

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

MAR 13 2023

FOR THE NINTH CIRCUIT

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

ELVIRA GUTIERREZ HERNANDEZ,

Petitioner,

v.

MERRICK B. GARLAND, Attorney
General,

Respondent.

No. 21-1182

Agency No. A205-920-773

MEMORANDUM*

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

Submitted March 09, 2023**
San Francisco, California

Before: FRIEDLAND and R. NELSON, Circuit Judges, and KATZMANN,***
Judge.

Elvira Gutierrez Hernandez, a native and citizen of Mexico, petitions for review of an order of the Board of Immigration Appeals (“BIA”) upholding the denial by the Immigration Judge (“IJ”) of her application for withholding of

* 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 Gary S. Katzmann, Judge for the United States Court of International Trade, sitting by designation.

removal, protection under the Convention Against Torture (“CAT”), and voluntary departure in the alternative. We have jurisdiction under 8 U.S.C. § 1252. Reviewing for substantial evidence, *Garcia v. Holder*, 749 F.3d 785, 789 (9th Cir. 2014), we deny the petition in part and dismiss it in part.

1. Gutierrez Hernandez contends that she would more likely than not be subject to persecution in Mexico because of her membership in her family.¹ She testified that she feared returning to Mexico because, after her son-in-law was shot, the shooter threatened to harm the entire family if her son-in-law cooperated with the police in their investigation. The IJ and BIA rejected Gutierrez Hernandez’s claim, reasoning that the harm she feared was speculative because the shooting happened nearly twenty years ago; there was no evidence that the shooter intended to make good on his threat; and her family members in Mexico had not been harmed to date. Substantial evidence supports this conclusion. Gutierrez Hernandez testified that her siblings remained in the same town where her son-in-law was shot, and that they had not been harmed since. Moreover, the shooter’s threat was contingent on her son-in-law cooperating with police, and Gutierrez Hernandez testified that he did not do so. The record therefore does not compel the conclusion that Gutierrez Hernandez

¹ Because Gutierrez Hernandez does not argue in her petition for review that she suffered past persecution, we do not consider whether she is entitled to a presumption of future persecution. See *Martinez-Serrano v. INS*, 94 F.3d 1256, 1259 (9th Cir. 1996) (“[A]n issue . . . not discussed in the body of the opening brief is deemed waived.”).

would more likely than not be subject to persecution upon return to Mexico.

See INS v. Cardoza-Fonseca, 480 U.S. 421, 430 (1987).

2. Substantial evidence also supports the agency's determination that Gutierrez Hernandez is not eligible for CAT relief. The IJ and BIA concluded that she did not demonstrate that she would more likely than not be tortured upon return to Mexico, or that the government would acquiesce to such torture. The record supports the agency's conclusion that Gutierrez Hernandez's fear was speculative because she did not provide any evidence that anyone would seek to harm her in particular. *See Xiao Fei Zheng v. Holder*, 644 F.3d 829, 835–36 (9th Cir. 2011). And the record does not compel the conclusion that the government would acquiesce to any possible harm Gutierrez Hernandez might suffer at the hands of her son-in-law's shooter, given her testimony that police tried to investigate the original shooting.

3. Gutierrez Hernandez also argues that the agency erred in concluding that she was ineligible for voluntary departure based on her conviction for criminal impersonation because her conviction was outside the relevant five-year period under 8 U.S.C. § 1229c(b)(1). In her brief before the BIA, Gutierrez Hernandez did not make any argument regarding the timing of her conviction, nor did she even mention the date of the conviction; rather, she argued only that her conviction should not be considered a crime of moral turpitude. Because the timing issue is unexhausted, we lack jurisdiction to review it. *See* 8 U.S.C. § 1252(d)(1); *Abebe v. Mukasey*, 554 F.3d 1203, 1208

(9th Cir. 2009) (en banc) (holding that a petitioner is “deemed to have exhausted only those issues he raised and argued in his brief before the BIA”).²

PETITION DENIED IN PART and DISMISSED IN PART.

² Gutierrez Hernandez did not challenge the BIA’s denial of administrative closure in her opening brief, so we do not address that claim. *See Martinez-Serrano*, 94 F.3d at 1259.