

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

OCT 24 2024

FOR THE NINTH CIRCUIT

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

ANIBAL HERNANDEZ ACOS,

Petitioner,

v.

MERRICK B. GARLAND, Attorney
General,

Respondent.

No. 23-3170

Agency No.
A206-622-864

MEMORANDUM*

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

Submitted October 22, 2024**
Pasadena, California

Before: TALLMAN, R. NELSON, and BRESS, Circuit Judges.

Anibal Hernandez-Acos, a native and citizen of El Salvador, petitions for review of a Board of Immigration Appeals (BIA) decision dismissing his appeal of an Immigration Judge (IJ) order denying his applications for asylum, 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).

removal, and protection under the Convention Against Torture (CAT).¹ We review the denial of withholding of removal and CAT relief for substantial evidence. *Sharma v. Garland*, 9 F.4th 1052, 1060, 1066 (9th Cir. 2021). “Under this standard, we must uphold the agency determination unless the evidence compels a contrary conclusion.” *Duran-Rodriguez v. Barr*, 918 F.3d 1025, 1028 (9th Cir. 2019). The BIA’s legal determinations, including whether a proposed particular social group is cognizable, are reviewed de novo. *Andrade v. Garland*, 94 F.4th 904, 910 (9th Cir. 2024). When the BIA, as here, references the IJ’s decision, we consider both decisions. *Garcia-Martinez v. Sessions*, 886 F.3d 1291, 1293 (9th Cir. 2018). We have jurisdiction under 8 U.S.C. § 1252, and we deny the petition.

1. To establish eligibility for withholding of removal, Hernandez-Acos must show “that it is more likely than not” that he will be persecuted if returned to El Salvador “because of” his membership in a particular social group or other protected ground. 8 U.S.C. § 1231(b)(3)(A); *Barajas-Romero v. Lynch*, 846 F.3d 351, 357–360 (9th Cir. 2017). Hernandez-Acos’s withholding claim fails for two reasons.

First, the IJ found that even if Hernandez-Acos’s proposed social group was cognizable, Hernandez-Acos did not demonstrate a nexus to a protected ground

¹ The IJ found that Hernandez-Acos’s asylum application was untimely. Hernandez-Acos did not seek review of that determination in either the BIA or this court.

because MS-13 made threats to extort money from him and not due to his membership in any protected group. *See Zetino v. Holder*, 622 F.3d 1007, 1016 (9th Cir. 2010) (holding that a “desire to be free from harassment by criminals motivated by theft or random violence by gang members bears no nexus to a protected ground”). Hernandez-Acos did not challenge the IJ’s nexus determination before the BIA, and the BIA deemed the issue waived. The lack of nexus is dispositive of Hernandez-Acos’s withholding of removal claim. This issue is unexhausted, and we may not consider it. *See* 8 U.S.C. § 1252(d)(1); *Umana-Escobar v. Garland*, 69 F.4th 544, 550 (9th Cir. 2023). This issue is also waived because Hernandez-Acos did not raise it in his opening brief. *See Corro-Barragan v. Holder*, 718 F.3d 1174, 1175 n.5 (9th Cir. 2013) (issues not raised in opening brief are waived).

Second, Hernandez-Acos’s proposed particular social group—“Central American business owners who are extorted by gang members and who the government is unwilling to protect”—is not cognizable. To demonstrate “membership in a particular social group,” an applicant must “establish that the group is (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question.” *Reyes v. Lynch*, 842 F.3d 1125, 1131 (9th Cir. 2016) (quoting *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 237 (BIA 2014)).

Hernandez-Acos’s proposed social group fails as a matter of law. “An

immutable characteristic is one that is either: (1) ‘beyond the power of an individual to change,’ or (2) ‘so fundamental to [individual] identity or conscience that it ought not be required to be changed.’” *Diaz-Reynoso v. Barr*, 968 F.3d 1070, 1076 (9th Cir. 2020) (alteration in original) (quoting *Matter of Acosta*, 19 I. & N. Dec. 211, 233–34 (BIA 1985)). We have held that being a “business owner is not an immutable characteristic because it is not fundamental to an individual’s identity.” *Macedo Templos v. Wilkinson*, 987 F.3d 877, 882–83 (9th Cir. 2021). Nor did Hernandez-Acos’s proposed particular social group satisfy the particularity requirement when it did not “provide a clear benchmark for determining who falls within the group.” *Acevedo Granados v. Garland*, 992 F.3d 755, 762 (9th Cir. 2021) (quoting *M-E-V-G-*, 26 I. & N. Dec. at 239–40); *see also Macedo Templos*, 987 F.3d at 882 (explaining that a proposed particular social group lacks particularity if “it could include large swaths of people and various cross-sections of community”).

2. Substantial evidence supports the agency’s denial of CAT relief. “To qualify for CAT relief, a petitioner must show that [h]e more likely than not will be tortured if [h]e is removed to h[is] native country.” *Vitug v. Holder*, 723 F.3d 1056, 1066 (9th Cir. 2013). Especially given the lack of evidence of past torture or serious physical harm, Hernandez-Acos did not demonstrate a particularized risk of torture. *See Dhital v. Mukasey*, 532 F.3d 1044, 1051 (9th Cir. 2008) (per curiam) (“[T]he petitioner must demonstrate that he would be subject to a ‘particularized threat of

torture” (quoting *Lanza v. Ashcroft*, 389 F.3d 917, 936 (9th Cir. 2004))). And although Hernandez-Acos highlights violent conditions in El Salvador, “evidence that a government has been generally ineffective in preventing or investigating criminal activities [does not] raise an inference that public officials are likely to acquiesce in torture, absent evidence of corruption or other inability or unwillingness to oppose criminal organizations.” *Garcia-Milian v. Holder*, 755 F.3d 1026, 1034 (9th Cir. 2014).

PETITION DENIED.²

² Hernandez-Acos’s motion to stay removal, Dkt. 2, is denied. The temporary stay of removal shall remain in place until the mandate issues.