

[DO NOT PUBLISH]

In the
United States Court of Appeals
For the Eleventh Circuit

No. 21-10497

Non-Argument Calendar

BERSAIN TOMAS-PEREZ,

Petitioner,

versus

U.S. ATTORNEY GENERAL,

Respondent.

Petition for Review of a Decision of the
Board of Immigration Appeals
Agency No. A208-574-680

Before JILL PRYOR, LUCK, and LAGOA, Circuit Judges.

PER CURIAM:

Bersain Tomas-Perez petitions for review of the decision of the Board of Immigration Appeals (the “Board”) affirming the immigration judge’s denial of his applications for asylum and withholding of removal. After careful consideration, we deny the petition in part and dismiss it in part.

I. FACTUAL BACKGROUND

Tomas-Perez is a native and citizen of Guatemala. In 2016, when he was 17 years old, he entered the United States. After entering the country, he was charged with being removable as a noncitizen present in the United States without having been admitted or paroled. *See* 8 U.S.C. § 1182(a)(6)(A)(i). In immigration proceedings, Tomas-Perez conceded removability and applied for asylum and withholding of removal.¹ He claimed that he feared persecution if he returned to Guatemala based on his membership in the particular social group consisting of street children who had

¹ Tomas-Perez also applied for protection under the Convention Against Torture (“CAT”), and the immigration judge denied his application. Because Tomas-Perez does not raise any arguments in his petition for review regarding the denial of his CAT claim, we do not discuss it further. *See Sepulveda v. U.S. Att’y Gen.*, 401 F.3d 1226, 1228 n.2 (11th Cir. 2005) (explaining when a petitioner fails to offer argument on an issue on appeal to us, that issue is abandoned).

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been abandoned by their parents and because of his race, as he is an indigenous Mayan.

An immigration judge held a hearing on Tomas-Perez's application. The evidence before the immigration judge reflected that Tomas-Perez and his family were members of the Mam Maya, an indigenous group in Guatemala. When Tomas-Perez was approximately five years old, his father died, leaving behind his mother and five young children. Because Tomas-Perez's mother was unable to find work in Guatemala and could not afford food and housing for her family, she left Guatemala.

Over the next several years, Tomas-Perez moved between Mexico and Guatemala, living with different family members. Initially he lived in Mexico with his older sister, Noemi. Noemi beat and mistreated him. He moved back to Guatemala and lived with his grandmother. But when his grandmother became severely ill, he returned to Mexico and again lived with Noemi.

At this point, Tomas-Perez, who was twelve years old, began to work. Noemi collected his earnings from his employer and refused to give him the money he had earned. When the employer began to pay Tomas-Perez directly, Noemi became angry and threw him out of the house. For a period of time, Tomas-Perez's employer provided him with housing. When Noemi discovered this arrangement, she called the police on the employer, who ended the employment. Tomas-Perez was left homeless and begging for money.

Tomas-Perez's mother urged him to leave Mexico and move back to Guatemala. He was unwilling to return to Guatemala because he believed there was nothing there for him but "the streets and the gangs." AR 258.² Instead, he came to the United States and applied for asylum and withholding of removal.

The record before the immigration judge who reviewed Tomas-Perez's application for asylum and withholding of removal also included evidence about country conditions in Guatemala. Although Guatemala law guaranteed indigenous persons equal rights, the country condition reports reflected that indigenous persons in Guatemala remained largely outside the political, economic, social, and cultural mainstream; had limited educational opportunities; and faced widespread discrimination.

After reviewing the evidence, the immigration judge denied Tomas-Perez's application for asylum and withholding of removal. Regarding the asylum claim, the immigration judge began by explaining that what happened to Tomas-Perez in Mexico—suffering harm at the hands of his sister—could not form the basis for his asylum claim. Because Mexico was not Tomas-Perez's country of nationality and Mexico had not been designated as an alternate country of removal, the questions of whether Tomas-Perez had faced past persecution or would suffer future

² "AR" refers to the administrative record.

