

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

OCT 23 2026

FOR THE NINTH CIRCUIT

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

RICARDO A PORTILLO-ANDINO; et al.,

Petitioners,

v.

TODD BLANCHE, Attorney General,

Respondent.

No. 25-5976

Agency Nos.

A220-796-839

A220-796-840

A200-796-840

MEMORANDUM*

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

Argued and Submitted September 16, 2026
Portland, Oregon

Before: W. FLETCHER, FRIEDLAND, and DE ALBA, Circuit Judges;
Dissent by Judge DE ALBA

Petitioners Ricardo Alexander Portillo-Andino and his wife and minor child, natives and citizens of Honduras, petition for review of a decision of the Board of Immigration Appeals (“BIA”) affirming an order of an immigration judge (“IJ”) denying their applications for asylum and withholding of removal.¹ We have

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

¹ The IJ also denied Petitioners’ application for relief under the Convention Against Torture, but Petitioners did not appeal that conclusion to the BIA and do not challenge it here.

jurisdiction under 8 U.S.C. § 1252, and we deny the petition.

For asylum and withholding of removal claims, we review “questions of law de novo and the agency’s factual findings for substantial evidence.” *Urquia-Yanez v. Blanche*, 176 F.4th 622, 626 (9th Cir. 2026) (quoting *Ruiz-Colmenares v. Garland*, 25 F.4th 742, 748 (9th Cir. 2022)). We must uphold the agency’s findings of fact “unless any reasonable adjudicator would be compelled to conclude to the contrary.” *Urias-Orellana v. Bondi*, 607 U.S. 537, 545 (2026) (quoting 8 U.S.C. § 1252(b)(4)(B)).

1. The BIA’s past persecution decision is properly subject to our review. In its first decision, the BIA “affirm[ed] the Immigration Judge’s determination that the [Petitioners] did not suffer past persecution” and accordingly “dismissed in part” the appeal. The BIA then remanded to the IJ to “give full and fair consideration to [Petitioners’] risk of future persecution, considering all elements of asylum and statutory withholding of removal necessary to resolve the claim,” with “the claim” being the well-founded fear of future persecution claim. Both sentences imply that the remand was only for the purpose of reviewing the relocation issue. Then, after the IJ again found that Petitioners could safely and reasonably relocate, Petitioners attempted to re-raise the past persecution issue before the BIA, but the BIA held that “this issue was not before the Immigration Judge on remand.” Taken together, the BIA’s decisions are best read as issuing a limited remand and leaving the

BIA's original affirmance of the IJ's past persecution decision in place. We therefore may review the BIA's original determination that Petitioners did not suffer past persecution.

2. Substantial evidence supports the BIA's conclusion that Petitioners did not suffer past persecution based on a protected characteristic. First, the BIA reasonably concluded that Petitioners did not suffer harm rising to the level of persecution. Although MS-13 gang members told Petitioners that they would be killed if they did not pay a "war tax" to the gang, the record does not compel the conclusion that those threats were "so menacing as to cause significant actual suffering or harm." *Duran-Rodriguez v. Barr*, 918 F.3d 1025, 1028 (9th Cir. 2019) (quoting *Lim v. INS*, 224 F.3d 929, 936 (9th Cir. 2000)); *see also Sharma v. Garland*, 9 F.4th 1052, 1062 (9th Cir. 2021) (describing when threats rise to the level of persecution). Additionally, the BIA concluded that any threats made to Petitioner's brother, Jose, were not directed toward Petitioners, and that conclusion was supported by both the IJ's findings and the underlying record. The record does not compel the conclusion that the threats experienced by Petitioners, though troubling, rose to the level of persecution, even considered cumulatively. *See Villegas Sanchez v. Garland*, 990 F.3d 1173, 1179 (9th Cir. 2021) (agreeing with BIA's conclusion below that "unfulfilled threats generally constitute harassment rather than persecution" (citation modified)).

3. Substantial evidence also supports the BIA's conclusion that any harm experienced by Petitioners lacked a nexus to Petitioners' membership in a particular social group, specifically their family group.² The BIA reasonably concluded that any threats directed against Petitioner were not because of his relationship with his family. Although the MS-13 gang members apparently abstained from extorting a "war tax" from Petitioners because Petitioner's brother was in the gang and then began seeking those payments after Petitioner's brother was killed, those facts show that Petitioners lost protection because of the loss of their family relationship, not that they were targeted because of their family relationship. The agency also reasonably concluded that Jose was not killed because he was Petitioner's brother, bolstering the conclusion that MS-13 was not targeting Petitioner's family specifically.

