

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

APR 5 2023

FOR THE NINTH CIRCUIT

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

Orvelin Lara-Vivas,

Petitioner,

v.

Merrick B. Garland, U.S. Attorney General,

Respondent.

No. 21-1063

Agency No.
A096-229-884

MEMORANDUM*

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

Argued and Submitted March 15, 2023
Pasadena, California

Before: TASHIMA, CHRISTEN, and MILLER, Circuit Judges.

Orvelin Lara-Vivas (Lara), a native and citizen of Mexico, petitions for review of the Board of Immigration Appeals' (BIA) decision affirming an Immigration Judge's (IJ) denial of his application for withholding of removal and protection under the Convention Against Torture (CAT). We have jurisdiction pursuant to 8 U.S.C. § 1252(a). We review de novo questions of law. *Ahmed v. Holder*, 569 F.3d 1009, 1012 (9th Cir. 2009). We review the

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

agency's factual findings for substantial evidence. *Shrestha v. Holder*, 590 F.3d 1034, 1039, 1048 (9th Cir. 2010).

Lara entered the United States at the age of fourteen. After Lara graduated from high school, a lawyer advised him to return to Mexico and seek lawful status from there. The lawyer failed to assist Lara in obtaining lawful status and, after a few years, Lara reentered the United States without inspection. Lara was detained and deported, and he returned to his hometown in Guerrero, Mexico, where he worked as a taxi driver. Lara considered moving to Tijuana in order to be closer to his family in the United States, but decided against it because that area was not secure. Years later, a drug cartel began extorting Lara to make monthly payments to be allowed to operate his taxi. Lara testified that the cartel was not satisfied with his payments and four cartel members, including a federal police officer, kidnapped him and held him for ransom in the mountains for four days. Lara's brother facilitated payment of about half the ransom, and the kidnappers released Lara, but they told him he would be killed if he did not pay the balance of the ransom within three days. Lara fled to Mexico City, where he spent only a few hours before flying to a border town and crossing into the United States.

After living in the United States for several years, Lara was detained by Immigration and Customs Enforcement. In a credible fear interview, he described the abuse he suffered while kidnapped. He described being severely beaten, having his head dunked in a container of water, having a gun pointed at

him, and being told he would be made to disappear if he did not pay. Lara interpreted this threat to mean “they cut you in pieces and throw body parts along the road or sometimes to mock them, they send the head and they disappear the body.” In response to a question about how he was threatened, Lara responded, “[T]hey didn’t torture me but they beat me up.” In response to a question about the injuries he suffered, Lara responded, “[T]hey didn’t cut off any parts to torture me or anything like that.”

Lara later prepared a declaration in conjunction with his request for relief pursuant to CAT. In it, he again described being severely beaten, having his head dunked in a bucket of water, and being told that he would be killed if his family failed to pay the ransom. He also stated, “They tortured me and used all kind[s] of intimidation.”

Finally, at his merits hearing before the IJ, Lara testified that his captors severely beat him, dunked his head in a bucket of water, and pointed a gun at him. He also testified that they threatened to kill him if he failed to obtain the required ransom, and he described the captors’ abuse as “brutal torture.” The IJ asked him why he said he was not tortured in his credible fear interview, and Lara explained that he had previously understood torture to mean “cut[ing] fingers, or cutting ears, or cutting all the fingers of[f] your hand, and, or maybe dismembering and sending it to your family, a part of your body to your

family.”¹ Lara described being burned with lit cigarettes, and the transcript shows he attempted to show the IJ burn scars on his arm, but the IJ did not make findings regarding what he saw on Lara’s arm. The IJ asked Lara what was the worst thing that happened to him during the four-day kidnapping, and he listed several forms of abuse including the beating, the water bucket, and having a gun pointed at him. He did not mention the cigarette burns.

The IJ perceived inconsistencies in Lara’s testimony and made an adverse credibility finding. “Where, as here, the BIA reviewed the IJ’s credibility-based decision for clear error and relied upon the IJ’s opinion as a statement of reasons but did not merely provide a boilerplate opinion,” we review “the reasons explicitly identified by the BIA, and then examine the reasoning articulated in the IJ’s oral decision in support of those reasons.” *Lai v. Holder*, 773 F.3d 966, 970 (9th Cir. 2014) (internal quotation marks and citations omitted). “Stated differently, we do not review those parts of the IJ’s adverse credibility finding that the BIA did not identify as ‘most significant’ and did not otherwise mention.” *Id.* (quoting *Tekle v. Mukasey*, 533 F.3d 1044, 1051 (9th Cir. 2008)). “[I]n assessing an adverse credibility finding under the [REAL ID] Act, we must look to the ‘totality of the circumstances[] and all relevant factors.’” *Alam v. Garland*, 11 F.4th 1133, 1137 (9th Cir. 2021) (en banc)

¹ In his testimony, Lara also explained that a childhood friend was kidnapped and ultimately killed and dismembered after his family failed to pay the ransom demanded by a cartel.

