

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

APR 14 2023

FOR THE NINTH CIRCUIT

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

JOSE DANIEL GOMEZ-MENENDEZ,

No. 21-1333

Petitioner,

Agency No. A201-291-600

v.

MEMORANDUM*

MERRICK B. GARLAND, U.S. Attorney
General,

Respondent.

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

Argued and Submitted March 27, 2023
San Francisco, California

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

Jose Daniel Gomez-Menendez, a Salvadoran national, entered the United States and applied for asylum, withholding of removal, and protection under the Convention Against Torture (CAT). An immigration judge (IJ) denied his applications and the Board of Immigration Appeals (BIA) affirmed. Exercising

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

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

jurisdiction under 8 U.S.C. § 1252, we deny Gomez-Menendez’s petition for review.

We review the agency’s factual findings for substantial evidence, treating them as “conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary.” *Flores Molina v. Garland*, 37 F.4th 626, 632 (9th Cir. 2022) (quoting 8 U.S.C. § 1252(b)(4)(B)). We review legal issues, including the agency’s purported failure to consider the cumulative effect of past harms, de novo. *Salguero Sosa v. Garland*, 55 F.4th 1213, 1218–19 (9th Cir. 2022).

To be eligible for asylum, Gomez-Menendez must demonstrate either that he was persecuted in the past, which raises a rebuttable presumption of future persecution, or that he has a “well-founded fear” of persecution in the future. *Flores Molina*, 37 F.4th at 633.¹

1. The agency correctly concluded that Gomez-Menendez did not suffer past persecution.² “Persecution . . . is an extreme concept that means something considerably more than discrimination or harassment.” *Sharma v. Garland*, 9 F.4th 1052, 1060 (9th Cir. 2021) (quoting *Donchev v. Mukasey*, 553 F.3d 1206, 1213 (9th Cir. 2009)). In analyzing whether past harm constitutes persecution, we consider,

¹ Gomez-Menendez’s petition does not challenge the agency’s denial of withholding of removal and CAT relief.

² The standard of review that we have applied to such conclusions has varied. *See Singh v. Garland*, 57 F.4th 643, 651–52 (9th Cir. 2022). Because we would reach the same conclusion under any standard of review, we need not discuss whether a more deferential standard should apply. *Cf. Fon v. Garland*, 34 F.4th 810, 813 n.1 (9th Cir. 2022) (applying the more deferential standard in granting a petition).

among other things, “physical violence and resulting serious injuries, frequency of harm, [and] specific threats combined with confrontation.” *Id.* at 1063. Mere threats rarely amount to persecution, unless they are “repeated, specific and ‘combined with confrontation or other mistreatment.’” *Duran-Rodriguez v. Barr*, 918 F.3d 1025, 1028 (9th Cir. 2019) (quoting *Lim v. INS*, 224 F.3d 929, 936 (9th Cir. 2000)); *Mashiri v. Ashcroft*, 383 F.3d 1112, 1119 (9th Cir. 2004) (“[T]hreats may be compelling evidence of past persecution, particularly when they are specific and menacing and are accompanied by evidence of violent confrontations, near-confrontations and vandalism.”).

While Gomez-Menendez testified that he was threatened on three occasions, his description of these threats, which occurred over a period of almost three years, varied considerably. For example, in the declaration that he filed in support of his asylum application, Gomez-Menendez described the first threat as a threat to “beat [him] up,” but in his testimony characterized it as a death threat.

More importantly, the record does not compel the conclusion that the threats here were combined with violent confrontation. The first two threats were not combined with physical mistreatment of any kind. The third threat was followed by an attempt on Gomez-Menendez’s life. Gomez-Menendez claims that the political opponent with whom he had clashed was responsible for the shooting, but he also conceded—in his report to the Salvadoran police, his declaration, and his testimony

before the IJ—that he could not see the faces of the men who shot at him. Substantial evidence thus supports the IJ’s conclusion that the threats and the shooting were not related. Based on this conclusion, the IJ did not err in finding that Gomez-Menendez did not suffer persecution.

Gomez-Menendez argues that the IJ erred by disaggregating the threats and the shooting incident. Gomez-Menendez is correct that the agency must consider the cumulative effect of his past-persecution evidence. *See Salguero Sosa*, 55 F.4th at 1218. But the IJ’s decision indicates that she considered all the evidence in the record. Summarizing her analysis, she stated, “the threats that the respondent received and the gunshot do not support a finding of past persecution.” And, as explained above, the IJ reasonably rejected Gomez-Menendez’s attempt to link the shooting to the earlier threats.

2. Substantial evidence supports the agency’s conclusion that Gomez-Menendez does not have a well-founded fear of persecution. To be well-founded, a fear must be objectively reasonable. *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1062 (9th Cir. 2017) (en banc). A ten-percent chance of persecution is sufficient. *Mendoza-Linares v. Garland*, 51 F.4th 1146, 1152 (9th Cir. 2022).

The record does not compel the conclusion that Gomez-Menendez’s fear of future persecution is objectively reasonable. While Gomez-Menendez was threatened on several occasions, the last of those threats occurred almost ten years

before his asylum hearing. Since the shooting was not clearly related to the threats, substantial evidence supports the agency's conclusion that Gomez-Menendez is unlikely to suffer harm on account of his political opinion if removed to El Salvador.

Gomez-Menendez complains that it is fundamentally unfair for the agency to rely on the passage of time to reject his future-persecution claim. It is true that we have previously rejected the agency's attempt to use its own administrative delay to rebut a noncitizen's presumption of future persecution. *See Salazar-Paucar v. INS*, 281 F.3d 1069, 1077 (9th Cir. 2002). But that does not change our rule that "the age of the threats" that a noncitizen received is "relevant to our evaluation of the reasonableness of [his] fear." *Canales-Vargas v. Gonzales*, 441 F.3d 739, 746 (9th Cir. 2006). And, unlike in *Salazar-Paucar*, the agency here did not use the passage of time to rebut a presumption of future persecution, because it correctly found that Gomez-Menendez had not established past persecution.

The stay of removal remains in place until the mandate issues.

PETITION DENIED.