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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CESAR D. COLIN ORTIZ; KARINA HERNANDEZ LEYVA, Petitioners, v. MERRICK B. GARLAND, Attorney General, Respondent.	No. 23-468 Agency Nos. A079-804-759 A077-764-173 MEMORANDUM[*]

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

Submitted March 29, 2024[**]
San Francisco, California

Before: PAEZ, WALLACH,[***] and NGUYEN, Circuit Judges.

[*] 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 Evan J. Wallach, United States Senior Circuit Judge for the U.S. Court of Appeals for the Federal Circuit, sitting by designation.

Petitioners Cesar D. Colin Ortiz (Colin Ortiz) and Karina Hernandez Leyva (Hernandez Leyva) seek review of the Board of Immigration Appeals' (BIA) dismissal of their appeal from an immigration judge's (IJ) denial of their applications for asylum, withholding of removal, and protection under the Convention Against Torture (CAT). We have jurisdiction under 8 U.S.C. § 1252(a), and we grant the petition for review in part, deny in part, and remand to the BIA.

Where, as here, the BIA adopted and affirmed the IJ's decision pursuant to *Matter of Burbano*, 20 I. & N. Dec. 872, 874 (B.I.A. 1994), we "review the IJ's decision directly." *Viridiana v. Holder*, 646 F.3d 1230, 1233 (9th Cir. 2011) (citing *Abebe v. Gonzales*, 432 F.3d 1037, 1040 (9th Cir. 2005) (en banc)).

1. Notice to Appear. Petitioners argue that the IJ lacked jurisdiction over their cases because he issued an incomplete notice to appear ("NTA"). The government contends that because Petitioners failed to raise this issue before the BIA, this court lacks jurisdiction to consider it.

Although the exhaustion requirement in 8 U.S.C. § 1252(d)(1) is not jurisdictional, *Santos-Zacaria v. Garland*, 598 U.S. 411, 413 (2023), the exhaustion requirement is mandatory if a party timely urges us to apply it. *Umana-Escobar v. Garland*, 69 F.4th 544, 550 (9th Cir. 2023). Because Petitioners failed to exhaust the alleged claim-processing violation and the government timely raised

§ 1252(d)(1), we decline to address Petitioners' challenge to the adequacy of the notice to appear.

2. Humanitarian Asylum. Petitioners argue that they are eligible for humanitarian asylum. The government correctly notes that Petitioners did not raise this argument before the BIA. We therefore enforce the mandatory claim-processing rule in § 1252(d)(1) and decline to address this argument. *Santos-Zacaria*, 598 U.S. at 419; *Umana-Escobar*, 69 F.4th at 550.

3. Asylum and Withholding of Removal. Hernandez Leyva argues that the agency erred in denying her claims for asylum and withholding of removal because she endured past persecution on account of an imputed political opinion and her family social group membership. We review for substantial evidence the agency's factual findings underlying Hernandez Leyva's claims for asylum and withholding of removal. *See Plancarte Sauceda v. Garland*, 23 F.4th 824, 831 (9th Cir. 2022). To be eligible for asylum or withholding of removal due to past persecution, an applicant must demonstrate that the past persecution was "on account of one or more protected grounds." *Davila v. Barr*, 968 F.3d 1136, 1141 (9th Cir. 2020). The BIA determined that Hernandez Leyva failed to meet this burden. This determination is supported by substantial evidence.

Hernandez Leyva has not provided any evidence indicating that she was harmed on account of a protected ground. The agency properly determined that

Hernandez Leyva was harmed inadvertently when she stepped in between Colin Ortiz and his attackers. There is no evidence that her attackers were motivated by an imputed political opinion or because of her kinship to Colin Ortiz or any other family members. *Barajas-Romero v. Lynch*, 846 F.3d 351, 357 (9th Cir. 2017) (explaining that "the persecutor's motive" is what matters for nexus).

