, and protection under the Convention Against Torture (CAT). We have

* 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.

jurisdiction under 8 U.S.C. § 1252, and we deny the petition.

Petitioner is a native and citizen of El Salvador who was placed in removal proceedings after entering the U.S. without valid papers on June 9, 2016. Petitioner alleges that on May 4, 2016, he was robbed by gang members near a park. Then, on May 21, 2016, three MS gang members approached the sales stand he operated at the time, said that they had been observing him, that they wanted him to move drugs, weapons, and extortion money, and that they would kill him if he didn't comply. Petitioner reported the event to the police who advised that he leave the country. On June 3, 2016, Petitioner quit his job and left the vicinity, evading the gang's search. He then crossed into the U.S. On August 11, 2016, he was served a Notice to Appear (NTA) that lacked a date or time for the removal hearing.

On August 6, 2018, the IJ ordered Petitioner's removal to El Salvador, and denied his applications for asylum, withholding of removal, and CAT protection (as well as a motion to terminate under *Pereira v. Sessions*, 138 S. Ct. 2105 (2018)). The particular social group presented by Petitioner was "former salesm[e]n who lack police protection against the gangs." In his appeal to the BIA, Petitioner changed the proposed social group to "'former salesmen' for the village of Agua Zarca." On January 19, 2021, the BIA dismissed the appeal.

"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).

The petition is denied for three reasons. First, Petitioner argues that the NTA he was served was defective under *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1480–81 (2021), which appears to be an attempted reprise of an argument he failed to raise before the BIA: that the defect defeated jurisdiction under *Pereira*. Not only is that argument waived because Petitioner never presented it to the BIA in any form, and thus not properly before our court (*see* 8 U.S.C. § 1252(d)(1)), it is foreclosed in any event by *United States v. Bastide-Hernandez*, 39 F.4th 1187, 1193 (9th Cir. 2022) (*en banc*).

Second, to the extent that Petitioner seeks review of his claims for asylum and withholding of removal, he has not demonstrated error in the BIA’s decision. Petitioner does not dispute the BIA’s determination that he failed to exhaust the proposed social group of “former salesm[e]n for the village of Agua Zarca.” We

thus lack jurisdiction to consider this group. *See* 8 U.S.C. § 1252(d)(1). To the extent Petitioner still contends he was persecuted on the basis of the proposed group of “former salesmen who lack police protection against the gangs”—the proposed group he did exhaust before the BIA—Petitioner has not demonstrated that this proposed group is legally cognizable.

Lastly, as to CAT relief, the BIA’s determination that Petitioner failed to show he faces a “*particularized threat*” of torture, *Dhital v. Mukasey*, 532 F.3d 1044, 1051 (9th Cir. 2008) (citation omitted), is supported by substantial evidence and nothing in the record compels a contrary conclusion.

PETITION DENIED.