NOT FOR PUBLICATION

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JERRY E. BRENES GUERRA, Petitioner, v. MERRICK B. GARLAND, Attorney General, Respondent.	No. 22-94 Agency No. A208-594-199 MEMORANDUM[*]

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

Submitted March 09, 2023[**]
San Francisco, California

Before: FRIEDLAND and R. NELSON, Circuit Judges, and KATZMANN,[***] Judge.

Jerry E. Brenes Guerra, a native and citizen of Guatemala, petitions for review of the Board of Immigration Appeals' (BIA) affirmance of an Immigration Judge's (IJ) denial of his applications for asylum and withholding of removal

[*] 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 Gary S. Katzmann, Judge for the United States Court of International Trade, sitting by designation.

under the Immigration and Nationality Act (INA).[1] Brenes Guerra also contends that the IJ lacked jurisdiction over his removal proceedings and that he should be permitted to apply for voluntary departure. We have jurisdiction under 8 U.S.C. § 1252. *Wang v. Sessions*, 861 F.3d 1003, 1007 (9th Cir. 2017).

We review factual findings underlying the BIA's denials of asylum and withholding of removal for substantial evidence, and review questions of law de novo. *Tamang v. Holder*, 598 F.3d 1083, 1088 (9th Cir. 2010). To reverse the BIA under the substantial evidence standard, we must determine that the evidence not only supports a contrary conclusion but also compels it. *Garcia-Milian v. Holder*, 755 F.3d 1026, 1031 (9th Cir. 2014). When the BIA relies in part on the immigration judge's reasoning, we review both decisions. *Singh v. Holder*, 753 F.3d 826, 830 (9th Cir. 2014).

1. In denying Brenes Guerra's asylum application, the BIA determined that Brenes Guerra did not establish past harm rising to the level of persecution and that Brenes Guerra did not establish a well-founded fear of persecution.[2] Because we would affirm the BIA's determination under any standard of review,

[1] Brenes Guerra also sought relief under the Convention Against Torture (CAT) before the IJ. That claim is not before us, as Brenes Guerra waived his CAT claim on appeal to the BIA and does not mention it in his opening brief.

[2] Because these holdings were sufficient to deny Brenes Guerra's asylum application, the BIA did not decide whether Brenes Guerra experienced harm on account of a protected ground. We likewise limit our review to these bases. *See Andia v. Ashcroft*, 359 F.3d 1181, 1184 (9th Cir. 2004) (per curiam) ("In reviewing the decision of the BIA, we consider only the grounds relied upon by that agency.").

we need not address the specific standard that applies in this case. *Cf. Fon v. Garland*, 34 F.4th 810, 813 & n.1 (9th Cir. 2022).

The past harm Brenes Guerra identifies consists of two events. First, the father of two young men who were killed in a car accident involving Brenes Guerra's cousin (Franklin) called Franklin's father (Uncle Elder) and demanded that Uncle Elder turn Franklin over to him because he was angry and wanted revenge. Second, one of Brenes Guerra's other uncles (Uncle Narry) was shot and killed by unknown perpetrators after being deported to Guatemala from the United States.

Persecution is "an extreme concept that does not include every sort of treatment our society regards as offensive." *Nagoulko v. INS*, 333 F.3d 1012, 1016 (9th Cir. 2003) (quoting *Korablina v. INS*, 158 F.3d 1038, 1044 (9th Cir. 1998)); *see also Sharma v. Garland*, 9 F.4th 1052, 1060–61 (9th Cir. 2021). We discern no error in the BIA and IJ's determination that these events did not amount to past persecution because Brenes Guerra was neither harmed nor threatened. The threat Uncle Elder received was not directed at Brenes Guerra, nor is there any evidence that the threat was fulfilled against Uncle Elder or Franklin. *See Villegas Sanchez v. Garland*, 990 F.3d 1173, 1179–80 (9th Cir. 2021) ("Mere threats, without more, do not necessarily compel a finding of past persecution."). And there is no evidence that Uncle Narry's murder involved Brenes Guerra or was connected to the threat against Uncle Elder and Franklin. *See Tamang*, 598 F.3d at 1092 ("[W]e have not found that harm to others may

substitute for harm to an applicant . . . who was not in the country at the time he claims to have suffered past persecution there.").

The BIA further determined that Brenes Guerra failed to establish a well-founded fear of future persecution. The BIA found that the threat was only directed at Uncle Elder and Franklin,[3] that Uncle Elder and Franklin remained in Guatemala unharmed, that there was no connection between the threat and Uncle Narry's murder, and that Brenes Guerra was not personally targeted. This properly supported the BIA's conclusion that Brenes Guerra's fear of persecution was not well-founded or objectively reasonable. *See Sharma*, 9 F.4th at 1065–66. And contrary to Brenes Guerra's assertion, the BIA and IJ did not erroneously conflate the nexus analysis with the fear of future persecution analysis. That the motivation behind the threat and the murder would also be relevant to the nexus analysis does not make it irrelevant to whether Brenes Guerra's fear of future persecution was objectively reasonable. *See id.* (finding the persecutors' interest in harming the petitioner relevant to whether the fear of future persecution was objectively reasonable).

2. Because Brenes Guerra "has not met the lesser burden of establishing his eligibility for asylum, he necessarily has failed to meet the more stringent 'clear probability' burden required for withholding of [removal]." *Molina-Morales v. INS*, 237 F.3d 1048, 1052 (9th Cir. 2001) (citation omitted).

[3] There is no evidence, as Brenes Guerra asserts, that the threat was to kill Uncle Elder's family.

3. Brenes Guerra also argued before the BIA that the IJ lacked jurisdiction over his case because his notice to appear did not specify the date and time of his removal proceedings. He contends that *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), supports his position. This argument is foreclosed by our precedent. *See United States v. Bastide-Hernandez*, 39 F.4th 1187, 1193 (9th Cir. 2022) (en banc); *Karingithi v. Whitaker*, 913 F.3d 1158, 1160 (9th Cir. 2019). The notice of hearing Brenes Guerra received four days after receiving his notice to appear provided the date and time of his hearing, and that was sufficient to vest jurisdiction. *Bastide-Hernandez*, 39 F.4th at 1193.

4. Brenes Guerra also argues that we should remand this case and permit him to apply for voluntary departure. Because he failed to make this argument before the BIA, it is unexhausted, and we lack jurisdiction to address it. *See Barron v. Ashcroft*, 358 F.3d 674, 678 (9th Cir. 2004) (citing 8 U.S.C. § 1252(d)(1)); *cf. Zamorano v. Garland*, 2 F.4th 1213, 1225 (9th Cir. 2021).

PETITION DENIED in part and DISMISSED in part.