NOT FOR PUBLICATION

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ANTHONY ALEXANDRE, Petitioner, v. MERRICK B. GARLAND, Attorney General, Respondent.	No. 21-1281 Agency No. A042-704-976 MEMORANDUM*

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

Argued and Submitted April 10, 2023
Pasadena, California

Before: W. FLETCHER, BERZON, and MILLER, Circuit Judges.

Anthony Alexandre, a native and citizen of Haiti, petitions for review of a decision of the Board of Immigration Appeals dismissing his appeal from an immigration judge's decision denying his applications for asylum, withholding of removal, and protection under the Convention Against Torture (CAT). We have jurisdiction under 8 U.S.C. § 1252, and we grant the petition in part and deny it in part.

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

We review the agency's factual findings, including adverse credibility findings, for substantial evidence. *Cordon-Garcia v. INS*, 204 F.3d 985, 990 (9th Cir. 2000). We review the agency's legal conclusions de novo. *Vitug v. Holder*, 723 F.3d 1056, 1062 (9th Cir. 2013).

1. We deny the petition for review with respect to Alexandre's claims for asylum and withholding of removal. The Board did not err in concluding that Alexandre was statutorily barred from obtaining asylum and withholding of removal because he was convicted of a per se particularly serious crime. Alexandre was convicted under California Penal Code section 273.5(a) of "willfully inflict[ing] corporal injury resulting in a traumatic condition" on a person with whom he shared an enumerated domestic relationship. He received a three-year sentence, together with a three-year sentence enhancement under California Penal Code section 12022.7(a) for "inflict[ing] great bodily injury . . . in the commission of a felony." For asylum purposes, Alexandre's conviction is per se particularly serious because it is an aggravated felony. *See* 8 U.S.C. § 1101(a)(43)(F) (defining "aggravated felony"); *id.* § 1158(b)(2)(B)(i) (categorizing aggravated felonies as particularly serious crimes); *see also* 18 U.S.C. § 16. For purposes of withholding of removal, the conviction is also per se particularly serious because Alexandre was "sentenced to an aggregate term of imprisonment of at least 5 years." 8 U.S.C. § 1231(b)(3)(B)(iv). The Board appropriately considered the three-year sentence enhancement when calculating

Alexandre's aggregate term of imprisonment. *See Mairena v. Barr*, 917 F.3d 1119, 1124 (9th Cir. 2019) (per curiam).

2. We grant the petition for review with respect to Alexandre's claim for CAT relief. The immigration judge found Alexandre not credible, and the Board appears to have adopted that finding by citing *Matter of Burbano*, 20 I. & N. Dec. 872 (B.I.A. 1994). Before this court, Alexandre argues that the adverse credibility finding was not supported by substantial evidence. The government offers no response, instead insisting (incorrectly) that "the Board did not rely upon [the adverse credibility] finding." The government has thus forfeited any argument that might have allowed us to uphold the agency's adverse credibility finding. *See United States v. Dreyer*, 804 F.3d 1266, 1277 (9th Cir. 2015).

Without the adverse credibility finding, the agency's denial of CAT relief cannot be sustained. Alexandre testified that he received numerous threats in response to his anti-voodoo activism in Haiti. Nonetheless, the immigration judge concluded that "[t]he record . . . does not support [Alexandre's] claim that government actors or voodoo priests will torture him in Haiti because of his anti-voodoo beliefs and activism." In reaching that conclusion, the immigration judge noted that Alexandre had been unable to provide documentation or "objective evidence" of the alleged threats. But if the adverse credibility finding is removed from the equation, then the agency could not ignore Alexandre's testimony about the threats without giving him "notice of the corroboration required, and an opportunity to either provide that corroboration or explain why

he cannot do so." *Ren v. Holder*, 648 F.3d 1079, 1091–92 (9th Cir. 2011). Though the immigration judge did press Alexandre on whether he could provide documentation of the threats, he did not say that such evidence was required, nor did he "evaluate [Alexandre]'s explanation [for why the corroborating evidence was not available] and determine on the record whether the evidence is reasonably obtainable or whether other evidence might suffice." *Id.* at 1092 n.12.

If the immigration judge had also found that the Haitian government would not acquiesce in any torture that Alexandre might face at the hands of voodoo priests, then that finding could have independently supported the agency's decision on this point. But although the immigration judge made such a finding with respect to other sources of torture that Alexandre feared, he made no such finding on the likelihood of government acquiescence when it came to torture at the hands of voodoo priests. Whatever the merits of Alexandre's theory of government acquiescence, the likelihood of acquiescence is a factual finding that must be made by the immigration judge. *See Rodriguez v. Holder*, 683 F.3d 1164, 1173 (9th Cir. 2012) ("The BIA may not make its own factual findings . . . ."). Because the immigration judge made no such finding, we remand to the agency for further proceedings on Alexandre's CAT claim.

The motion for a stay of removal (Dkt. No. 2) is denied as moot.

The parties shall bear their own costs.

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

Judge W. Fletcher would deny the petition in its entirety.