4. Substantial evidence also supports the BIA's conclusion that Petitioners did not have a well-founded fear of future persecution because they had not shown that they could not safely relocate anywhere in Honduras. Because the BIA held that Petitioners had not shown past persecution, Petitioners bore the burden of showing that they had a well-founded fear of future persecution as an alternative basis for

² Before the IJ, Petitioners also argued that the threats they experienced were based on their membership in the particular social group "owners of small businesses" and on their political opinion. After the IJ found no nexus to these characteristics, however, Petitioners did not challenge that conclusion on appeal to the BIA or before this court.

asylum. 8 C.F.R. § 1208.13(b)(1). The BIA affirmed the IJ's factual finding that Petitioners had not shown that the MS-13 gang could find them anywhere in Honduras. That conclusion was reinforced by the fact that Petitioners have family members who lived safely in Honduras after Jose's murder, including some who still live there. For instance, Petitioner's father, who had been a direct target of the threat the gang made to Jose, safely relocated to a different part of Honduras before eventually leaving the country.³ The BIA's conclusion that Petitioners could safely relocate is accordingly supported by substantial evidence. The BIA also affirmed the IJ's conclusion that relocation would be reasonable, given Petitioner's age, education, and work history. Although the BIA's affirmance of this conclusion was summary, Petitioners did not challenge the reasonableness of relocation in their briefs before the BIA.

5. The BIA did not engage in improper factfinding, and its conclusions are supported by the IJ's factual findings.⁴ Petitioners point to certain statements in

³ The BIA also relied on the fact that Petitioners had themselves relocated to San Pedro Sula for several months prior to coming to the United States and had not been threatened during that time. Petitioners dispute the import of that fact, arguing that they were in hiding during that time. Because other facts are sufficient to support the BIA's conclusion, it is not necessary to resolve that dispute.

⁴ Petitioners argued in their opening brief that the BIA improperly engaged in factfinding. The Government did not respond to that argument in any way in its answering brief and thereby forfeited any argument that the BIA did not engage in improper factfinding. "Generally, an appellee waives any argument it fails to raise in its answering brief," *De Leon v. Garland*, 51 F.4th 992, 1004 (9th Cir. 2022)

the BIA’s opinions that, in their view, found facts not found below, but each of those statements is supported by facts found by the IJ.⁵ First, the BIA relied on the finding that when the gang threatened Jose before he was killed, the gang did not threaten harm to Petitioners. Petitioners assert that the IJ did not make that finding. Although the BIA cited to the hearing transcript in its opinion, the BIA’s conclusion is also supported by the IJ’s finding that the gang boss told Jose he would “deal with the things he loved the most, that he would end Jose’s father’s life and kill Jose.” The BIA fairly read that as excluding Petitioners from the threat.

Second, Petitioners argue that the BIA improperly found facts that the “war tax” threats “did not involve personal threats of imminent violence” and were “generic” “extortion,” “like that experienced by many business owners in Honduras.” However, the facts relied upon by the BIA are drawn from the IJ’s findings of fact. Despite recognizing that the gang told Petitioner that “if he did

(quoting *United States v. Dreyer*, 804 F.3d 1266, 1277 (9th Cir. 2015) (en banc)), even if the appellee believes the argument is “obvious,” as the Government unhelpfully contended at oral argument. Nonetheless, we forgive the forfeiture because the issue requires us to address only pure questions of law, and to avoid the uneconomical possibility of remanding the case to an agency that already rendered a sound decision.

⁵ As Petitioners’ counsel conceded at oral argument, the IJ’s summary of Petitioner’s testimony, which the IJ found to be credible and relied on throughout both of the IJ’s opinions, was functionally part of the IJ’s findings of fact.

not pay the tax he would be killed,” the IJ concluded that the threats were “more consistent with harassment” and not “so menacing as to cause significant actual suffering or harm,”” citing *Duran-Rodriguez v. Barr*, 918 F.3d at 1028, and *Sharma v. Garland*, 9 F.4th at 1062, for the type of threats required to rise to the level of persecution. The BIA, citing those same cases, also found that the threats did not rise to the level of persecution. The BIA’s conclusion that the “war tax” threats were generic and experienced by many business owners is supported by the IJ’s finding that the gang told Petitioner that he was being charged the war tax because his brother was no longer in MS-13. In sum, every fact relied upon by the BIA is reflected in the IJ’s factual findings.