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persecution in Mexico were irrelevant to his asylum claim.³ The immigration judge instead looked at whether Tomas-Perez had established that he had faced or would face persecution in Guatemala, which was his country of nationality.

The immigration judge provided several reasons for denying Tomas-Perez's petition for asylum. For one, the immigration judge concluded that Tomas-Perez failed to demonstrate a sufficient nexus between his race or particular social group and the persecution he claimed he would face in Guatemala. The immigration judge reasoned that any harm Tomas-Perez would face in Guatemala would not be "because of his race or membership in the proposed particular social group." *Id.* at 50.

For another, the immigration judge rejected Tomas-Perez's proposed particular social group of street children abandoned by their parents. The immigration judge determined that this proposed group was not a cognizable social group because being a child was not an immutable characteristic. But even if it could be a cognizable social group, the immigration judge concluded, Tomas-Perez, who was over 18 years old, was no longer a member of the group.

³ Given this determination, the immigration judge did not address whether the harm that Tomas-Perez experienced in Mexico at the hands of his sister rose to the level of persecution.

The immigration judge also denied Tomas-Perez's application for withholding of removal. The immigration judge explained that the standard regarding the probability of being subjected to persecution for a withholding-of-removal claim was more demanding than the standard for an asylum claim. Because Tomas-Perez failed to meet the relevant standard for asylum, the immigration judge concluded, he could not satisfy the standard for withholding of removal.

Tomas-Perez sought review before the Board, arguing that the immigration judge erred in denying his applications for asylum and withholding of removal. He argued that his credible testimony established that he had suffered past persecution in Guatemala because the Mayan population is treated differently in Guatemala and as a child he had been orphaned and forced to live in the streets. Because he established past persecution, he argued, he enjoyed a presumption of a well-founded fear of future persecution that the government would be unable to overcome.

The Board dismissed Tomas-Perez's appeal. The Board expressly "adopt[ed] and affirm[ed]" the immigration judge's order denying Tomas-Perez's claims for asylum and withholding of removal. *Id.* at 3. The Board acknowledged that Tomas-Perez had endured "abuse and hardship . . . as a youth in Mexico." *Id.* But, the Board explained, Tomas-Perez's asylum claim was "premised on him being a refugee from his native Guatemala." *Id.* The Board concluded that Tomas-Perez failed to establish that he suffered past persecution because the harm that he "suffered in Mex-

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ico d[id] not support a claim of past persecution in Guatemala.”
Id.

Tomas-Perez now petitions for our review of the Board’s decision.

II. STANDARD OF REVIEW

We review the Board’s decision only, except where the Board expressly adopted or agreed with the immigration judge’s decision, in which case we review both decisions. *See Jathursan v. U.S. Att’y Gen.*, 17 F.4th 1365, 1372 (11th Cir. 2021). Here, the Board expressly adopted the immigration judge’s decision.

On appeal from the Board’s decision, we review legal questions *de novo*. *Zhou Hua Zhu v. U.S. Att’y Gen.*, 703 F.3d 1303, 1307 (11th Cir. 2013). Factual determinations are reviewed under a substantial evidence standard, which requires us to “view the record evidence in the light most favorable to the agency’s decision and draw all reasonable inferences in favor of that decision.” *Adefemi v. Ashcroft*, 386 F.3d 1022, 1026–27 (11th Cir. 2004) (en banc). Findings of fact may be reversed “only when the record compels a reversal.” *Id.* at 1027. “[T]he mere fact that the record may support a contrary conclusion is not enough to justify a reversal of the administrative findings.” *Id.*

III. LEGAL ANALYSIS

In his petition for review, Tomas-Perez challenges the denial of his claims for asylum and withholding of removal. We consider each claim in turn.

