

NOT FOR PUBLICATION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

JUAN MANUEL BERNABE-MONTERO,

No. 21-227

Petitioner,

Agency No. A213-020-436

v.

MERRICK B. GARLAND, Attorney
General,

MEMORANDUM*

Respondent.

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

Submitted March 6, 2023**
Pasadena, California

Before: CALLAHAN, FORREST, and H.A. THOMAS, Circuit Judges.

Juan Manuel Bernabe-Montero, a native and citizen of Mexico, petitions for review of the Board of Immigration Appeals' (BIA) dismissal of his appeal from an Immigration Judge's (IJ) order denying his applications for cancellation of removal, asylum, withholding of removal, and relief under the Convention Against Torture (CAT). Bernabe-Montero also petitions for review of the BIA's

* 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).

rejection of his claim that the IJ violated his due process rights by denying his motion for a continuance.

We have jurisdiction under 8 U.S.C. § 1252. When, as here, the BIA cites *Matter of Burbano*, 20 I. & N. Dec. 872, 874 (BIA 1994), and expressly adopts and affirms the IJ's decision, we "look through the BIA's decision and treat the IJ's decision as the final agency decision for the purposes of [the] appeal."

Tamang v. Holder, 598 F.3d 1083, 1088 (9th Cir. 2010). However, where the BIA conducts its own analysis of an issue, we limit our review to the BIA's decision. *See Perez-Portillo v. Garland*, 56 F.4th 788, 792 (9th Cir. 2022).

Questions of law, including due process claims, are reviewed de novo.

Gonzaga-Ortega v. Holder, 736 F.3d 795, 800 (9th Cir. 2013). Factual findings are reviewed for substantial evidence, meaning that the agency's findings are "conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." *See Villavicencio v. Sessions*, 904 F.3d 658, 663–64 (9th Cir. 2018) (as amended). We dismiss in part and deny in part the petition for review.

1. We lack jurisdiction to review "the merits of a discretionary decision to deny cancellation of removal." *Vilchez v. Holder*, 682 F.3d 1195, 1198 (9th Cir. 2012); 8 U.S.C. § 1252(a)(2)(B)(i); 8 U.S.C. § 1229b. We therefore do not review the merits of the IJ's cancellation decision.

2. Bernabe-Montero argues that the IJ's denial of his motion to continue violated his due process rights by preventing him from reasonably presenting his case. *See Vilchez*, 682 F.3d at 1198 (describing our jurisdiction to consider

due process claims related to cancellation decisions). He posits that the lack of a continuance prevented him from marrying his fiancé before the merits hearing and thus prevented his fiancé from counting as a qualifying relative for the purposes of the IJ's hardship determination. The BIA, issuing its decision over six months after the IJ's decision, noted that Bernabe-Montero had not yet married his fiancé and concluded, on this basis, that Bernabe-Montero's fiancé would not have become a qualifying relative, even if the IJ had granted the continuance motion.

We will reverse the BIA's decision on due process grounds if (i) the proceeding before the IJ was so unfair that it prevented Bernabe-Montero from reasonably presenting his case, and (ii) this violation may have affected the outcome of the proceeding. *See Ibarra-Flores v. Gonzales*, 439 F.3d 614, 620–21 (9th Cir. 2006). Given that Bernabe-Montero had not married his fiancé by the time of the BIA's decision, we find no error in its holding that the IJ's denial of Bernabe-Montero's motion did not prevent him from reasonably presenting his case. The BIA, moreover, correctly held that the denial did not affect the outcome of the proceeding, because Bernabe-Montero (i) did not substantiate the seriousness of his fiancé's medical conditions, (ii) did not allege his fiancé would lose access to medical care upon his removal, and (iii) testified that his fiancé was being supported by her daughter during his detention.

3. The IJ held that Bernabe-Montero's asylum application, which was filed "nearly twenty years after his last arrival in the United States," was

untimely. Bernabe-Montero argues that changed circumstances justify his late application. *See Husyev v. Mukasey*, 528 F.3d 1172, 1178 (9th Cir. 2008) (describing our jurisdiction to consider questions of law related to timeliness determinations); 8 U.S.C. § 1158(a)(2)(D).

The IJ correctly held that neither (i) Bernabe-Montero’s allegation of “recent increases in crime and cartel-related violence in Mexico,” nor (ii) the disappearance of Bernabe-Montero’s cousin in 2018, constituted changed circumstances that would justify the late filing of Bernabe-Montero’s asylum application. Bernabe-Montero did not submit evidence that crime and cartel-related violence had increased since he last left Mexico, and there is nothing in the record concerning the cause of his cousin’s disappearance besides Bernabe-Montero’s speculation that cartels were involved.

4. Substantial evidence supports the IJ’s finding that Bernabe-Montero failed to show he would be harmed on account of membership in his family for the purposes of his application for withholding of removal. *See Garcia v. Wilkinson*, 988 F.3d 1136, 1146 (9th Cir. 2021) (stating that a withholding of removal applicant must prove that a protected ground is a reason for future persecution). Bernabe-Montero fears returning to Mexico because his cousin recently disappeared and he believes she may have been targeted by the drug cartels in his hometown. However, “[t]he record does not demonstrate who was responsible for his cousin’s disappearance, or that she was harmed on account of her family group membership, much less that cartel members are actively

searching for [Bernabe-Montero] in Mexico.”

5. Bernabe-Montero’s CAT claim fails for substantially the same reason. *See* 8 C.F.R. § 1208.16(c)(2) (a CAT applicant must “establish that it is more likely than not that he . . . would be tortured if removed to the proposed country of removal.”). While he also supports his CAT claim with country-conditions evidence, this evidence does not establish that Bernabe-Montero is any more likely to be a victim of violence than the “populace as a whole in Mexico.” *Ramirez-Munoz v. Lynch*, 816 F.3d 1226, 1230 (9th Cir. 2016).

PETITION DISMISSED IN PART AND DENIED IN PART.¹

¹ We also deny as moot Bernabe-Montero’s motion for a stay of removal pending appeal.