Hernandez Leyva also argues that she established a well-founded fear of future persecution and that the IJ failed to consider record evidence and country conditions reports. Having failed to show past persecution, Hernandez Leyva is not entitled to a presumption of future persecution. *See Sharma v. Garland*, 9 F.4th 1052, 1060 (9th Cir. 2021). Substantial evidence supports the agency's determination that Hernandez Leyva has not demonstrated a well-founded fear of future persecution. Although Hernandez Leyva's cousins were killed by cartels, their circumstances differ markedly from hers, so this evidence does not demonstrate a "pattern of persecution closely tied to the petitioner [herself]" necessary for "a successful showing of past persecution." *Id*. at 1062 (quoting *Wakkary v. Holder*, 558 F.3d 1049, 1060 (9th Cir. 2009)) (cleaned up). The general country conditions reports also do not demonstrate a pattern of persecution closely tied to Hernandez Leyva, so do not establish that she has a well-founded fear of future persecution. Nor has she demonstrated that any future persecution would be on account of a protected ground.

Because Hernandez Leyva has not met the lesser burden of establishing her eligibility for asylum, she necessarily has failed to meet the more stringent burden required for withholding of removal. *See id.* at 1066.

4. CAT Relief. Colin Ortiz argues that he is entitled to CAT relief and that the IJ failed to consider all evidence "relevant to the possibility of future torture." The IJ denied Colin Ortiz's claim for CAT relief, concluding that he had presented no evidence to support this "speculative fear" of being tortured by the cartel in the future. The BIA affirmed, concluding that even assuming Colin Ortiz suffered past torture, he had not established a probability of future torture and had not established the requisite government acquiescence.

"We review the denial of CAT relief for substantial evidence." *Tzompantzi-Salazar v. Garland*, 32 F.4th 696, 703 (9th Cir. 2022). "To receive deferral of removal under the CAT, an applicant must establish that 'it is more likely than not that he or she would be tortured if removed.'" *Hernandez v. Garland*, 52 F.4th 757, 768–69 (9th Cir. 2022) (quoting 8 C.F.R. § 1208.16(c)(2)). "In addition, the petitioner must demonstrate that he would be subject to a particularized threat of torture, and that such torture would be inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." *Dhital v. Mukasey*, 532 F.3d 1044, 1051 (9th Cir. 2008) (per curiam) (cleaned up). In evaluating a petitioner's CAT claim, the agency considers "all

evidence relevant to the possibility of future torture" including evidence of past torture, ability to relocate within the country of removal, evidence of gross, flagrant or mass violations of human rights in the country of removal, and other relevant country conditions information. 8 C.F.R. 1208.16(c)(3).

The agency concluded that Colin Ortiz had not submitted objective evidence indicating that he would be subject to a particularized threat of torture. This determination is not supported by substantial evidence.

Colin Ortiz testified that about thirty minutes after filing his police report about the cartel's threats to him and his family, he was abducted by cartel members, who began to beat and sexually assault him in the car. Colin Ortiz was then detained with other abductees at a cabin where there were signs of torture. At the cabin, he was repeatedly beaten, sexually assaulted, and threatened. His abductors repeatedly told him that their conduct was on account of the police report he had filed. Colin Ortiz suffered severe physical injuries from the assault, including rectal trauma and bleeding. He has experienced continued psychological trauma in the years since. The IJ found his testimony credible. Record evidence and testimony compel the conclusion that Colin Ortiz suffered past torture.[1]

[1] Given his credible testimony and medical records, no reasonable adjudicator could say that Colin Ortiz did not endure severe pain or suffering, or that his torture was not on account of his decision to file a police report against his harassers and to coerce him to murder on behalf of the cartel. *Diaz-Reynoso v. Barr*, 968 F.3d 1070, 1089 (9th Cir. 2020) ("Torture is any act by which severe pain or suffering is

The agency also determined that Colin Ortiz had failed to demonstrate that any future torture would be inflicted with the consent or acquiescence of a public official or other person acting in an official capacity. This determination is also not supported by substantial evidence.

The IJ and BIA concluded that Colin Ortiz had not demonstrated government acquiescence because there were certain instances where some officials assisted Hernandez Leyva and Colin Ortiz. The BIA affirmed the IJ's determination that Colin Ortiz had failed to show that "the government of Mexico would acquiesce" in his harm. This was legal error. "[A]n applicant for CAT relief need not show that the entire foreign government would consent to or acquiesce in his torture. He need show only that 'a public official' would so acquiesce." *Madrigal v. Holder*, 716 F.3d 499, 509 (9th Cir. 2013) (citing 8 C.F.R. § 208.18(a)(1)).

