

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

JAN 4 2023

FOR THE NINTH CIRCUIT

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

CARLOS ISRAEL MARTIN-CALMO,

No. 20-73799

Petitioner,

Agency No. A208-187-083

v.

MEMORANDUM*

MERRICK B. GARLAND, Attorney
General,

Respondent.

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

Submitted November 15, 2022**
San Francisco, California

Before: McKEOWN and PAEZ, Circuit Judges, and MOLLOY,** District Judge.
Partial Concurrence and Partial Dissent by Judge PAEZ.

Carlos Israel Martin-Calmo, a native and citizen of Guatemala, petitions for
review of a decision by the Board of Immigration Appeals (“BIA”) dismissing his

* 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 Donald W. Molloy, United States District Judge for
the District of Montana, sitting by designation.

appeal from the immigration judge’s denial of his motion to terminate removal proceedings and his applications for asylum, withholding of removal, and protection under the Convention Against Torture (“CAT”). We review the BIA’s “legal conclusions de novo and its factual findings for substantial evidence.” *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1059 (9th Cir. 2017) (en banc) (citations omitted). We have jurisdiction under 8 U.S.C. § 1252 and deny the petition for review.

The BIA correctly denied Martin-Calmo’s motion to terminate removal proceedings. The Immigration and Nationality Act provision requiring notices to appear to contain “the time and place” of the removal hearing,” 8 U.S.C. § 1229(a)(1)(G)(i), does not concern “the authority of immigration courts to conduct” removal proceedings. *United States v. Bastide-Hernandez*, 39 F.4th 1187, 1192 (9th Cir. 2022) (en banc). Accordingly, a notice to appear that lacks information about the date, time, and place of the removal proceedings does not divest the immigration court of jurisdiction over the proceedings where, as here, the noncitizen receives the information in later hearing notices. *See Karingithi v. Whitaker*, 913 F.3d 1158, 1162 (9th Cir. 2019).

Further, substantial evidence supports the BIA’s finding that Martin-Calmo’s proposed social groups—persons who have defied the Mara Salvatrucha (MS 13) gang’s demands and escaped from them, and persons taking

concrete steps to oppose gang authority in Guatemala—are not cognizable. The proposed social groups are “defined exclusively by the fact that [their] members have been,” or could be, “subjected to harm” by MS 13, and therefore lack “a common characteristic aside from persecution.” *Diaz-Reynoso v. Barr*, 968 F.3d 1070, 1086 (9th Cir. 2020) (internal quotation marks omitted). The BIA also permissibly found that the proposed social groups are too broad and diverse to be defined with particularity, *see Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1091 (9th Cir. 2013) (en banc), and that Martin-Calmo failed to provide sufficient evidence of the groups’ social distinction in Guatemalan society, *Villegas Sanchez v. Garland*, 990 F.3d 1173, 1180–81 (9th Cir. 2021).

Finally, Martin-Calmo contends that MS 13 targeted him based on his “anti-gang political opinion.” The BIA explained that it found “no clear error in the Immigration Judge’s finding that [Martin-Calmo’s] claim is related to gang recruitment and criminal activity, rather than persecution on account of membership in a particular social group, political opinion, or any other protected ground.” Although he submitted evidence that gangs in Guatemala are powerful entities, Martin-Calmo did not establish that MS 13 “held any sort of belief system that they perceived [him] to oppose” and thus fails to “show a political motive in resisting gang recruitment.” *See Santos-Lemus v. Mukasey*, 542 F.3d 738, 747 (9th Cir. 2008) (holding that the BIA did not err in determining that “a general aversion

to gangs does not constitute a political opinion for asylum purposes”), *abrogated on other grounds by Henriquez-Rivas v. Holder*, 707 F.3d 1081 (9th Cir. 2013). The BIA thus did not err in denying Martin-Calmo’s application for asylum.

Substantial evidence also supports the BIA’s determination that Martin-Calmo is ineligible for withholding of removal. Because Martin-Calmo’s proposed social groups are not cognizable and he failed to show that he was beaten by MS 13 based on his political opinion, he cannot demonstrate that his “life or freedom would be threatened in” his home country because of a protected ground. *Reyes-Reyes v. Ashcroft*, 384 F.3d 782, 788 (9th Cir. 2003) (citing 8 U.S.C. § 1231(b)(3)(A)); *Mendoza-Alvarez v. Holder*, 714 F.3d 1161, 1164–65 (9th Cir. 2013). The “clear probability standard for withholding of removal is more stringent than the well-founded fear standard governing asylum,” *Viridiana v. Holder*, 646 F.3d 1230, 1239 (9th Cir. 2011) (internal quotation marks omitted), so the BIA did not err in concluding that Martin-Calmo’s ineligibility for asylum also rendered him ineligible for withholding of removal.

Finally, the BIA permissibly denied Martin-Calmo’s application for CAT relief because the record does not compel the conclusion that it is more likely than not that he will be tortured by or with the consent or acquiescence of the government if returned to Guatemala. *See Barajas-Romero v. Lynch*, 846 F.3d

351, 361 (9th Cir. 2017).