A. *Asylum*

An undocumented immigrant who is present in the United States may apply for asylum. 8 U.S.C. § 1158(a)(1). The government has discretion to grant asylum if an applicant establishes that he is a “refugee.” *Id.* § 1158(b)(1)(A). A “refugee” is defined as:

any person who is outside any country of such person’s nationality . . . and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

Id. § 1101(a)(42)(A).

To establish eligibility for asylum, an applicant must, with specific and credible evidence, show “(1) past persecution on account of a statutorily listed factor” or “(2) a well-founded fear that the statutorily listed factor will cause future persecution.” *Ruiz v. U.S. Att’y Gen.*, 440 F.3d 1247, 1257 (11th Cir. 2006) (internal quotation marks omitted). 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.” *Sepulveda v. U.S. Att’y Gen.*, 401 F.3d 1226, 1231 (11th Cir. 2005) (alteration adopted) (internal quotation marks omitted). In addition, “a petitioner cannot show past persecution based on threatening or harmful acts against family members where the

petitioner has not been directly threatened or harmed.” *Rodriguez v. U.S. Att’y Gen.*, 735 F.3d 1302, 1309 (11th Cir. 2013).

When an applicant demonstrates past persecution, there arises a rebuttable presumption that he has a well-founded fear of persecution. *Sepulveda*, 401 F.3d at 1231. That presumption may be rebutted if the government establishes that “[t]here has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution” or “[t]he applicant could avoid future persecution by relocating to another part of the applicant’s country of nationality . . . and under all the circumstances, it would be reasonable to expect the applicant to do so.” 8 C.F.R. § 208.13(b)(1)(i)(A), (B).

An applicant also may establish a well-founded fear of persecution without proving past persecution. *See Kazemzadeh v. U.S. Att’y Gen.*, 577 F.3d 1341, 1352 (11th Cir. 2009). To do so, the applicant must show “a fear of persecution in his country of nationality on account of a protected ground, a ‘reasonable possibility’ of suffering persecution if the applicant returns to that country, and that he is unable or unwilling to return because of his fear.” *Id.* The applicant’s fear must be both “subjectively genuine and objectively reasonable.” *Id.* (internal quotation marks omitted).

To be eligible for asylum, an applicant also must satisfy the nexus requirement, meaning he must prove he suffered persecution “on account of” a protected basis.” *Perez-Sanchez v. U.S. Att’y Gen.*, 935 F.3d 1148, 1158 (11th Cir. 2019) (internal quota-

tion marks omitted). To satisfy this nexus requirement, “an applicant must establish his membership in a particular social group was or is ‘at least one central reason’ for his persecution.” *Id.* (quoting 8 U.S.C. § 1158(b)(1)(B)(i)).

In his petition for review, Tomas-Perez raises several arguments challenging the immigration judge’s decision to deny his asylum application. Among other things, he argues that the immigration judge erred by “fail[ing] to sufficiently separate and discuss the individual elements necessary to establish the Petitioner’s eligibility for asylum.” Petitioner’s Br. at 20. Tomas-Perez contends that the immigration judge improperly collapsed the question of whether he had suffered past persecution or had a well-founded fear of future persecution with the separate question of whether any such persecution was on account of a protected ground.

We lack jurisdiction to review this argument because Tomas-Perez failed to raise it before the Board. It is well-established that we lack jurisdiction to consider an argument raised in a petition for review if the petitioner failed to exhaust his administrative remedies with respect to that argument. *See Amaya-Artunduaga v. U.S. Att’y Gen.*, 463 F.3d 1247, 1250 (11th Cir. 2006). We dismiss the portion of Tomas-Perez’s petition contending that the immigration judge erred in failing to discuss separately the elements of his asylum claim because he failed to raise this argument in his appeal to the Board.

