[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-12830
Non-Argument Calendar

Agency No. A208-743-002

JESUS MATEO-NICOLAS,
J.J.M.A.,

Petitioners,

versus

U.S. ATTORNEY GENERAL,

Respondent.

Petition for Review of a Decision of the
Board of Immigration Appeals

(March 10, 2020)

Before GRANT, LUCK, and ANDERSON, Circuit Judges.

PER CURIAM:

Jesus Mateo-Nicolas, the lead petitioner, and his son, J.J.M.A.,[1] seek review of the Board of Immigration Appeals' ("BIA") order summarily affirming the Immigration Judge's ("IJ") denial of his application for asylum. Mateo-Nicolas raises two arguments on appeal: (1) his 2015 notice to appear ("NTA") failed to comply with the claims-processing rule and his case should be dismissed; and (2) the record compels the conclusion that he was eligible for asylum. We address each issue in turn, and ultimately dismiss Mateo-Nicolas's petition in part and deny it in part.

I. NOTICE TO APPEAR

When the BIA issues a summary affirmance of the IJ's opinion under 8 C.F.R. § 1003.1(e)(4), we review the IJ's opinion, not the BIA's decision. *See Mendoza v. U.S. Att'y Gen.*, 327 F.3d 1283, 1284 n.1 (11th Cir. 2003). We review *de novo* our own subject matter jurisdiction. *Jeune v. U.S. Att'y Gen*, 810 F.3d 792, 799 (11th Cir. 2016). We are precluded from reviewing a final order of removal if a petitioner has failed to exhaust all administrative remedies available to him as of right. *Id.* at 800; 8 U.S.C. § 1252(d)(1).

"[W]hen a petitioner has neglected to assert an error before the BIA that he later attempts to raise before us, the petitioner has failed to exhaust his administrative remedies." *Jeune*, 810 F.3d at 800. "Moreover, to exhaust a claim

[1] Mateo-Nicolas's son is a derivative beneficiary on Mateo-Nicolas's asylum claim.

before the BIA, it is not enough that the petitioner has merely identified an issue to that body. A petitioner has not exhausted a claim unless he has both raised the 'core issue' before the BIA, and also set out any discrete arguments he relies on in support of that claim." *Id.* (internal citations omitted).

Regarding the initiation of removal proceedings, the person must be served with an NTA specifying, *inter alia*, "[t]he time and place at which the proceedings will be held." Immigration and Nationality Act ("INA") § 239(a)(1), 8 U.S.C. § 1229(a)(1). In *Pereira*, decided after the agency issued Mateo-Nicolas's NTA, the Supreme Court concluded that a putative NTA that did not specify either the time or place of the removal proceedings did not trigger the stop-time rule for cancellation of removal. *Pereira v. Sessions*, 138 S. Ct. 2105, 2110 (2018). The Supreme Court reasoned that an NTA that lacked such information was "not a notice to appear under section 1229(a), and so [did] not trigger the stop-time rule." *Id.* at 2113-14 (quotation marks omitted).

In *Perez-Sanchez*, we addressed a petitioner's claim under *Pereira* that the IJ "never had jurisdiction over his removal case" because the NTA "did not include either the time or date of his removal hearing." *Perez-Sanchez v. U.S. Att'y Gen.*, 935 F.3d 1148, 1150 (11th Cir. 2019). We determined that the NTA was deficient under section 1229(a) for failing to specify the time and date of the removal hearing, but it did not deprive the agency of jurisdiction over the removal

proceedings because the statutory "time-and-place requirement," like 8 C.F.R. § 1003.14, did not "create a jurisdictional rule," but was instead a "claim-processing rule." *Id.* at 1154–55. However, we noted that, to the extent that Perez-Sanchez argued he was entitled to a remand because his NTA violated the claim-processing rules, he failed to exhaust this claim before the agency. *Id.* at 1157. Accordingly, we dismissed that part of his petition for lack of jurisdiction for failure to exhaust. *Id.*

Here, we conclude that we do not have jurisdiction to hear Mateo-Nicolas's petition in this respect because he failed to raise this argument before the BIA. While he briefly mentioned jurisdiction in his brief to the BIA, he apparently concedes that it was without sufficient support to have exhausted the claim. But in any event, even if he *had* properly exhausted his jurisdictional claim, our decision in *Perez-Sanchez* forecloses his argument. Accordingly, Mateo-Nicolas's petition is dismissed in this respect.

