

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

APR 21 2023

FOR THE NINTH CIRCUIT

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

TERESITA CALDERON CALVILLO,

No. 20-73794

Petitioner,

Agency No. A205-739-759

v.

MEMORANDUM*

MERRICK B. GARLAND, Attorney
General,

Respondent.

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

Submitted April 17, 2023**

Before: CLIFTON, R. NELSON, and BRESS, Circuit Judges.

Teresita Calderon Calvillo, a native and citizen of Mexico, petitions pro se for review of the Board of Immigration Appeals' ("BIA") order dismissing her appeal from an immigration judge's decision denying her applications for asylum, withholding of removal and protection under the Convention Against Torture

* 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).

(“CAT”). We have jurisdiction under 8 U.S.C. § 1252. We review de novo the legal question of whether a particular social group is cognizable, except to the extent that deference is owed to the BIA’s interpretation of the governing statutes and regulations. *Conde Quevedo v. Barr*, 947 F.3d 1238, 1241-42 (9th Cir. 2020). We review for substantial evidence the agency’s factual findings. *Id.* at 1241. We deny in part and dismiss in part the petition for review.

Because Calderon Calvillo does not challenge the agency’s determination that the asylum application is untimely, we do not address it. *See Rios v. Lynch*, 807 F.3d 1123, 1125 n.1 (9th Cir. 2015).

As to withholding of removal and Calderon Calvillo’s proposed particular social group of “homosexual women,” we do not disturb the agency’s determination that she failed to establish she suffered harm that rises to the level of persecution. *See Nagoulko v. INS*, 333 F.3d 1012, 1016-17 (9th Cir. 2003) (discrimination and harassment did not rise to the level of persecution). Substantial evidence supports the agency’s conclusion that Calderon Calvillo failed to establish a clear probability of future persecution on this ground. *See id.* at 1018 (possibility of future persecution “too speculative”).

As to her proposed particular social group of “individuals who have been in the United States for many years and will be perceived to have money,” the BIA did not err in concluding that Calderon Calvillo failed to establish membership in a

cognizable particular social group. *See Reyes v. Lynch*, 842 F.3d 1125, 1131 (9th Cir. 2016) (to demonstrate membership in a particular social group, “[t]he applicant must ‘establish that the group is (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question’” (quoting *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 237 (BIA 2014))); *see also, Barbosa v. Barr*, 926 F.3d 1053 (9th Cir. 2019) (particular social group of “individuals returning to Mexico from the United States who are believed to be wealthy” not cognizable). Thus, Calderon Calvillo’s withholding of removal claim fails.

Substantial evidence also supports the agency’s denial of CAT protection because Calderon Calvillo failed to show it is more likely than not she will be tortured by or with the consent or acquiescence of the government if returned to Mexico. *See Aden v. Holder*, 589 F.3d 1040, 1047 (9th Cir. 2009).

We do not consider the materials Calderon Calvillo references in her opening brief that are not part of the administrative record. *See Fisher v. INS*, 79 F.3d 955, 963-64 (9th Cir. 1996) (en banc).

We lack jurisdiction to consider whether Calderon Calvillo’s case warrants a favorable exercise of prosecutorial discretion. *See Vilchiz-Soto v. Holder*, 688 F.3d 642, 644 (9th Cir. 2012).

The temporary stay of removal remains in place until the mandate issues. The motion for a stay of removal is otherwise denied.

PETITION FOR REVIEW DENIED in part, DISMISSED in part.