The BIA’s decision—read in context—addresses each of Martin-Calmo’s claims, and Martin-Calmo has offered nothing that would cause us to reverse the BIA.

PETITION DENIED.

Martin Calmo v. Garland, No. 20-73799

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Paez, J., concurring in part and dissenting in part:MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

I concur in the majority's disposition of Martin Calmo's asylum and Convention Against Torture claims, but I respectfully dissent from the majority's decision to uphold the agency's denial of Martin Calmo's claim for withholding of removal. As I read the BIA's decision, the agency relied solely on its determination that Martin Calmo failed to establish that the Guatemalan government is "unable or unwilling" to protect him from MS-13 to deny the withholding of removal claim. This determination was based on legal error and is unsupported by substantial evidence. *See Plancarte Saucedo v. Garland*, 23 F.4th 824, 831 (9th Cir. 2022) (reviewing the BIA's legal conclusions de novo and factual findings for substantial evidence). I would therefore remand Martin Calmo's withholding of removal claim to the BIA for further proceedings. *See Garcia v. Wilkinson*, 988 F.3d 1136, 1142 (9th Cir. 2021) ("In reviewing the BIA's decision, we consider only the grounds relied upon by that agency.").

1. The denial of Martin Calmo's withholding of removal claim may be affirmed only on the basis of the BIA's finding that the Guatemalan government is able and willing to control MS-13. *See Nava v. INS*, 217 F.3d 646, 658 n.16 (9th Cir. 2000). In denying withholding of removal, the BIA explained: "Because the respondent has not established eligibility for asylum for reasons *other than nexus*,

it necessarily follows that he cannot establish eligibility for withholding of removal, which has a higher burden of proof.” This statement correctly recognizes that denial of withholding of removal does *not* “necessarily follow” from a denial of asylum based on nexus, *Garcia*, 988 F.3d at 1147, and explicitly declines to rely on nexus for the denial of withholding of removal.

As I read the BIA’s decision, the agency denied Martin Calmo’s asylum claim for three reasons: (1) failure to propose a cognizable particular social group, (2) failure to show the requisite nexus between his opinion and the actions of his persecutors, and (3) failure to show that the Guatemalan government was unable or unwilling to protect him. Contrary to the majority’s disposition, then, the agency never addressed whether Martin Calmo held a political opinion and instead determined that Martin Calmo failed to show that his persecutors were motivated by his opinion. Thus, the only reason the BIA provided for denial of withholding of removal under Martin Calmo’s political opinion theory was the Guatemalan government’s ability and willingness to protect him from MS-13.

2. The BIA’s determination that the Guatemalan government is able and willing to control MS-13 is unsupported by substantial evidence and based on legal error. First, the BIA relies on a finding that the Guatemalan government has “made efforts to control gang and criminal activities.” Neither the IJ nor the BIA, however, indicate what “efforts” or which country condition reports support this

finding, and a review of the record does not provide clarity. Second, the BIA noted that Martin Calmo “did not report to the police to show that the government . . . demonstrated an inability to protect him as a victim” and had not “persuasively shown . . . that his reporting would be ‘futile and dangerous,’” citing *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1073 (9th Cir. 2017) (en banc). As the en banc court explained in *Bringas-Rodriguez*, there is no heightened evidentiary standard for asylum applicants who fail to report persecution to local authorities. *Id.* at 1064–69. A showing that reporting would have been “futile and dangerous” is sufficient, but not necessary, to establish inability or unwillingness to protect. *Id.* at 1066, 1070 (discussing *Rahimzadeh v. Holder*, 613 F.3d 916, 922 (9th Cir. 2010)). Regardless of whether the applicant reported persecution to the authorities, the agency “must examine all relevant evidence, including country reports,” to determine whether the government is unable or unwilling to control the persecutor. *Bringas-Rodriguez*, 850 F.3d at 1069 (citations omitted).

Here, Martin Calmo testified that the local police did nothing when his family reported that gang members shot his uncle in the head and submitted substantial country conditions evidence demonstrating repeatedly that the Guatemalan government is woefully ill-equipped to protect people like Martin Calmo from gangs due to pervasive institutional weakness, corruption, and lack of funds. On appeal, the government offers only two citations to potential “efforts”

found in the country conditions evidence. The examples suggest at best an occasional *willingness* to control gangs, but, read within context, only underscore the Guatemalan government's continued *inability* to do so. *See Madrigal v. Holder*, 716 F.3d 499, 506 (9th Cir. 2013). This record compels the conclusion that the Guatemalan government is unable or unwilling to protect Martin Calmo. *See Plancarte Saucedo*, 23 F.4th at 831 (reviewing factual findings for substantial evidence).

3. Because the BIA's decision on withholding of removal under Martin Calmo's political opinion claim cannot be sustained on its own reasoning, I would grant the petition as to withholding of removal and remand to the BIA for further proceedings. *See Sanchez Rosales v. Barr*, 980 F.3d 716, 719 (9th Cir. 2020) ("If . . . the BIA's decision cannot be sustained upon its reasoning, we must remand").