

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

SEP 22 2022

FOR THE NINTH CIRCUIT

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

CARLOS MORALES–HERNANDEZ,
AKA Carlos Hernandez Morales,

Petitioner,

v.

MERRICK B. GARLAND, Attorney
General,

Respondent.

No. 17-71602

Agency No. A208-084-046

MEMORANDUM*

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

Submitted September 20, 2022**
Pasadena, CA

Before: BOGGS, *** WARDLAW, and IKUTA, Circuit Judges.

Carlos Morales-Hernandez petitions for review of a Board of Immigration Appeals (BIA) final order of removal. We have jurisdiction under 8 U.S.C. § 1252,

* 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 Danny J. Boggs, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

and we deny the petition.

Morales-Hernandez, a native and citizen of Guatemala, served in the Guatemalan military for nine years. He also later served as a confidential informant for the military, although it is not clear whether he was in the military at that time. He subsequently entered the United States without being admitted or paroled, in 2003. In 2015, he was placed in removal proceedings and subsequently moved for withholding of removal and protection under the Convention Against Torture (CAT). The immigration court denied his motions and ordered him removed in 2016. The BIA affirmed removal in 2017.¹

To qualify for withholding of removal, an applicant must establish “a clear probability” that his life or freedom would be threatened in the country of removal on account of his race, religion, nationality, membership in a particular social group, or political opinion by the government or forces the government is unable or unwilling to control. *Tamang v. Holder*, 598 F.3d 1083, 1091 (9th Cir. 2010). Clear probability can be demonstrated by either 1) establishing a presumption of fear of future persecution based on past persecution, which is not rebutted, *see* 8 CFR § 208.16(b)(1), or 2) through an independent showing of clear probability of future persecution. 8 U.S.C. § 1231(b)(3)(A), (B); 8 C.F.R. § 208.16.

¹ Morales-Hernandez does not seek review of the denial of his CAT claim. *See* 8 C.F.R. §§ 1208.16–18.

Morales-Hernandez testified that he left Guatemala in 2003 because guerrillas had threatened him and three months later shot him in the buttocks when he was walking home from work because he knew “insider information” about the guerillas from his nine years serving in the military. The immigration judge (IJ) made an adverse credibility finding “due to vague and inconsistent testimony” by Morales-Hernandez, including conflicting testimony about whether he was a member of the military when he was shot. But the IJ held that even if Morales-Hernandez were credible, there was no evidence that he was threatened or shot “due to any association with the military” and did not establish past persecution on account of his membership in the claimed particular social group “as an informant for the government.” The BIA affirmed. Factual determinations by the BIA and IJ are reviewed for substantial evidence and must be upheld unless the record compels a contrary conclusion. *Garcia-Milian v. Holder*, 755 F.3d 1026, 1031 (9th Cir. 2014), 8 U.S.C. § 1252(b)(4)(B). We find nothing in the record that supports, much less compels, a different finding.

The IJ also held that Morales-Hernandez did not establish a clear probability of future persecution to warrant withholding of removal, as he failed to demonstrate that he would be singled out individually or that guerillas have a pattern or practice of targeting ex-members of the Guatemalan military. The BIA found no clear error, holding that Morales-Hernandez could not demonstrate a clear probability of

persecution “based on events that occurred in the past as a result of the risks normally associated with his occupation in the Guatemalan military. *See Matter of Fuentes*, 19 I&N Dec. 658, 661 (BIA 1988).” The BIA also found no clear error in the IJ’s finding that, based on evidence of country conditions, Morales-Hernandez failed to show a clear probability of the risk of future persecution “because he is a former member of the Guatemalan military.”

Morales-Hernandez does not contest the finding that he failed to establish a clear probability of future persecution. Rather, he petitions only on the grounds that he is entitled to a presumption of future persecution based on past persecution. In support, Morales-Hernandez maintains that he “never argued that he was shot because he was a member of the Guatemalan military but always argued that Petitioner was a government informant.” He claims that because he suffered past persecution because of his status as “a government informant,” not “a former member of the military,” he is entitled to a presumption of eligibility for withholding of removal and therefore his petition should be granted.

First, Morales-Hernandez’s asylum application specifically states that he was seeking asylum and withholding of removal based on his membership in the “Guatemala military.” Second, whether Morales-Hernandez was an informant *in* the military or *for* the military is, in this case, a distinction without a difference, as there was no evidence supporting, much less compelling, a finding that he suffered past

persecution based on any affiliation he had with the military, either as a soldier or an informant. Although there may be some confusion in nomenclature as to his claimed social group, the IJ and the BIA did not err in finding that there was no nexus between his past persecution and his membership in that claimed social group.

The petition for review is **DENIED**.