

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

OCT 29 2018

FOR THE NINTH CIRCUIT

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

SALVADOR ERNESTO ESCOBAR-
PINEDA,

Petitioner,

v.

JEFFERSON B. SESSIONS III, Attorney
General

Respondent.

No. 16-74020

Agency No. A208-269-863

MEMORANDUM*

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

Argued and Submitted October 10, 2018
Seattle, Washington

Before: BLACK,** PAEZ, and BEA, Circuit Judges

Salvador Ernesto Escobar-Pineda (“Pineda”), a citizen of El Salvador,
petitions for review from the Board of Immigration Appeals’ (BIA) dismissal of
his appeal from the Immigration Judge’s (IJ) decision that he does not qualify for

* This disposition is not appropriate for publication and is not precedent
except as provided by Ninth Circuit Rule 36-3.

** The Honorable Susan H. Black, United States Circuit Judge for the U.S.
Court of Appeals for the Eleventh Circuit, sitting by designation.

asylum, withholding of removal, or relief under the Convention Against Torture (CAT). We review the BIA’s decision under the substantial evidence standard, *Vitug v. Holder*, 723 F.3d 1056, 1062 (9th Cir. 2013), and we affirm.

1. Pineda first argues that he is entitled to asylum based upon his membership in the particular social groups of (1) “people suspected of being members of a rival gang,” and (2) “civilian witnesses in El Salvador who have assisted law enforcement.” An applicant seeking asylum or withholding of removal “based on ‘membership in a particular social group’ must establish that the group is (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question.” *Matter of M-E-V-G*, 26 I. & N. Dec. 227, 237 (BIA 2014).

First, we have held that “gang membership” and “resisting gang membership” are not particular social groups for purposes of asylum claims. *Barrios v. Holder*, 581 F.3d 849, 854 (9th Cir. 2009); *Arteaga v. Mukasey*, 511 F.3d 940, 945-46 (9th Cir. 2007). Although we analyze whether an asylum applicant is a member of a particular social group on a case-by-case basis, *Pirir-Boc v. Holder*, 750 F.3d 1077, 1084 (9th Cir. 2014), Pineda offers no explanation, outside of the fact that gang members know he lives in a rival gang area, as to why he is part of a sufficiently particular and distinct social group recognized by

Salvadoran society. Thus, we affirm the BIA’s decision that Pineda is not in a particular social group of “people suspected of being members of a rival gang.”

Second, Pineda has not established that his proposed particular social group of “civilian witnesses in El Salvador who have assisted law enforcement” is sufficiently particular and socially distinct in Salvadoran society. Pineda attempts to compare his case to our decision in *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1092 (9th Cir. 2013) (en banc), where we reversed the BIA’s holding that Henriquez-Rivas’s particular social group of people testifying against gang members was not socially visible. But Pineda’s case is distinguishable from *Henriquez-Rivas*. First, unlike in *Henriquez-Rivas*, Pineda never testified in open court or even to the police; he talked to the police twice after he witnessed gang members set a car on fire. *See id.* Further, in *Henriquez-Rivas*, there was significant evidence that Salvadoran society recognized the particular vulnerability of people who testify against gang members in court: a law had been enacted specifically to protect witnesses who testify against gang members. *Id.* Here, Pineda presented no evidence that Salvadoran society recognizes people who talk to the police after witnessing a crime as a defined and socially distinct group.

Accordingly, we affirm the BIA's decision that Pineda is not in a particular social group of "civilian witnesses in El Salvador who have assisted law enforcement."¹

2. Pineda also argues that he is eligible for withholding of removal. An applicant seeking withholding of removal bears a higher burden of proof than he does for asylum. *Zehatye v. Gonzales*, 453 F.3d 1182, 1190 (9th Cir. 2006).

Because Pineda has not met his lower burden of establishing his eligibility for asylum, it follows that he also has not met his burden to prove he is eligible for withholding of removal. Therefore, we affirm the BIA's decision that Pineda is not entitled to withholding of removal.

