

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

FEB 8 2024

FOR THE NINTH CIRCUIT

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

GABRIEL BENICIO CHAVEZ,

Petitioner,

v.

MERRICK B. GARLAND, Attorney
General,

Respondent.

No. 23-251

Agency No.
A028-813-075

MEMORANDUM*

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

Submitted February 5, 2024**
San Francisco, California

Before: R. NELSON, FORREST, and SANCHEZ, Circuit Judges.

Gabriel Benicio Chavez, native and citizen of El Salvador, petitions for review of the Immigration Judge's determination that Chavez should be removed because he lacks a reasonable fear of persecution or torture. We have jurisdiction

* 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).

under 8 U.S.C. § 1252(a). *See Park v. Garland*, 72 F.4th 965, 973 (9th Cir. 2023).

We review for substantial evidence an immigration judge’s negative reasonable fear finding, *see Bartolome v. Sessions*, 904 F.3d 803, 811 (9th Cir. 2018), and we deny the petition.

1. In 1993, the Superior Court of California sentenced Chavez to 29 years in prison on convictions of first-degree murder and first-degree attempted murder. Chavez states that “[t]he murder was 18th Street gang related in its causation and execution.” In prison, he “maintained a connection to the 18th Street gang for his protection.”

On September 16, 2022, the Department of Homeland Security (“agency”) found Chavez removable as a noncitizen convicted of an aggravated felony and issued a final administrative removal order under 8 U.S.C. § 1228(b). Following a reasonable fear hearing, the Immigration Judge concurred with the asylum officer’s finding that Chavez lacks a reasonable fear of either (1) persecution on account of a protected ground or (2) torture to warrant a full hearing for withholding of removal and protection under the Convention Against Torture (“CAT”).

2. Substantial evidence supports the agency’s finding that Chavez failed to present a reasonable fear of persecution on account of a protected ground. To warrant a full withholding of removal hearing, an individual with a final administrative removal order must establish a “reasonable possibility that he . . .

would be persecuted on account of his . . . race, religion, nationality, membership in a particular social group or political opinion.” 8 C.F.R. § 208.31(c). A petitioner must establish that his asserted group is a legally cognizable “particular social group.” *See* 8 U.S.C. § 1231(b)(3)(A). Chavez argues that he will face persecution and torture in El Salvador as both a “former” and current 18th Street gang member.

Chavez’s putative groups of former and current gang membership are mutually exclusive, and neither is a cognizable “particular social group” under our controlling precedent. *See Reyes v. Lynch*, 842 F.3d 1125, 1137 (9th Cir. 2016) (“former members of the Mara 18 gang [also known as the 18th Street gang] in El Salvador who have renounced their membership” lack the necessary particularity and social distinction to qualify as a particular social group); *Arteaga v. Mukasey*, 511 F.3d 940, 945 (9th Cir. 2007) (petitioner who “was *still* a gang member” but “no longer ‘active’” failed to establish membership in a particular social group for lack of a common immutable characteristic (emphasis in original)). “Congress, in offering refugee protection for individuals facing potential persecution through social group status, [had not] intended to include violent street gangs.” *Arteaga*, 511 F.3d at 945–46. Chavez’s tattoos do not alter this analysis so as to compel a different result. *See, e.g., id.* at 945 (“‘Tattooed gang member’ falls outside the Ninth Circuit’s definition of social group.”).

3. Substantial evidence supports the agency’s finding that Chavez’s asserted fear of reprisal pursuant to El Salvador’s “lawful sanctions” against gang membership does not establish a reasonable fear of torture. *See Del Cid Marroquin v. Lynch*, 823 F.3d 933, 937 (9th Cir. 2016) (that “gang membership is illegal under Salvadoran law” does “not establish that the government tortures former gang members or those with gang-related tattoos”). While a noncitizen does not need to establish harm on account of a protected ground for CAT protection, *see* 8 C.F.R. § 1208.18(a)(1), Chavez fails to establish “a reasonable possibility that he . . . would be tortured in” El Salvador to merit protection under CAT, *id.* § 1208.31(c).

PETITION DENIED.