6. Petitioners have not shown that either the BIA or the IJ improperly failed to consider the evidence in the record. In the absence of reason to believe otherwise, the agency is presumed to have considered the evidence before it, even if not every piece of evidence is mentioned or analyzed. *Cruz v. Bondi*, 146 F.4th 730, 739 (9th Cir. 2025).

7. The temporary administrative stay is lifted, and Petitioners’ motion to stay removal (Dkt. No. 4) is denied.

PETITION DENIED.

Portillo-Andino, et al. v. Blanche, Case No. 25-5976

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DE ALBA, Circuit Judge, dissenting:

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I would grant the petition in full and would remand to the BIA because the BIA engaged in improper fact-finding when affirming the IJ's past persecution determination. The BIA's "regulations prohibit the [BIA] from engaging in de novo review of findings of fact determined by an IJ." *Rodriguez v. Holder*, 683 F.3d 1164, 1170 (9th Cir. 2012) (quoting 8 C.F.R. § 1003.1(d)(3)(i)) (simplified)). "Where the BIA engages in de novo review of an IJ's factual findings instead of limiting its review to clear error, it has committed an error of law." *Id.*

Here, instead of applying a clear error review to the IJ's factual findings regarding past persecution, the BIA improperly "substitut[ed] its own view of the evidence for the IJ's." *Soto-Soto v. Garland*, 1 F.4th 655, 661 (9th Cir. 2021). Specifically, for the nexus element related to the Petitioners' past persecution, the BIA pieced together or reworked facts in the record to create a nexus analysis—one the IJ did not make. As one example, the BIA reworked the facts in the record to find that Petitioners' fear was "magnified by the then-recent killing" of Jose, but that the "evidence does not reflect that the gang killed [Jose] because of animus against his family, or that they blamed [Petitioners] for [Jose's] transgressions." A finding not made by the IJ. Thus, the BIA engaged in improper factual finding. *See Perez-Palafox v. Holder*, 744 F.3d 1138, 1146 (9th Cir. 2014) (holding that the

“BIA engaged in improper factfinding because the BIA based its determination on factual findings not made by the IJ”).

Even assuming *arguendo* that it is not clear whether the BIA’s reworking of the facts constitutes improper factual findings, this also requires remand for its ambiguity. *See Lona v. Barr*, 958 F.3d 1225, 1231 n.7 (9th Cir. 2020) (noting that it is “preferable that the agency show its work . . . so that we are not left guessing at its reasonings for denying relief” (simplified)). Additionally, the government failed to respond to Petitioners’ argument that the BIA engaged in improper factual finding, thus forfeiting this issue. *See Hamer v. Neighborhood Hous. Servs. of Chicago*, 583 U.S. 17, 20 n.1 (2017) (“Forfeiture is the failure to make the timely assertion of a right.” (quotation modified)); *see also United States v. Dreyer*, 804 F.3d 1266, 1277 (9th Cir. 2015) (en banc); *see Clem v. Lomeli*, 566 F.3d 1177, 1182 (9th Cir. 2009) (“Generally, an appellee waives any argument it fails to raise in its answering brief.”) Although the majority correctly recognizes that the issue presents a question of law, its resolution depends on a record that, as discussed above, is either insufficiently developed or, at a minimum, ambiguous.

Accordingly, none of the three circumstances in which the Court may exercise its discretion to excuse forfeiture is present. *See Moran v. Screening Pros, LLC*, 943 F.3d 1175, 1180 (9th Cir. 2019) (citing *Ruiz v. Affinity Logistics Corp.*, 667 F.3d 1318, 1322 (9th Cir. 2012)) (citing *Bolker v. Comm’r*, 760 F.2d 1039, 1042 (9th Cir.

1985)) (“[D]iscretion to make an exception to waiver under three circumstances:

(1) ‘in the “exceptional” case in which review is necessary to prevent a miscarriage of justice or to preserve the integrity of the judicial process,’ (2) ‘when a new issue arises while appeal is pending because of a change in the law,’ and, (3) ‘when the issue presented is purely one of law and either does not depend on the factual record developed below, or the pertinent record has been fully developed.’”).

Therefore, I respectfully dissent.