(second alteration in original) (quoting 8 U.S.C. § 1158(b)(1)(B)(iii)); *see also Kumar v. Garland*, 18 F.4th 1148, 1153 (9th Cir. 2021).

The BIA gave two reasons for upholding the IJ’s adverse credibility finding. First, it noted Lara’s statements regarding whether he was or was not “tortured.” Lara’s statements about torture do not support an adverse credibility finding. His credible fear interview statements and subsequent testimony establish that he understood that “torture” entails dismemberment. In his credible fear interview, declaration, and hearing testimony, Lara consistently described being beaten, having his head dunked into buckets or bins of water, and being threatened with death. Lara’s testimony regarding his previous understanding of the meaning of “torture” was entirely consistent with his description of the abuse he suffered: he explained the kidnappers “didn’t cut off any parts to torture me or anything like that.”

The second reason the BIA gave for affirming the adverse credibility determination was that Lara “omitted from both [the credible fear] interview and his declaration some of the most serious mistreatment, including that he was burned with cigarettes and a gun was pointed to his head.” This is incorrect for two reasons: during his credible fear interview, Lara did describe having a gun pointed at him; and Lara did not consider the cigarette burns to be as serious as the other forms of abuse, including not knowing whether he would be killed. Lara’s declaration did not explicitly mention a gun, but it described the captors as “tortur[ing]” him, “us[ing] all kind[s] of intimidation,” and

threatening to kill him, in addition to beating him and putting his “head in to a bucket with water.”

Separately, Lara argues that the IJ’s finding that he could relocate within Mexico was unsupported. The government argues that Lara failed to exhaust his challenge to this finding, but we have jurisdiction to consider an issue “addressed on the merits by the BIA, regardless of whether the petitioner raised it before the agency.” *Parada v. Sessions*, 902 F.3d 901, 914 (9th Cir. 2018). The BIA considered the merits of the IJ’s finding and determined there was “no clear error in the factual findings or legal error.” This is sufficient to exhaust the issue.

A petitioner does not have the burden of showing that relocation is impossible in order to obtain CAT relief. *Maldonado v. Lynch*, 786 F.3d 1155, 1164 (9th Cir. 2015) (en banc). Rather, relocation is one factor for the IJ to consider in determining whether a petitioner is more likely than not to be subject to torture. *Id.* “[T]he IJ must consider all relevant evidence; no one factor is determinative.” *Id.*

In support of his relocation finding, the IJ first observed that “Respondent indicated in his declaration that he was considering relocation to Tijuana.” But Lara’s decision not to move to Tijuana occurred well before he was kidnapped, and, if anything, his decision not to move there undermines the IJ’s relocation finding. The IJ also observed that Lara “did not claim that he experienced any harm for the short time that he was in Mexico City.” This does not support the

IJ's relocation finding because the record shows that Lara traveled surreptitiously to Mexico City overnight and was only there for a matter of hours as he waited to take a flight to the border.

Explaining his contention that he could not relocate, Lara testified that one of his kidnappers was a federal police officer, that the cartel that kidnapped him has cells around the country, and that both the local and federal police cooperate with the cartels. On this record, the IJ's finding that Lara could relocate was not supported by substantial evidence. *See Maldonado*, 786 F.3d at 1164.

Finally, Lara's challenge to the BIA's denial of his claim for withholding of removal fails. The record indicates that Lara was kidnapped because of his failure to make payments to the cartel, not based on imputed political opinion. He has not provided any indication that any future persecution would be on account of a protected ground. As such, the agency's conclusion is supported by substantial evidence.²

² Lara also argues that the IJ violated his due process rights by denying a continuance to allow Lara's brother to testify without considering the relevant factors required by our caselaw. *See An Na Peng v. Holder*, 673 F.3d 1248, 1253 (9th Cir. 2012). Assuming arguendo that the IJ abused his discretion by denying the continuance, Lara cannot show prejudice as to his withholding claim because he has not provided any indication that future persecution would be on account of his political opinion or that his brother's testimony could support such a conclusion. Lara argues that he was prejudiced by the denial of a continuance because he was unable to call his brother as a witness in support of his CAT claim. We do not reach this issue because remand of the CAT claim is required by our conclusion that the adverse credibility determination and relocation finding are not supported by substantial evidence.

GRANTED in part, DENIED in part, and REMANDED.³

³ After briefing in this case was complete, the government notified us of a recent Second Circuit decision, *Bhaktibhai-Patel v. Garland*, 32 F.4th 180, 189–93, 196 (2d Cir. 2022), which held, contrary to *Ortiz-Alfaro v. Holder*, 694 F.3d 955, 958 (9th Cir. 2012), that decisions made during withholding-only proceedings are not final orders of removal subject to judicial review. The government did not ask us to reach this issue and we decline to do so.