

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

AUG 21 2018

FOR THE NINTH CIRCUIT

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

JOSE LUIS IXTABALAN-RENOJ, AKA
Jose Luis Perez,

Petitioner,

v.

JEFFERSON B. SESSIONS III, Attorney
General,

Respondent.

No. 16-71837

Agency No. A075-112-392

MEMORANDUM*

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

Submitted August 14, 2018**
San Francisco, California

Before: O'SCANNLAIN and BEA, Circuit Judges, and STEARNS,** District
Judge.

* 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 Richard G. Stearns, United States District Judge for
the District of Massachusetts, sitting by designation.

Jose Luis Ixtabalan-Renoj (Ixtabalan) petitions from a Board of Immigration Appeals (BIA) decision denying him withholding of removal and protection under the Convention Against Torture (CAT). We deny the petition.

A court of appeals reviews a denial of withholding of removal under the substantial evidence standard. *Kumar v. Gonzales*, 444 F.3d 1043, 1049 (9th Cir. 2006). “Under that standard, the BIA’s determination must be upheld if it is supported by reasonable, substantial and probative evidence from the record.” *Id.* With respect to factual allegations, where “the IJ and the BIA determined that [an applicant’s] testimony was credible, we treat the facts to which he testified as true.” *Singh v. Holder*, 764 F.3d 1153, 1159 (9th Cir. 2014). These factual findings are to be deemed “conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary.” 8 U.S.C. § 1252(b)(4)(B); *see also Sangha v. INS*, 103 F.3d 1482, 1487 (9th Cir. 1997).¹

To establish eligibility for withholding of removal, an applicant must demonstrate a “clear probability,” *INS v. Cardoza-Fonseca*, 480 U.S. 421, 430 (1987), that his “life or freedom would be threatened” on account of his “race,

¹ While both the IJ and BIA held that Ixtabalan was collaterally estopped from asserting claims that should have been raised in the 2004 proceedings, the government now apparently agrees that the BIA and IJ erred in this respect. We need not resolve the issue as the BIA’s determination that Ixtabalan’s claims fail on the merits is supported by substantial evidence.

religion, nationality, membership in a particular social group, or political opinion,” 8 U.S.C. § 1231(b)(3)(A), if he were to be returned to his home country. The applicant must also demonstrate that the persecution “is committed by the government or forces the government is either unable or unwilling to control.” *Doe v. Holder*, 736 F.3d 871, 877-78 (9th Cir. 2013) (internal quotation marks omitted).

Ixtabalan fails to meet the requirement that there be a causal connection between his claimed familial-based social group membership — family members of former military service members — and the persecution he suffered. Simply put, Ixtabalan put forward no evidence that the individuals who attacked him even knew that a member of his family had served in the military, much less that they attacked him for that reason. *See Regalado-Escobar v. Holder*, 717 F.3d 724, 730 (9th Cir. 2013) (no past persecution on account of political opinion where applicant “offered no evidence to show that his attackers were even aware of his political beliefs”).

Although the BIA and the IJ applied the “one central reason” test which has now been supplanted for withholding of removal claims, *see Barajas-Romero v. Lynch*, 846 F.3d 351, 360 (9th Cir. 2017) (holding that the less demanding “a reason” standard applies to withholding of removal claims), we see no reason to remand the case for further consideration. Where, as here, the “the IJ and Board

clearly found there was *no* nexus between the [conduct underlying the applicant’s claim] and a protected ground,” and where “substantial evidence supports this finding . . . remanding in light of *Barajas-Romero* would be an ‘idle and useless formality’ as the outcome would be the same under either standard.” *Macias-Padilla v. Sessions*, 2018 WL 1633006, at *1 (9th Cir. Apr. 5, 2018) (quoting *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766 n.6 (1969)).

The BIA upheld the IJ’s determination that Ixtabalan did not meet his burden under CAT of establishing a clear probability of being tortured if returned to his home country. Substantial evidence supports the BIA’s determination that Ixtabalan’s claim fails for two independent reasons. First, Ixtabalan could not make the required showing that the physical beatings and threats he experienced in Guatemala rose to the level of torture as defined by the CAT and its implementing regulations. *See* 8 C.F.R. § 1208.18(a)(1) (defining torture as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person”). Second, even if the physical beatings, coupled with the menacing phone calls and the killings of his uncle and father, could meet the required CAT showing of “severe pain or suffering,” Ixtabalan failed to show that these indignities were “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.” 8 C.F.R. § 1208.18(a)(1).

PETITION FOR REVIEW DENIED.