FILED
United States Court of Appeals
Tenth Circuit

September 15, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ELMER LEONEL BARRERA-CRUZ,

Petitioner,

v.

MERRICK GARLAND,
United States Attorney General,

Respondent.

No. 23-9501
(Petition for Review)

ORDER AND JUDGMENT*

Before **HOLMES**, Chief Judge, **HARTZ** and **PHILLIPS**, Circuit Judges.

Elmer Barrera-Cruz, a native and citizen of Guatemala, petitions for review of a decision by the Board of Immigration Appeals (BIA) affirming the denial by an Immigration Judge (IJ) of his applications for withholding of removal and for relief

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* After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

under the Convention Against Torture (CAT). Exercising jurisdiction under 8 U.S.C. § 1252, we deny the petition for review.[1]

BACKGROUND

Mr. Barrera-Cruz entered the United States in 2006. In 2014, the Department of Homeland Security served him with a Notice to Appear (NTA), charging him with removability under 8 U.S.C. § 1182(a)(6)(A)(i). Mr. Barrera-Cruz admitted to the allegations in the NTA and conceded removability but applied for withholding of removal and CAT protection. He asserted he was afraid to return to Guatemala because of gang violence.

During his merits hearing before the IJ, Mr. Barrera-Cruz testified that his parents owned a small store in Guatemala and that he was present in 2005 when members of the Mara Salvatrucha (MS-13) gang entered the store and demanded his parents pay a monthly "quota." He testified that, although his parents initially paid, they struggled to come up with the amount demanded until December of 2005, when they shut down the business completely. Mr. Barrera-Cruz left Guatemala on January 9, 2006. He further testified that, after he left, MS-13 members continued to look for him and that the last time they came to his parents' home to do so was sometime around July 2006.

Mr. Barrera-Cruz testified there was a standing order to kill him in the MS-13 gang, and such an order "has to be followed until [that] person dies or until they . . .

[1] We grant the motion to extend the deadline of Petitioner's reply brief, and we accept the brief as timely filed.

make the person die." R. at 146. He testified neither he nor his family members sought the assistance of the Guatemalan police and that, although he has two sisters in Guatemala, neither had ever had any problems with the gang. He was unaware of any time the gang attempted to look for him at the home of his children's mother, and he acknowledged the gang had never harmed either of his two children (ages 7 and 3 in 2005).

The IJ denied both requested forms of relief. The IJ found Mr. Barrera-Cruz to be generally credible but found there was some conflict between his testimony and the sworn declaration of his former partner regarding how frequently MS-13 gang members went looking for him in Guatemala in 2006 after he left the country. The IJ also found "insufficient evidence to find that there is, in fact, a standing order to kill [Mr. Barrera-Cruz] based on a business that stopped paying the quota and shut down nearly 14 years ago." *Id*. at 76. These findings vitiated the claims for withholding of removal and CAT protection.

Mr. Barrera-Cruz appealed to the BIA, which dismissed the appeal after concluding, among other things, that the IJ's findings were not clearly erroneous. On the CAT claim, the BIA concluded that "even assuming, arguendo, the Guatemalan government is willfully blind to torture by gangs, [Mr. Barrera-Cruz] has not established that *he* is more likely than not to be tortured." *Id*. at 5–6 (emphasis added). This petition for review followed.

DISCUSSION

Because a single board member issued the BIA decision, we review it "as the final agency determination and limit our review to issues specifically addressed therein." *Diallo v. Gonzales*, 447 F.3d 1274, 1279 (10th Cir. 2006). "However, when seeking to understand the grounds provided by the BIA, we are not precluded from consulting the IJ's more complete explanation of those same grounds." *Uanreroro v. Gonzales*, 443 F.3d 1197, 1204 (10th Cir. 2006) (internal citation omitted). "We consider any legal questions de novo, and we review the agency's findings of fact under the substantial evidence standard. Under that test, our duty is to guarantee that factual determinations are supported by reasonable, substantial and probative evidence considering the record as a whole." *Elzour v. Ashcroft*, 378 F.3d 1143, 1150 (10th Cir. 2004). "To obtain reversal of factual findings, a petitioner must show the evidence he presented was so compelling that no reasonable factfinder could find as the BIA did." *Gutierrez-Orozco v. Lynch*, 810 F.3d 1243, 1245 (10th Cir. 2016) (internal quotation marks omitted).

The Attorney General "may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1231(b)(3)(A). "[T]o qualify for withholding of removal, applicants must prove a *clear probability* of persecution . . . ." *Addo v. Barr*, 982 F.3d 1263, 1273 (10th Cir. 2020) (internal quotation marks omitted). "A 'clear probability' means the persecution is more likely than not to

occur upon return." *Uanreroro*, 443 F.3d at 1202. To obtain CAT protection, an applicant must establish it is more likely than not the applicant will be tortured in the country of removal by, at the instigation of, or with the acquiescence of a public official or one acting in an official capacity. 8 C.F.R. §§ 1208.16–18.

Reviewing the whole record, we conclude substantial evidence supports the factual findings of the IJ and BIA that Mr. Barrera-Cruz is not entitled to withholding of removal or CAT protection. Evidence supporting those findings included the lack of harm to any of Mr. Barrera-Cruz's family members, the testimony that MS-13 gang members only physically saw Mr. Barrera-Cruz one time when they came to his parents' store in 2005 demanding a quota, the substantial period of time elapsed between that incident and the merits hearing in 2018, and the conflicting testimony regarding how many times gang members allegedly came looking for him after he left Guatemala. Because we conclude substantial evidence supports the finding that Mr. Barrera-Cruz did not prove a clear probability of future persecution, we need not review whether the BIA was correct to conclude that any such persecution would not be based on a protected ground.

The deficiencies of Mr. Barrera-Cruz's claim for withholding of removal likewise undermine his claim for CAT protection. He devotes a large portion of his opening brief to the issue of whether country conditions evidence in Guatemala sufficiently established the government was willfully blind to gang violence, but he does not challenge the BIA's finding that he failed to present sufficient evidence that he, individually and specifically, would more likely than not face torture in

Guatemala. This finding is independently dispositive of his CAT claim. *See Escobar-Hernandez v. Barr*, 940 F.3d 1358, 1362 (10th Cir. 2019) ("[B]y itself, pervasive violence in an applicant's country generally is insufficient to demonstrate the applicant is more likely than not to be tortured upon returning there."). And Mr. Barrera-Cruz's failure to challenge this finding in his opening brief waives any review of this independently dispositive issue. *See Murrell v. Shalala*, 43 F.3d 1388, 1390 (10th Cir. 1994) (concluding because an unchallenged agency finding was "by itself, a sufficient basis for" the agency to deny relief, "success on appeal is foreclosed—regardless of the merit of [petitioner's] arguments relating to" a separate ground for the denial of relief).

CONCLUSION

We deny the petition for review.

Entered for the Court

Jerome A. Holmes
Chief Judge