

NOT FOR PUBLICATION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

VICTORINO HERNANDEZ-MARINERO,

No. 22-349

Petitioner,

Agency No.

A206-410-370

v.

MEMORANDUM*

MERRICK B. GARLAND, Attorney
General,

Respondent.

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.***

Victorino Hernandez-Marinero, a native and citizen of Mexico, timely petitions for review of the Board of Immigration Appeals' (BIA) dismissal of his appeal from the immigration judge's denial of his applications for withholding of

* 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.

removal and protection under the Convention Against Torture (CAT). We have jurisdiction pursuant to 8 U.S.C. § 1252. We review the BIA’s legal conclusions de novo and its factual findings for substantial evidence. *See Plancarte Saucedo v. Garland*, 23 F.4th 824, 831 (9th Cir. 2022). We deny the petition.

The BIA did not err in denying withholding of removal as Hernandez-Marinero’s proposed particular social group is not cognizable. Individuals on a gang’s hit list share no “common characteristic[s] aside from persecution,” and therefore such a proposed group is “impermissibly circular.” *Diaz-Reynoso v. Barr*, 968 F.3d 1070, 1086 (9th Cir. 2020); *see also Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 232 (BIA 2014) (“[A] ‘particular social group’ cannot be defined exclusively by the claimed persecution[.]”). Moreover, the proposed social group is not particular or socially distinct. *See Reyes v. Lynch*, 842 F.3d 1125, 1139–40 (9th Cir. 2016) (holding that a social group was “too amorphous,” and therefore not particular, because it included a diffuse and shifting population); *Diaz-Torres v. Barr*, 963 F.3d 976, 981 (9th Cir. 2020) (observing that being on a “persecutor’s enemies list” is not sufficient to establish social distinction).

Neither did the BIA err in denying protection under CAT. Substantial evidence supports the BIA’s conclusion that the past harm that Hernandez-Marinero suffered did not amount to torture. *See Ahmed v. Keisler*, 504 F.3d 1183, 1200–01 (9th Cir. 2007); 8 C.F.R. § 1208.18(a)(2). Substantial evidence also supports the BIA’s determination that Hernandez-Marinero did not establish that any future harm would be at the instigation of, or with the consent or

acquiescence of, public officials. *See Andrade-Garcia v. Lynch*, 828 F.3d 829, 836 (9th Cir. 2016) (“[A] general ineffectiveness on the government’s part to investigate and prevent crime will not suffice to show acquiescence.”); 8 C.F.R. § 1208.18(a)(1).

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

PETITION DENIED.