

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

MAR 29 2023

FOR THE NINTH CIRCUIT

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

Fernando GONZALEZ-ESPITIA,

No. 21-297

Petitioner,

Agency No. A208-126-662

v.

MEMORANDUM*

MERRICK B. GARLAND, Attorney
General,

Respondent.

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

Submitted March 27, 2023**
San Francisco, California

Before: BOGGS,** M. SMITH, and OWENS, Circuit Judges.

Fernando Gonzalez-Espitia, a native and citizen of Mexico, petitions this court to review the Board of Immigration Appeals' denial of withholding of removal

* 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 Danny J. Boggs, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

and Convention Against Torture (CAT) relief. We have jurisdiction pursuant to 8 U.S.C. § 1252(a). We dismiss the petition in part and deny in part.

Because the parties are familiar with the facts, we do not recount them here except where necessary to provide context. We review legal questions de novo and factual determinations for substantial evidence. *Tomczyk v. Garland*, 25 F.4th 638, 643 (9th Cir. 2022) (en banc). Because the Board of Immigration Appeals (BIA) affirmed the decision of the Immigration Judge (IJ) and incorporated portions of the IJ's decision, "we treat the incorporated parts of the IJ's decision as the BIA's." *Maie v. Garland*, 7 F.4th 841, 845 (9th Cir. 2021) (quotation omitted).

1. We lack subject-matter jurisdiction over Gonzalez-Espitia's argument that the BIA deprived him of due process by issuing a notice to appear (NTA) lacking date, time, and location information. "[W]e may not entertain due process claims based on correctable procedural errors unless the alien raised them below." *Agyeman v. INS*, 296 F.3d 871, 877 (9th Cir. 2002); *see also Ruiz-Colmenares v. Garland*, 25 F.4th 742, 748 (9th Cir. 2022) (requiring exhaustion of a petitioner's argument "that the agency lacked jurisdiction because his charging document failed to specify the time and date of his hearing."). Gonzalez-Espitia's notice of appeal to the BIA and accompanying brief, each filed by counsel, contained no reference to the NTA argument that he now raises before this court.

2. The BIA did not deprive Gonzalez-Espitia—who was represented by

counsel and repeatedly confirmed his desire to seek withholding of removal and CAT relief—of due process by failing to inform him of his eligibility for pre-conclusion voluntary departure. To prevail on a due process challenge, Gonzalez-Espitia must show both that (1) his removal proceedings were “fundamentally unfair,” and (2) he suffered prejudice, such that “the outcome of the proceeding may have been affected.” *Zamorano v. Garland*, 2 F.4th 1213, 1226 (9th Cir. 2021) (quotation omitted). Even assuming the first prong were met, Gonzalez-Espitia cannot show that he was prejudiced.

A petitioner can seek *pre-* or *post-*conclusion voluntary departure. *See* 8 U.S.C. § 1229c(a)(1), (b)(1). Though post-conclusion voluntary departure requires some threshold eligibility showings that pre-conclusion does not, *see id.*, a grant of either kind of relief is discretionary and requires the IJ to weigh “favorable and unfavorable factors.” *Zamorano*, 2 F.4th at 1221 (quotation omitted). Here, the IJ denied post-conclusion voluntary departure after weighing those factors, reasoning that Gonzalez-Espitia’s eight unlawful entries into the United States suggested that he “does not abide by the lawful regulations and laws of the United States.” Gonzalez-Espitia offers no reason to think that the IJ’s reasoning and ultimate decision would have differed if he had requested pre-conclusion voluntary departure.

3. The BIA correctly concluded that Gonzalez-Espitia did not suffer past

persecution. *See* 8 U.S.C. § 1231(b)(3)(A); 8 C.F.R. § 1208.16(b)(1).¹ “While we have recognized that harm to a petitioner’s close family members or associates may be *relevant* to assessing whether the petitioner suffered past persecution, we have not found that harm to others may *substitute* for harm to an applicant” *Tamang v. Holder*, 598 F.3d 1083, 1091–92 (9th Cir. 2010) (emphasis added). Here, Gonzalez-Espitia’s sole past-persecution evidence concerns the extortion of his nephew, which lacked any direct effect on Gonzalez-Espitia. Moreover, Gonzalez-Espitia testified that he did not personally experience any harm while in Mexico.

4. The BIA was not required to conduct particular-social-group and nexus analyses after determining that Gonzalez-Espitia failed to establish persecution. A lack of persecution is dispositive of an application for withholding of removal. *See* 8 C.F.R. § 1208.16(b)(1) (“The burden of proof is on the applicant . . . to establish that his or her life or freedom would be threatened in the proposed country of removal”).

5. Regarding CAT relief, the IJ did not err by failing to “directly ask[]” Gonzalez-Espitia which “part of Mexico he would be returning to.” The BIA must consider “all evidence relevant to the possibility of future torture.” 8 C.F.R.

¹ We need not decide which standard of review—de novo or substantial evidence—applies to the BIA’s past-persecution determination because, even applying de novo review, we find no error in the BIA’s determination here. *Cf. Flores Molina v. Garland*, 37 F.4th 626, 633 n.2 (9th Cir. 2022).

§ 1208.16(c)(3). Here, the IJ found that Gonzalez-Espitia had never been harmed by a police officer or government official in Mexico (or by any group whose harm the government would acquiescence in). And Gonzalez-Espitia himself testified that he did not fear returning to Mexico. Because Gonzalez-Espitia failed to show a likelihood of torture *anywhere* in Mexico, the IJ had no need to conduct an internal-relocation analysis. *See id.* § 1208.16(c)(3)(ii) (whether the applicant can “relocate . . . where he or she is *not likely to be tortured*” (emphasis added)).

DISMISSED IN PART and DENIED IN PART.