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U.S. COURT OF APPEALS

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSE EDGARDO MARTINEZ-AYALA, Petitioner, v. MERRICK B. GARLAND, Attorney General, Respondent.	No. 22-1210 Agency No. A079-433-781 MEMORANDUM[*]

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

Argued and Submitted July 12, 2024
San Francisco, California

Before: HIGGINSON[**], MENDOZA, and DESAI, Circuit Judges.

Jose Edgardo Martinez-Ayala ("Martinez"), a native and citizen of El Salvador, petitions for review of two Board of Immigration Appeals ("BIA") orders affirming the denial of his withholding of removal and Convention Against Torture

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

[**] The Honorable Stephen A. Higginson, United States Circuit Judge for the U.S. Court of Appeals for the Fifth Circuit sitting by designation.

("CAT") claims.[1] Martinez seeks protection based on past encounters with gang members in El Salvador. He alleged that the gang members attempted to recruit him over fifty times, which he resisted on account of his Catholic faith, and that the gang members "beat [him] up" and attempted to shoot him three times because of his resistance. He also alleged that on two occasions, police officers detained and beat him.

In 2015, an immigration judge ("IJ") denied Martinez's claims for withholding of removal and CAT protection, finding in part that the police officers who beat him were "just rogue police officers." The BIA dismissed the appeal as to the denial of both claims. Martinez petitioned this court for review, but before the court reviewed the merits, the government moved to remand the case in light of intervening precedent that invalidated the "rogue officers" reasoning. *Barajas-Romero v. Lynch*, 846 F.3d 351, 361–63 (9th Cir. 2017). On remand, the IJ again denied the CAT claim, and the BIA dismissed the appeal. Martinez timely petitioned this court for review.

We have jurisdiction under 8 U.S.C. § 1252. We review legal questions de novo, *Rodriguez v. Holder*, 683 F.3d 1164, 1169 (9th Cir. 2012), and factual

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[1] DHS originally ordered Martinez removed in 2002, and he returned to El Salvador. He subsequently reentered the United States at least twice. Martinez is therefore in withholding-only proceedings seeking only withholding of removal and CAT protection. *Johnson v. Guzman Chavez*, 594 U.S. 523, 531–32 (2021).

determinations underlying the denial of relief for substantial evidence, *Plancarte Sauceda v. Garland*, 23 F.4th 824, 831 (9th Cir. 2022). We grant the petition in part and deny the petition in part.

1. We grant the petition on the withholding of removal claim because the BIA committed three legal errors.[2]

First, the BIA engaged in impermissible factfinding when concluding that Martinez's proposed particular social group ("PSG") is not cognizable. The IJ categorically concluded that Martinez could not advance a gang-related PSG based on Ninth Circuit precedent, without analyzing any of the cognizability factors: immutability, particularity, and social distinction. *See Akosung v. Barr*, 970 F.3d 1095, 1103 (9th Cir. 2020). The BIA affirmed the IJ's supposed finding that Martinez did not prove social distinction, but the IJ made no such factual finding. By purporting to affirm a factual finding that the IJ did not make, the BIA engaged in improper factfinding which constitutes a legal error. *See Rodriguez*, 683 F.3d at 1170 ("Where the IJ has not made a finding of fact on a disputed matter, and such a finding is necessary to resolution of the case, the BIA must remand to the IJ to make the required finding; it may not conduct its own fact-finding.").

Next, the BIA erred by applying a more stringent nexus standard than

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[2] The government concedes that the 2016 BIA order denying Martinez's withholding of removal claim is properly before us.

required. For withholding of removal claims, the proper nexus standard is whether the alleged protected ground is "a reason" for persecution. *Barajas-Romero*, 846 F.3d at 359–60. Here, the BIA erroneously applied the more demanding "one central reason" standard, which applies only to asylum claims. *Id.* The government concedes this constitutes error but argues that the BIA's error is harmless because the IJ found that Martinez could not prove a nexus under either standard. The IJ's opinion contains no such finding, nor does it contain an independent motive finding. Because the record is "not unambiguous" as to whether the BIA would have reached the same conclusion under the less stringent standard, *id.* at 360, remand is required.

