

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

FEB 22 2019

FOR THE NINTH CIRCUIT

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

ANA AIDA MORATAYA-MARTINEZ,

No. 12-71242

Petitioner,

Agency No. A072-400-796

v.

MEMORANDUM*

WILLIAM P. BARR, Attorney General,

Respondent.

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

Argued and Submitted February 7, 2019
San Francisco, California

Before: PAEZ and BERZON, Circuit Judges, and FEINERMAN,** District Judge.

Ana Aida Morataya-Martinez, a native and citizen of Guatemala, petitions for review of the Board of Immigration Appeals' (BIA) dismissal of her appeal challenging the Immigration Judge's (IJ) denial of her applications for asylum, withholding of removal, and relief under the Convention Against Torture (CAT).

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

** The Honorable Gary Feinerman, United States District Judge for the Northern District of Illinois, sitting by designation.

We grant the petition in part and deny it in part.

1. The BIA and IJ concluded that Morataya-Martinez's treatment by guerillas searching for her brother-in-law, Louis, did not rise to the level of persecution. *See Baghdasaryan v. Holder*, 592 F.3d 1018, 1023 (9th Cir. 2010). Substantial evidence does not support this determination. *See Vinh Tan Nguyen v. Holder*, 763 F.3d 1022, 1029 (9th Cir. 2014).

“[A]s we have consistently recognized, being forced to flee from one's home in the face of an immediate threat of severe physical violence or death is squarely encompassed within the rubric of persecution” *Mendoza-Pablo v. Holder*, 667 F.3d 1308, 1314 (9th Cir. 2012). This court has regularly held that credible, specific death threats, combined with physical violence or other harm to the petitioner, constitute past persecution. *See, e.g., Madrigal v. Holder*, 716 F.3d 499, 504 & n.2 (9th Cir. 2013); *Ahmed v. Keisler*, 504 F.3d 1183, 1194 (9th Cir. 2007); *Fedunyak v. Gonzales*, 477 F.3d 1126, 1129 (9th Cir. 2007); *Deloso v. Ashcroft*, 393 F.3d 858, 860-61, 866 n.5 (9th Cir. 2005); *Reyes-Guerrero v. INS*, 192 F.3d 1241, 1243-46 (9th Cir. 1999); *see also Salazar-Paucar v. INS*, 281 F.3d 1069, 1075 (9th Cir.), *opinion amended on denial of reh'g*, 290 F.3d 964 (9th Cir. 2002). We have also held that violence against a petitioner's family members supports a finding of past persecution. *See, e.g., Gonzalez v. INS*, 82 F.3d 903, 909 (9th Cir. 1996).

The guerillas repeatedly threatened to kill or seriously injure Louis's relatives, including Morataya-Martinez and her child. These threats were accompanied by physical attacks, which lent credence to the family's fears that the guerrillas would carry out their threats. Accordingly, substantial evidence does not support the BIA and IJ's determination that Morataya-Martinez did not suffer persecution in Guatemala.

The BIA and IJ did not err, however, in holding that Morataya-Martinez's rape as a young girl, although terrible, did not support her claim of past persecution. As the agency noted, Morataya-Martinez did not present evidence that her assault was on account of a protected ground. On appeal to this court, Morataya-Martinez argued for the first time that the rape "was on account of 'all women in Guatemala.'" Because that argument is not exhausted, it is not properly before this court. *Vargas v. INS*, 831 F.2d 906, 907-08 (9th Cir. 1987).

2. Because Morataya-Martinez established past persecution, she is entitled, for purposes of asylum, to a rebuttable presumption of a well-founded fear of future persecution. 8 C.F.R. § 1208.13(b)(1). For purposes of withholding, she is similarly entitled to a rebuttable presumption that her "life or freedom would be threatened in the future in the country of removal on the basis of the original claim." 8 C.F.R. § 1208.16(b)(1)(i). Because the IJ and BIA concluded Morataya-Martinez had not shown past persecution, neither accorded her the presumptions to

which she was entitled; they then found she had not met her wrongly-imposed burden. For that reason, we grant the petition as to Morataya-Martinez's applications for asylum and withholding of removal, and remand for consideration of those applications under the appropriate presumptions.

3. Although the BIA recognized that Morataya-Martinez pressed a humanitarian asylum claim for the first time on appeal, it rejected the claim on the merits, citing only a lack of evidence supporting past persecution. Thus, we have jurisdiction to review this claim. *See Sinotes-Cruz v. Gonzales*, 468 F.3d 1190, 1194 (9th Cir. 2006). Because we conclude that Morataya-Martinez experienced persecution in Guatemala, we also grant the petition as to her application for humanitarian asylum, and remand for consideration of that application.

4. Morataya-Martinez presents two unpersuasive arguments as to how the BIA and IJ erred in assessing her claim for CAT relief. First, Morataya-Martinez contends that “[t]he Board, adopting the IJ’s decision . . . failed to apply the correct standard for CAT.” It is unclear to what standard Morataya-Martinez objects. If she takes issue with the IJ’s application of a preponderance of the evidence standard, her concern is unfounded, as that standard is required by regulation. 8 C.F.R. § 208.16(c)(2); *see also Cole v. Holder*, 659 F.3d 762, 770 (9th Cir. 2011).

Second, Morataya-Martinez argues that “[t]he IJ and Board failed to consider the country conditions in Guatemala in the articles contained in the record

evidence.” She is correct that the IJ’s discussion of her CAT claim is brief, and the BIA adopted the IJ’s reasoning. The IJ, however, averred that he “carefully listened to the respondent’s testimony and considered all evidence of record,” and elsewhere in his opinion acknowledges his receipt of the State Department country conditions report. Because Morataya-Martinez does not present evidence that compels a result contrary to that reached by the IJ, we deny the petition with respect to the CAT claim.

5. The BIA and IJ did not determine whether any persecution of Morataya-Martinez by the guerillas was on account of a protected ground. The BIA may address that issue on remand, as well as any other issues left open by this decision.

GRANT in part, DENY in part, and REMAND.