

NOT FOR PUBLICATION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

FABIANA DOMINGO FERNANDO;
MAGDY LILIANA PEDRO DOMINGO,

Petitioners,

v.

MERRICK B. GARLAND, Attorney
General,

Respondent.

No. 20-71285

Agency Nos. A208-307-850
A208-307-851

MEMORANDUM*

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

Submitted November 16, 2022**
San Francisco, California

Before: S.R. THOMAS and BENNETT, Circuit Judges, and LASNIK,** 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 Robert S. Lasnik, United States District Judge for the
Western District of Washington, sitting by designation.

Petitioners Fabiana Domingo Fernando (“Fernando”) and her daughter, Magdy Liliana Pedro Domingo, are natives and citizens of Guatemala. They petition for review of the Board of Immigration Appeals (“BIA”) order denying their applications for asylum and withholding of removal.¹ We have jurisdiction under 8 U.S.C. § 1252 and deny the petition in part and dismiss it in part.

1. The BIA denied asylum and withholding of removal because Petitioners: (1) failed to show past persecution or an objectively reasonable fear of future persecution, and (2) failed to show a nexus between any harm and a protected ground. *See Nahrvani v. Gonzales*, 399 F.3d 1148, 1152 (9th Cir. 2005) (past persecution or an objectively reasonable fear of future persecution and nexus to a protected ground are elements of an asylum claim); *Flores-Vega v. Barr*, 932 F.3d 878, 886 (9th Cir. 2019) (same for withholding of removal claims).

Petitioners challenge those conclusions. But the record does not establish that Petitioners suffered past persecution.² It also does not compel a conclusion that Petitioners hold an objectively reasonable fear of future persecution or that they

¹ The BIA also denied Petitioners’ claim for relief under the Convention Against Torture (“CAT”). Petitioners do not challenge the denial of CAT relief.

² Because we would find a lack of past persecution even under de novo review, we need not decide whether we apply de novo or substantial evidence review to the BIA’s determination that Petitioners failed to establish past persecution. *See Singh v. Garland*, 48 F.4th 1059, 1066–67 (9th Cir. 2022) (noting an intra-circuit split on the appropriate standard of review that applies to whether particular facts rise to the level of past persecution).

have established the required nexus to a protected ground. *See Duran-Rodriguez v. Barr*, 918 F.3d 1025, 1028 (9th Cir. 2019).

The killings of Fernando’s brothers and pastor do not prove past persecution *against Petitioners* because the evidence shows that the killings were acts of “isolated violence” rather than part of a “pattern of persecution closely tied to the [Petitioners].” *Arriaga-Barrientos v. INS*, 937 F.2d 411, 414 (9th Cir. 1991); *see also Wakkary v. Holder*, 558 F.3d 1049, 1060 (9th Cir. 2009). Petitioners’ evidence essentially boils down to one instance of an anonymous, intoxicated man who shouted threats from the street while Petitioners were inside their home. This is insufficient to show past persecution or compel a finding of an objectively reasonable fear of future persecution. *See Duran-Rodriguez*, 918 F.3d at 1028 (“[C]ases with threats alone, particularly anonymous or vague ones, rarely constitute persecution.”); *Nahrvani*, 399 F.3d 1148 (“*de minimis* property damage and anonymous, ambiguous threats,” *id.* at 1153, do not compel a finding that petitioner held an objectively reasonable fear of future persecution, *id.* at 1154).

The record also fails to compel the conclusion that the threats against Petitioners or the killings of Fernando’s brothers were motivated by any of the protected grounds asserted by Petitioners: their race (Mayan Kanjobal), religion (Evangelical Christian), family membership, and each being “an indigenous female living in an indigenous area, whose family had been the victim of threats and

murder.” The killing of Fernando’s pastor does not compel a conclusion that Petitioners suffered or will suffer persecution on account of their religion, as there is no evidence that the killing was closely tied to Petitioners and the church continued to operate after the pastor’s death, so apparently Petitioners were able to practice their religion without further issue.

Petitioners’ remaining challenges are unpersuasive. The BIA did not improperly disregard certain evidence because the BIA’s order shows that it considered the evidence but found that it was immaterial given the dispositive lack of persecution finding. The BIA’s order does not suggest that its no-nexus determination was based on an inaccurate description of Petitioners’ proposed particular social group. Further, even assuming error, it would be inconsequential because the BIA’s lack of past and future persecution findings are dispositive. *See Sharma v. Garland*, 9 F.4th 1052, 1059–66 (9th Cir. 2021). Finally, the BIA declined to remand to allow the immigration judge (“IJ”) to conduct a “disfavored group analysis” because it found that, even under a disfavored group analysis, Petitioners had not shown sufficient *individualized risk* to establish a well-founded fear of future persecution. *See Halim v. Holder*, 590 F.3d 971, 977–79 (9th Cir. 2009). Petitioners point to no evidence that compels a contrary finding, and thus the BIA did not err in failing to remand.

2. Petitioners argue that the IJ lacked jurisdiction because their notices to

appear (“NTA”) failed to comply with 8 U.S.C. § 1229, which requires an NTA to specify “[t]he time and place at which the proceedings will be held.” 8 U.S.C. § 1229(a)(1)(G)(i). Petitioners failed to exhaust this argument because they made a substantively different argument below. Their BIA brief argued that the IJ lacked jurisdiction because their NTAs did not include a certificate of service notifying them of the immigration court in which the NTAs would be filed. We therefore lack jurisdiction over Petitioners’ jurisdictional argument. *See Alvarado v. Holder*, 759 F.3d 1121, 1127 n.5 (9th Cir. 2014). Even if we had jurisdiction, Petitioners’ argument would fail under *United States v. Bastide-Hernandez*, 39 F.4th 1187 (9th Cir. 2022) (en banc).

PETITION DENIED IN PART AND DISMISSED IN PART.