And third, the BIA failed to consider one of Martinez's potential protected grounds. The agency is required to address all arguments raised by a petitioner, *Sagaydak v. Gonzales*, 405 F.3d 1035, 1040 (9th Cir. 2005), which includes all of a petitioner's asserted protected grounds, *see, e.g.*, *Rios v. Lynch*, 807 F.3d 1123, 1127–28 (9th Cir. 2015). The BIA noted that Martinez raised a claim based on political opinion, but it did not address whether Martinez espoused a political opinion or whether he proved a nexus to his political opinion. Its failure to consider the political opinion claim is thus legal error. *See id.* (holding that the BIA and IJ erred by failing to recognize a petitioner asserted a "family" PSG when filing a claim for withholding based on the murders of his relatives and their religious beliefs).

The government asserts that even if the BIA committed any of the errors

Martinez alleges, remand is not required because it would be futile. We decline to make that determination because we cannot find facts in the first instance, nor can we affirm on any ground on which the BIA did not rely. *See Arrey v. Barr*, 916 F.3d 1149, 1157 (9th Cir. 2019). We grant the petition on the withholding of removal claim.

2. We deny the petition on the CAT claim because the BIA did not commit legal error in its review.

First, the BIA properly considered "all evidence relevant to the possibility of future torture." 8 C.F.R. § 1208.16(c)(3). The BIA need not discuss each piece of evidence that it reviews. *Cole v. Holder*, 659 F.3d 762, 771 (9th Cir. 2011). Martinez argues that the BIA failed to mention "highly probative" or "potentially dispositive" evidence, which violates its obligation to consider all relevant evidence. *Parada v. Sessions*, 902 F.3d 901, 916 (9th Cir. 2018) (quoting *Cole*, 659 F.3d at 772). But the agency did not misstate any record evidence, and it referenced most or all of the facts that Martinez alleges it failed to consider. Thus, "the IJ did review the record, he was just not persuaded by it." *Gonzalez-Caraveo v. Sessions*, 882 F.3d 885, 894 (9th Cir. 2018).

Second, the BIA applied the correct legal standards. Martinez alleges that the BIA interpreted a lack of lasting injuries as per se evidence that past harm did not rise to the level of torture. But nothing in the record suggests the BIA misunderstood

the relevant standard. Its reference to a lack of lasting injuries was one of many observations supporting its conclusion that Martinez did not suffer past torture. Martinez also argues that the agency improperly narrowed the acquiescence standard, but the record does not show that the BIA or IJ required a higher level of awareness than the CAT standard requires. *Cf. Aguilar-Ramos v. Holder*, 594 F.3d 701, 705 (9th Cir. 2010) (holding that the agency improperly narrowed the acquiescence standard by requiring "actual knowledge or willful acceptance" of torture).

Third, the agency properly aggregated possible sources of torture. Martinez asserts that the agency failed to combine the potential risk of torture from gangs with the risk of torture from police. *See Cole*, 659 F.3d at 775. The BIA properly aggregated the alleged potential sources of torture because the IJ found that Martinez did not show any risk of future torture by the police at all. Although the agency "did not make it perfectly clear that it was performing an aggregate analysis," *Iraheta-Martinez v. Garland*, 12 F.4th 942, 960 (9th Cir. 2021), its "path may reasonably be discerned," and it did not commit legal error, *id.* (quoting *Garland v. Ming Dai*, 593 U.S. 357, 369 (2021)).

And fourth, the BIA did not err in its 2022 decision by relying on country conditions reports from 2017. Martinez submitted the evidence that he now objects to, and country conditions evidence is not per se stale after five years. Further,

Martinez does not allege that any material difference in the conditions in El Salvador has rendered the evidence stale. *See Parada*, 902 F.3d at 913–14. The agency thus properly considered the reports pursuant to its obligation to consider all relevant evidence. 8 C.F.R. § 1208.16(c)(3).

The petition is GRANTED in part and DENIED in part.