¹ The dissent argues that the BIA and IJ failed to conduct a proper case-specific inquiry into Escobar-Pineda's claim that he is a member in the particular social group of "civilian witnesses in El Salvador who have assisted law enforcement." Particularly, the dissent notes that the "agency's cursory analysis is insufficient to satisfy our demand for an evidence-based, fact-specific determination." But the dissent neglects to mention that the BIA could not conduct a more "evidence-based" determination in this case because Escobar-Pineda did not "present[] evidence that his claimed groups are socially distinct within El Salvadoran society." Indeed, the same is true on appeal. Escobar-Pineda argues that he is a member in the group of "civilian witnesses in El Salvador who have assisted law enforcement" by comparing his case to *Henriquez-Rivas*, but he has not presented any evidence that Salvadoran society recognizes this group as a defined and socially distinct group. This lack of evidence contrasts with the evidence presented by Henriquez-Rivas that the Salvadoran legislature had recognized and protected people who testified against gangs in open court. *Henriquez-Rivas*, 707 F.3d at 1092. Thus, the BIA did not err in its analysis of Escobar-Pineda's claimed particular social groups.

3. Finally, Pineda argues that he is eligible for CAT relief. To be eligible for CAT relief, Pineda must show that “it is more likely than not” that he would be tortured if removed to El Salvador by or with acquiescence from public officials or others acting in an official capacity. 8 C.F.R. §§ 1208.16(c)(2), 1208.18(a)(1). Pineda has not met his burden. As the BIA recognized, the beatings Pineda suffered by gang members were isolated incidents, and he did not sustain injuries from them. He also has not presented specific evidence that the gang members would torture him upon his return to El Salvador.

Even if Pineda could show he would be tortured by the gang members who beat him up prior to fleeing El Salvador, Pineda has not proven that such torture would be by or with the acquiescence of public officials. Indeed, Pineda testified that the police never sought to harm him when they asked for his assistance in finding the car fire suspects; rather, they actively investigated the case and tried to find the gang members who started the car fire. These actions do not suggest that the police were working with the gang members or ignoring their behavior. Thus, substantial evidence supports the BIA’s conclusion that Pineda is not entitled to CAT relief.

AFFIRMED.

Escobar-Pineda v. Sessions, No. 16-74020

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PAEZ, Circuit Judge, concurring in part and dissenting in part:

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I agree with my colleagues that the BIA properly denied Escobar-Pineda's asylum and withholding of removal claims to the extent they were based on a particular social group ("PSG") consisting of "people suspected of being members of a rival gang." I also agree that there is no merit to Escobar-Pineda's CAT claim. I would, however, grant the petition and remand to the BIA for further consideration of his second proposed PSG, "civilian witnesses in El Salvador who have assisted law enforcement." I respectfully dissent from the court's failure to grant such relief.

"Whether a group constitutes a 'particular social group' is a question of law" that we must review de novo. *Pirir-Boc v. Holder*, 750 F.3d 1077, 1081 (citing *Mendoza-Alvarez v. Holder*, 714 F.3d 1161, 1163 (9th Cir. 2013)). Importantly, "the agency must make a case-by-case determination as to whether the group is recognized by the particular society in question." *Id.* at 1084; *see also Reyes v. Lynch*, 842 F.3d 1125, 1137 (9th Cir. 2016) (affording *Chevron* deference to the BIA's framework for analyzing PSGs, in part, because there is "a process of case-by-case adjudication.").

Here, both the BIA and IJ failed to conduct a case-specific inquiry into Escobar-Pineda's second proposed PSG. The BIA, adopting the IJ's reasoning,

essentially held that this PSG was not cognizable because it was not like the situation in *Henriquez-Rivas*, in which the petitioner had testified in open court. 707 F.3d 1081 (9th Cir. 2013) (en banc). Both the BIA and IJ ignored the causal connections between Escobar-Pineda's cooperation with the police, and the violence and threats he suffered as a result. Moreover, they failed to engage with the country conditions that Escobar-Pineda submitted about the overwhelming reluctance of victims to report to the police in El Salvador, the intimidation and killing of witnesses like Escobar-Pineda, and the inability of the country's judiciary and security forces to combat such intimidation. The agency's cursory analysis is insufficient to satisfy our demand for an evidence-based, fact-specific determination. *Pirir-Boc*, 750 F.3d at 1084 (emphasizing the importance of "country conditions reports, expert witness testimony, and press accounts," which can "establish that a group exists and is perceived as 'distinct' or 'other' in a particular society.").

For these reasons, I would grant the petition in part and remand to the BIA for further consideration of the second PSG in accordance with our precedents.