II. ASYLYM

We next move to Mateo-Nicolas's claim that he was entitled to asylum because he established a well-founded fear of future persecution on account of his membership in the particular social group of "[y]oung men who are targeted by gangs and not having any protection from the police or the government due to

widespread corruption." The IJ determined that Mateo-Nicolas's fear of future persecution was highly speculative.

In this respect, we review legal determinations *de novo*. *Diallo v. U.S. Att'y Gen.*, 596 F.3d 1329, 1332 (11th Cir. 2010). Factual determinations are reviewed under the substantial-evidence test, which requires the reviewing court to "'affirm the BIA's decision if it is supported by reasonable, substantial, and probative evidence on the record considered as a whole.'" *Id.* (quoting *Al Najjar v. Ashcroft*, 257 F.3d 1262, 1283–84 (11th Cir. 2001)). We review the record evidence in the light most favorable to the agency's decision and draw all reasonable inferences in favor of that decision. *Id.* We review *de novo* whether a group proffered by an asylum applicant constitutes a particular social group under the INA. *See Amezcua-Preciado v. U.S. Att'y Gen.*, 943 F.3d 1337, 1341 (11th Cir. 2019). However, this *de novo* review is informed by *Chevron* deference—in other words, we "defer[] to the reasonable interpretation of the ambiguous statutory phrase 'particular social group' made by three-member panel, precedential BIA decisions." *Id.* at 1306, 1308; *see also Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984) (requiring deference to an agency's reasonable interpretation of ambiguous terms in the statute that it administers).

An applicant for asylum must meet the INA's definition of refugee. INA § 208(b)(1), 8 U.S.C. § 1158(b)(1). The definition of refugee includes any person

"'who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of,'" his country of nationality "'because of persecution or a well-founded fear of persecution on account of' a protected ground, including membership in a particular social group." *Amezcua-Preciado*, 943 F.3d 1337, 1342 (quoting INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A)). The protected ground must have been, or will be, "'at least one central reason for persecuting the applicant.'" *Id.* (quoting INA § 208(b)(1)(B)(i), 8 U.S.C. § 1158(b)(1)(B)(i)). The asylum applicant bears the burden of showing "refugee" status. *Id.*

To meet this burden, the applicant must, with specific and credible evidence, establish (1) past persecution on account of a statutorily listed factor, or (2) a "well-founded fear" that the statutorily listed factor will cause such future persecution. *Diallo*, 596 F.3d at 1332 (citing 8 C.F.R. §§ 208.13(a)–(b); *Al Najjar*, 257 F.3d at 1287). Where an applicant does not allege past persecution, he may nonetheless demonstrate a well-founded fear of future persecution by proving a subjectively genuine and objectively reasonable fear of persecution due to protected grounds. *Kazemzadeh v. U.S. Att'y Gen.*, 577 F.3d 1341, 1352 (11th Cir. 2009). The subjective component is generally satisfied by the applicant's credible testimony that he genuinely fears persecution. *See Al Najjar*, 257 F.3d at 1289. In most cases, the objective prong can be fulfilled either by establishing past

persecution or that he has a "good reason to fear future persecution." *Id.* "[A]n applicant establishes a well-founded fear when he establishes that there is 'a reasonable possibility he or she would be singled out individually for persecution' or that he is a member of, or is identified with, a group that is subjected to a pattern or practice of persecution." *Djonda v. U.S. Att'y Gen.*, 514 F.3d 1168, 1174 (11th Cir. 2008) (quoting 8 C.F.R. § 208.13(b)(2)(iii)).

