

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

JAN 10 2023

FOR THE NINTH CIRCUIT

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

NEFTALI ISRAEL MERINO LOZANO,

No. 20-70511

Petitioner,

Agency No. A202-007-409

v.

MEMORANDUM*

MERRICK B. GARLAND, Attorney
General,

Respondent.

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

Submitted December 7, 2022**
Pasadena, California

Before: M. SMITH, COLLINS, and LEE, Circuit Judges.

* 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).

Neftali Israel Merino Lozano, a native and citizen of El Salvador, seeks review of the Board of Immigration Appeals' ("BIA") dismissal of his appeal of an Immigration Judge's ("IJ") order denying his application for asylum, withholding of removal, and relief under the Convention Against Torture ("CAT"). This court has jurisdiction under 8 U.S.C. § 1252 and denies the petition.

1. Substantial evidence supports the BIA's denial of Lozano's application for asylum and withholding of removal because he failed to establish a nexus between a protected ground and his past persecution or well-founded fear of future persecution.

Lozano offered two reasons why gang members in El Salvador harmed him: (1) his refusal to join their gang and (2) his familial relationship to his brother Oscar. As to the gang recruitment argument, the BIA properly held that those who have refused to join a gang do not constitute a cognizable particular social group. *See Barrios v. Holder*, 581 F.3d 849, 855 (9th Cir. 2009). Lozano's argument based on his relationship to his brother also fails: Although family membership can serve as a cognizable particular social group, *Rios v. Lynch*, 807 F.3d 1123, 1128 (9th Cir. 2015), substantial evidence does not compel the conclusion that the family relationship is why gang members persecuted him. Lozano was beaten before Oscar faced any threats from MS-13, suggesting that MS-13 persecuted him independently of his relationship to Oscar.

Lozano also cannot establish that he has a well-founded fear of future persecution because of his familial relationship to Oscar. Lozano's sister has continued to live in El Salvador since Oscar's death without any harm or threats from MS-13. *See Tamang v. Holder*, 598 F.3d 1083, 1094 (9th Cir. 2010) (explaining that a petitioner's fear of future persecution is weakened when similarly situated family members living in the home country are not harmed). And Lozano's failure to provide any reason why Oscar was targeted or why he would be targeted now as a result of what happened to Oscar further weakens his claim.

2. Lozano did not challenge the BIA's denial of his request for CAT protection in his briefing to this court. This issue is waived on appeal and this court will not consider it. *See Alcaraz v. I.N.S.*, 384 F.3d 1150, 1161 (9th Cir. 2004); *Koerner v. Grigas*, 328 F.3d 1039, 1048 (9th Cir. 2003).

DENIED.