

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

NOV 18 2022

FOR THE NINTH CIRCUIT

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

OLIVIA MARGARITA XIGUA;
MARIANO ISAIAS GOMEZ-XIGUA,

Petitioners,

v.

MERRICK B. GARLAND, Attorney
General,

Respondent.

No. 20-70346

Agency Nos. A208-378-264
A208-378-265

MEMORANDUM*

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

Submitted November 16, 2022**
San Francisco, California

Before: RAWLINSON and HURWITZ, Circuit Judges, and CARDONE,** 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 Kathleen Cardone, United States District Judge for the
Western District of Texas, sitting by designation.

Olivia Xigua and her minor son (“Xigua”)¹ seek review of a decision of the Board of Immigration Appeals (“BIA”) denying remand to allow them to apply for voluntary departure and dismissing an appeal from an order of an Immigration Judge (“IJ”) denying asylum, withholding of removal, and protection under the Convention Against Torture (“CAT”). We review the agency’s jurisdiction de novo, *Hernandez v. Holder*, 738 F.3d 1099, 1101 (9th Cir. 2013); its denial of a motion to remand for abuse of discretion, *Taggar v. Holder*, 736 F.3d 886, 889 (9th Cir. 2013); and denials of asylum, withholding of removal, and CAT relief for substantial evidence, *Guo v. Sessions*, 897 F.3d 1208, 1212 (9th Cir. 2018). We deny the petition.

1. “[J]urisdiction vests in the Immigration Court when a charging document, such as a notice to appear [(“NTA”)], is filed.” *Karingithi v. Whitaker*, 913 F.3d 1158, 1158 (9th Cir. 2019). “[T]he lack of time, date, and place in the NTA sent to [Xigua] did not deprive the immigration court of jurisdiction over her case” because Xigua later received a “complete notice” and “appeared for her scheduled hearings.” *Aguilar Fermin v. Barr*, 958 F.3d 887, 895 (9th Cir. 2020); *see also United States v. Bastide-Hernandez*, 39 F.4th 1187, 1188 (9th Cir. 2022) (en banc) (“[T]he failure of an NTA to include time and date information does not deprive the immigration court of subject matter jurisdiction.”).

¹ Olivia is the lead petitioner and her son a derivative beneficiary who raises no independent claims.

2. The record contains no evidence that Xigua had the means to depart the United States, an eligibility requirement for voluntary departure. *See* 8 U.S.C. § 1229c(b)(1)(D). The BIA therefore reasonably held that even assuming Xigua satisfied the physical presence requirement, *see* 8 U.S.C. § 1229c(b)(1)(A), she had “not met [the] burden of establishing . . . a reasonable possibility of meeting the other requirements,” *see Garcia v. Holder*, 621 F.3d 906, 912 (9th Cir. 2010). It thus did not abuse its discretion when it denied her motion to remand. *See id*; *Angov v. Lynch*, 788 F.3d 893, 897 (9th Cir. 2015).

3. Substantial evidence supports the BIA’s determination that Xigua did not establish past persecution or a likelihood of future persecution on account of a protected ground for the purposes of her asylum and withholding claims. *See* 8 U.S.C. §§ 1101(a)(42)(A), 1231(b)(3).

a. Her mother-in-law’s conduct and the alleged threats by the Zeta gang do not compel the conclusion that the “cumulative effect of all the incidents that [Xigua] has suffered” rise to the level of persecution. *See Sharma v. Garland*, 9 F.4th 1052, 1059–62 (9th Cir. 2021) (cleaned up).² And, the agency’s determinations that her mother-in-law would not treat Xigua more poorly than before if she returned to Guatemala and that the Zetas would not “have a continuing interest” in harming

² Because Xigua failed to establish past persecution, she is ineligible for humanitarian asylum. *See Mohammed v. Gonzales*, 400 F.3d 785, 801 (9th Cir. 2005).

Xigua are supported by the record. *See id.* at 1065.

b. Substantial evidence supports the agency's finding that Xigua had not demonstrated a nexus between feared persecution by the Zetas and a protected ground. "[H]arassment by criminals motivated by theft or random violence by gang members bears no nexus to a protected ground." *Zetino v. Holder*, 622 F.3d 1007, 1016 (9th Cir. 2010). The nexus finding is fatal to Xigua's asylum and withholding claims as to the Zetas. *See Riera-Riera v. Lynch*, 841 F.3d 1077, 1081 (9th Cir. 2016).

4. Substantial evidence supports the agency's conclusion that Xigua is not more likely than not to be tortured if removed. *See* 8 C.F.R. § 1208.16(c)(4). Because "[t]orture is more severe than persecution," *Davila v. Barr*, 968 F.3d 1136, 1144 (9th Cir. 2020) (cleaned up), and the record does not compel the conclusion that Xigua suffered past persecution, it also does not compel the conclusion of past torture. Nor does "generalized evidence of violence and crime" suffice to show that an applicant is more likely than not to be tortured in the future. *See Delgado-Ortiz v. Holder*, 600 F.3d 1148, 1152 (9th Cir. 2010).

PETITION FOR REVIEW DENIED.