

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

DEC 12 2022

FOR THE NINTH CIRCUIT

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

FILIBERTO OLEA CRUZ,

Petitioner,

v.

MERRICK B. GARLAND, Attorney
General,

Respondent.

No. 21-70633

Agency No. A088-884-256

MEMORANDUM*

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

Submitted December 7, 2022**
Pasadena, California

Before: BERZON, R. NELSON, and BADE, Circuit Judges.

Filiberto Olea Cruz, a native and citizen of Mexico, petitions for review of the Board of Immigration Appeals' ("BIA") dismissal of his appeal of an immigration judge's ("IJ") 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).

jurisdiction under 8 U.S.C. § 1252. We “review factual findings for substantial evidence and legal questions de novo.” *Guerra v. Barr*, 974 F.3d 909, 911 (9th Cir. 2020). Under the substantial evidence standard, the agency’s findings are “conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary.” *B.R. v. Garland*, 26 F.4th 827, 835 (9th Cir. 2022) (quoting *Velasquez-Gaspar v. Barr*, 976 F.3d 1062, 1064 (9th Cir. 2020)). We deny the petition for review.

1. Olea Cruz contends that the IJ violated his due process rights by failing to act as a neutral factfinder. Olea Cruz asserts that the IJ displayed an improper attitude. While the IJ sometimes appeared impatient, “a mere showing that the IJ was unfriendly, confrontational, or acted in an adversarial manner is not enough” to show the IJ abandoned his role as a neutral arbiter. *Rizo v. Lynch*, 810 F.3d 688, 693 (9th Cir. 2016). There is no indication that the IJ prevented Olea Cruz from presenting his case. *Hussain v. Rosen*, 985 F.3d 634, 644 (9th Cir. 2021) (“The core of the due process right afforded petitioners in immigration proceedings is the *opportunity* to testify.”). Olea Cruz’s claim fails because he has not demonstrated that the IJ’s conduct prejudiced him. *See Gutierrez v. Holder*, 662 F.3d 1083, 1091 (9th Cir. 2011) (“An alien bears the burden of proving the alleged violation [of due process] prejudiced his or her interests.”).

2. Olea Cruz challenges the denial of asylum. The IJ denied asylum based on

the determination that Olea Cruz’s asylum application was untimely and there was no cognizable excuse for the lateness. Olea Cruz did not appeal that determination to the BIA. We therefore lack jurisdiction over Olea Cruz’s challenge to the denial of asylum as untimely.¹ *See Barron v. Ashcroft*, 358 F.3d 674, 677–78 (9th Cir. 2004) (holding that 8 U.S.C. § 1252(d)(1) mandates exhaustion and, thus, this court generally lacks jurisdiction over “the merits of a legal claim not presented in administrative proceedings below”). As the timelines issue is conclusive, 8 U.S.C. § 1158(a)(2)(B), we do not reach the merits of Olea Cruz’s challenge to the denial of asylum.

3. Substantial evidence supports the agency’s adverse credibility determination. The IJ “must provide a specific cogent reason for the adverse credibility finding,” *Garcia v. Holder*, 749 F.3d 785, 789 (9th Cir. 2014) (citations omitted), but “[t]here is no bright-line rule under which some number of inconsistencies requires sustaining or rejecting an adverse credibility determination,” *Alam v. Garland*, 11 F.4th 1133, 1137 (9th Cir. 2021) (en banc). The IJ must consider the “totality of the circumstances” and may analyze factors including demeanor, candor, responsiveness, plausibility, inconsistency,

¹ Olea Cruz also waived review of the denial of asylum as untimely because he fails to make any arguments to support such a claim. *See Martinez-Serrano v. INS*, 94 F.3d 1256, 1259–60 (9th Cir. 1996) (issues not specifically raised and argued in a party’s opening brief are waived).

inaccuracy, and falsehood. *Shrestha v. Holder*, 590 F.3d 1034, 1042 (9th Cir. 2010). In considering the totality of the circumstances, the IJ must consider “a petitioner’s explanation for a perceived inconsistency and relevant record evidence.” *Id.* at 1044.

The agency provided specific, cogent reasons for finding Olea Cruz not credible, including the material inconsistencies between his hearing testimony and record evidence regarding whether the police refused to take a report related to the shooting of Olea Cruz’s father. The IJ permitted Olea Cruz to explain the discrepancies and considered Olea Cruz’s explanations. Considering the “totality of the circumstances[] and all relevant factors,” we conclude that substantial evidence supports the adverse credibility determination. *Alam*, 11 F.4th at 1137 (alteration in original) (citation omitted).

4. The agency alternatively determined that, even if Olea Cruz were credible, he was not entitled to withholding of removal because, among other reasons, he failed to show membership in the proposed particular social group “family of landowners” and thus failed to show the requisite nexus to a protected ground. Olea Cruz does not point to any record evidence inconsistent with the agency’s finding that he failed to show membership in the proposed particular social group. *See Singh v. Ashcroft*, 361 F.3d 1152, 1157 n.3 (9th Cir. 2004); Fed. R. App. P. 28(a)(8)(A). Thus, even if Olea Cruz were credible and his particular social group

cognizable, because membership in a cognizable social group is an essential element of his claim for withholding of removal based on this protected ground, *see Reyes v. Lynch*, 842 F.3d 1125, 1132 n.3 (9th Cir. 2016), the agency’s unchallenged determination is dispositive.

5. Substantial evidence supports the agency’s denial of Olea Cruz’s CAT claim.² While an adverse credibility determination does not preclude CAT relief, *see Shrestha*, 590 F.3d at 1048–49, Olea Cruz must point to record evidence other than his own testimony to meet his burden of demonstrating that it is more likely than not that he will be tortured if removed, 8 C.F.R. § 1208.16(c)(2). The record does not compel the conclusion that it is more likely than not that Olea Cruz would suffer harm rising to the level of torture if he returned to Mexico. *See Delgado-Ortiz v. Holder*, 600 F.3d 1148, 1152 (9th Cir. 2010) (evidence of generalized violence and crime in Mexico was not particular to petitioners and did not satisfy the petitioners’ burden).

PETITION DISMISSED IN PART AND DENIED IN PART.

² Considering that an issue can be “argued in a slightly different manner [to the BIA] and still be preserved for appeal,” *Cruz-Navarro v. INS*, 232 F.3d 1024, 1030 n.8 (9th Cir. 2000), we conclude that Olea Cruz exhausted his arguments regarding his CAT claim.