

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

JUN 8 2023

FOR THE NINTH CIRCUIT

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

MARVIN ANTONIO BATRES-OCHOA,

Petitioner,

v.

MERRICK B. GARLAND, Attorney
General,

Respondent.

No. 21-1037

Agency No.
A209-826-037

MEMORANDUM*

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

Submitted June 6, 2023**
Pasadena, California

Before: WALLACE and OWENS, Circuit Judges, and FITZWATER, District
Judge.***

Marvin Antonio Batres-Ochoa, a native and citizen of El Salvador,
petitions for review of the Board of Immigration Appeals' ("BIA") decision
dismissing his appeal from an immigration judge's ("IJ") decision denying his

* 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 Sidney A. Fitzwater, United States District Judge
for the Northern District of Texas, sitting by designation.

applications for asylum, withholding of removal, and protection under the Convention Against Torture (“CAT”). As the parties are familiar with the facts, we do not recount them here. We deny the petition for review.

“Where, as here, the [BIA] adopts the IJ’s decision citing *Matter of Burbano*, 20 I. & N. Dec. 872 (BIA 1994) and provides its own review of the evidence and law, we review the decisions of both the BIA and the IJ.” *Udo v. Garland*, 32 F.4th 1198, 1202 (9th Cir. 2022). “We review the [BIA’s] legal conclusions de novo and its factual findings for substantial evidence.” *Id.* (internal quotation marks and citation omitted).

1. Batres-Ochoa alleged persecution on account of the particular social group of “Salvadoran young adult males who are perceived to be affiliated with gangs.” In denying Batres-Ochoa’s asylum application, the BIA determined that Batres-Ochoa did not establish past harm rising to the level of persecution or a well-founded fear of future persecution. Because we would affirm the BIA’s determination under any standard of review, we need not address the specific standard that applies in this case. *See Singh v. Garland*, 57 F.4th 643, 651-52 (9th Cir. 2022) (stating that it is unclear in our case law if a de novo or substantial evidence standard applies to the question of whether particular facts amount to persecution); *Fon v. Garland*, 34 F.4th 810, 813 n.1 (9th Cir. 2022) (“Because we would reach the same conclusion under any standard of review, we need not address whether a less deferential standard should pertain [to the BIA’s past persecution determination].”).

Batres-Ochoa identifies one incident of past harm that occurred when he was twenty-one years old. The police stopped Batres-Ochoa and his friend because the police suspected that they were gang members. One officer ordered Batres-Ochoa to place his hands behind his head, squeezed Batres-Ochoa's fingers, and then punched him in the stomach. After about an hour, the police released Batres-Ochoa and his friend, but kept Batres-Ochoa's cell phone, which Batres-Ochoa retrieved at the police station later that evening. The officer told Batres-Ochoa that he believed that all young men were gang members and that he would be watching him. After Batres-Ochoa left El Salvador, the police arrested the same friend for being a suspected gang member and detained him for three days.

We discern no error in the BIA's determination that the harm Batres-Ochoa experienced did not rise to the level of past persecution. *See Sharma v. Garland*, 9 F.4th 1052, 1060-63 (9th Cir. 2021) (discussing factors that guide the analysis and stating that "[b]ecause it is an extreme concept, persecution does not include every sort of treatment our society regards as offensive" (internal quotation marks and citation omitted)). Batres-Ochoa argues that his harm was more egregious because he was of a "young age" at the time of the incident. However, Batres-Ochoa was twenty-one years old and not a child at the time of his encounter with the police. *Cf. Hernandez-Ortiz v. Gonzales*, 496 F.3d 1042, 1046 (9th Cir. 2007) (holding that "injuries to a family must be considered in an asylum case where the events that form the basis of the past

persecution claim were perceived when the petitioner was a child”).

Nor do we discern error in the BIA’s determination that Batres-Ochoa failed to establish a well-founded fear of future persecution, even considering his friend’s three-day detention and country conditions evidence. *See Sharma*, 9 F.4th at 1065-66.

2. Because Batres-Ochoa “has not met the lesser burden of establishing his eligibility for asylum, he necessarily has failed to meet the more stringent ‘clear probability’ burden required for withholding of [removal].” *Id.* at 1066 (citation omitted).

3. For the CAT claim, substantial evidence supports the BIA’s determination that Batres-Ochoa failed to show that he would more likely than not be tortured if returned to El Salvador. *See id.* at 1067.

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

PETITION FOR REVIEW DENIED.