Colin Ortiz met his burden to show that public officials acquiesced in his past torture. First, he presented testimony and record evidence reflecting widespread police corruption both in Mexico and in his hometown of Lazaro Cardenas. A former Lazaro Cardenas police officer testified before the IJ and stated that approximately two-thirds of the Lazaro Cardenas police department

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intentionally inflicted for such purposes as . . . punishing an act committed or one suspected of having been committed . . . .")

accept bribes or are otherwise involved with the cartel. The officer testified that a fellow officer was murdered just one day after they reported departmental corruption to federal officials. This is particularized evidence of the police officers' inability or unwillingness to combat cartel violence.

Second, the police officer who allowed Petitioners to file a police report asked them not to meet him again at the police station "[b]ecause [they] were going to get him into trouble." That officer also inferred that they would be subject to gang retribution. Minutes later, after leaving the police station, Colin Ortiz was abducted and tortured. Taken together, these instances establish that public officials, at minimum, "stood by" as Colin Ortiz was tortured.[2] *Ornelas-Chavez v. Gonzales*, 458 F.3d 1052, 1060 (9th Cir. 2006).

The evidence before us compels the conclusion that public officials in Mexico would likely acquiesce in the future torture that Colin Ortiz would likely suffer. Record evidence and testimony reflects that the Lazaro Cardenas police department is largely unwilling or unable to combat cartel violence, even if police

[2] Colin Ortiz also presented evidence that the local human rights official was aware of police corruption in Lazaro Cardenas when she advised Hernandez Leyva not to tell the local police officers where their children were because they "didn't know who [they] were trading or dealing with."

officers occasionally permit citizens to file police reports.[3] Colin Ortiz met his burden to establish government acquiescence for CAT relief. *Hermosillo v. Garland*, 80 F.4th 1127, 1133 (9th Cir. 2023); *Xochihua-Jaimes v. Barr*, 962 F.3d 1175, 1186 (9th Cir. 2020).

Finally, Colin Ortiz offered evidence about his unsuccessful attempt to relocate within Mexico, but neither the IJ nor the BIA addressed the possibility of relocation. Relocation is one non-dispositive factor in the agency's analysis, and Colin Ortiz need not prove the *impossibility* of relocation. 8 C.F.R. § 1208.16(c)(3)(ii); *Maldonado v. Lynch*, 786 F.3d 1155, 1164 (9th Cir. 2015). Neither the BIA nor the IJ discussed the possibility of relocation, so we grant Colin Ortiz's petition for review and remand for the agency to consider whether he could safely relocate to another area in Mexico where he is not likely to be tortured. 8 C.F.R. § 1208.16(c)(3)(ii).

In light of our determination that Colin Ortiz suffered past torture and has established government acquiescence, we also remand so the BIA may reconsider its determination as to his likelihood of future torture. *See Diaz-Reynoso*, 968 F.3d at 1089–90. The evidence may well support a finding that Colin Ortiz suffers "permanent and continuing harm" from his past torture, which the agency should

[3] Record evidence explains that corruption of public officials in Mexico remains a problem, particularly at the state and local levels of government, with police officers frequently working directly on behalf of drug cartels.

also consider in its analysis. *Mohammed v. Gonzales*, 400 F.3d 785, 802 (9th Cir. 2005) (holding that "permanent and continuing harm" from past torture "may be enough to establish that [a petitioner] is automatically entitled, without more, to protection under CAT."). Colin Ortiz's continued pain and suffering from his past torture should be afforded significant weight. *See id*.

Because Hernandez Leyva did not suffer past torture and has not established that it is more likely than not that she would be tortured if removed to Mexico, the agency's determination that she is not entitled to CAT relief is supported by substantial evidence. We therefore deny her petition for review.

PETITION GRANTED IN PART; DENIED IN PART; REMANDED.