Persecution is "an extreme concept, requiring more than a few isolated incidents of verbal harassment or intimidation, and . . . mere harassment does not amount to persecution." *Diallo*, 596 F.3d at 1333 (quotation marks omitted); *see also Silva v. U.S. Att'y Gen.*, 448 F.3d 1229, 1237 (11th Cir. 2006) (holding that death threats and threatening anonymous phone calls were merely harassment and, without more, did not qualify as persecution). Verbal threats of imprisonment combined with a "minor" beating does not compel a finding of past persecution. *See Djonda*, 514 F.3d at 1174. Threats or harm to a petitioner's family member do not constitute evidence of persecution against the petitioner "where there has been no threat or harm directed against the petitioner." *Rodriguez v. U.S. Att'y Gen.*, 735 F.3d 1302, 1308 (11th Cir. 2013); *see also De Santamaria v. U.S. Att'y Gen.*, 525 F.3d 999, 1009, n.7 (11th Cir. 2008) (noting that harm to another person may constitute evidence of persecution against a petitioner where the harm "concomitantly threatens the petitioner").

The INA statute itself does not define particular social group, but we have deferred to the BIA's formulation of criteria for determining whether a particular group qualifies. *Amezcua-Preciado*, 943 F.3d at 1342. "Under the first of these criteria, the group's members must have a 'common characteristic other than their risk of being persecuted,' and that characteristic must be immutable or fundamental to a member's individual conscience or identity." *Id.* (quoting *Castillo-Arias v. U.S. Att'y Gen.*, 446 F.3d 1190, 1193-94, 1196-97 (11th Cir. 2006)). "However, because 'particular social group' should not be a catch-all for all persons alleging persecution who do not fit elsewhere, the risk of persecution alone does not create a particular social group within the meaning of the INA." *Id.* (quotation omitted). Second, the particular social group must have sufficient social distinction so that the society perceives them as a district group. *Id.* Finally, a group must be "defined with particularity," meaning it must "be discrete and have definable boundaries," and not be "amorphous, overbroad, diffuse, or subjective." *Id.* (quotation marks omitted).

Two precedential BIA decisions indicate that resistance to gang membership does not constitute a particular social group: *Matter of S–E–G–*, 24 I. & N. Dec. 579 (BIA 2008), and *Matter of E–A–G–*, 24 I. & N. Dec. 591 (BIA 2008). In the first decision, the BIA concluded that Salvadoran youth who resisted gang membership and their family members did not constitute a particular social group

because the proposed group lacked social distinction and particularity. *See Matter of S–E–G–*, 24 I. & N. Dec. at 584–88. In the latter, the BIA explained that young Honduran men resistant to gang membership lacked the requisite social distinction to constitute a particular social group. *See Matter of E–A–G–*, 24 I. & N. Dec. at 594.

Here, we conclude that substantial evidence supports the IJ's finding that Mateo-Nicolas's fear of future persecution was highly speculative. Any potential gang recruitment was directed at his son, who was merely included as a derivative in Mateo-Nicolas's asylum application. But the relevant inquiry is whether the *applicant* had a well-founded fear of future persecution and whether the harm was tethered to his membership in his proposed social group of young men who are targeted by gangs. Mateo-Nicolas, however, did not allege that *he* had any gang encounters.

Moreover, his proposed particular social group lacks social distinction and particularity. But even if it were sufficient, while his son may have fit into the group, he did not. Therefore, Mateo-Nicolas was not eligible for asylum because he did not meet his burden of showing an objectively reasonable, well-founded fear of future persecution on account of his membership in a particular social group. Thus, we deny his petition in this respect.

PETITION DISMISSED IN PART AND DENIED IN PART.