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With this jurisdictional issue resolved, we now proceed to the arguments in support of Tomas-Perez's asylum claim that he exhausted. He primarily argues that substantial evidence does not support the immigration judge's determination that he failed to establish he had suffered past persecution in Guatemala. And because he established past persecution, he says, the immigration judge should have applied a rebuttable presumption that he had a well-founded fear of future persecution, concluded that the presumption was not overcome, and granted his asylum application.

To support this argument, Tomas-Perez asserts that "[t]he record is replete with example after example" of instances where he was threatened or subjected to physical violence. Petitioner's Br. at 20. But his brief identifies not a single instance when he was subjected to threats or violence in Guatemala, his country of national origin. Certainly, the record contains ample evidence that Tomas-Perez's sister beat and threatened him, but this conduct occurred in Mexico, not Guatemala. Tomas-Perez offers no explanation for how this mistreatment in Mexico established that Tomas-Perez suffered past persecution in Guatemala. *See* 8 U.S.C. § 1101(a)(42)(A) (explaining that to qualify as a refugee, a person must show that he faced past persecution or future persecution in his country of national origin).

Tomas-Perez also argues the immigration judge erred by ignoring evidence that his family members had experienced past persecution in Guatemala where they had been subjected to "oral threats [and] violence." Petitioner's Br. at 20. But, again, Tomas-

Perez’s brief fails to identify even a single instance when his family members were subjected to threats or violence in Guatemala. And even if the record contained such evidence, it would not necessarily establish past persecution. Evidence of threatening or harmful acts against an asylum applicant’s family members establishes past persecution only when the applicant also was “directly threatened or harmed,” which was not the case here. *See Rodriguez*, 735 F.3d at 1309.

Tomas-Perez further argues that because he suffered past persecution, the Board and immigration judge were required to apply a rebuttable presumption that had a well-founded fear of future persecution and should have concluded that the presumption was not overcome here.⁴ Because, as we explained above, substantial evidence supports the immigration judge’s determination that Tomas-Perez failed to establish that he suffered past persecution, neither the Board nor the immigration judge erred in failing to apply the rebuttable presumption. And because the pre-

⁴ An applicant may be eligible for asylum without proving past persecution if he has a “subjectively genuine and objectively reasonable fear” of future persecution if returned to his country of nationality. *Kazemzadeh*, 577 F.3d at 1352 (internal quotation marks omitted). But, in his petition for review, Tomas-Perez raises no argument that he established a well-founded fear of future persecution independent of the presumption created by past persecution. Tomas-Perez thus has abandoned any claim that he established a well-founded fear of future persecution independent of the presumption created by past persecution. *See Sepulveda*, 401 F.3d at 1228 n.2.

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sumption did not apply, there was no need for the Board or the immigration judge to address whether the presumption had been overcome. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) (“As a general rule . . . agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach.”).⁵

B. Withholding of Removal

We now turn to Tomas-Perez’s withholding-of-removal claim. Under the withholding-of-removal statute, an applicant shall not be removed to a country if his life or freedom would be threatened in such country “because of” a protected ground. 8 U.S.C. § 1231(b)(3)(A). For a withholding-of-removal claim, the applicant must show that it is “more likely than not” that he will be persecuted if returned to a particular country. *Sepulveda*, 401 F.3d at 1232 (internal quotation marks omitted). “If an applicant is unable to meet the well-founded fear standard for asylum, [he] is generally precluded from qualifying for” withholding of removal. *Id.* at 1232–33 (alteration adopted) (internal quotation

⁵ Tomas-Perez also argues that substantial evidence does not support the immigration judge’s determinations that his proposed particular social group of street children abandoned by their parents was not a cognizable social group and that he failed to establish a sufficient nexus between the alleged persecution and his membership in the group. Because we conclude that substantial evidence supports the immigration judge’s determination that Tomas-Perez failed to establish he suffered past persecution, we need not reach these arguments.

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marks omitted). Tomas-Perez's failure to satisfy the well-founded fear standard thus dooms his withholding-of-removal claim as well.

IV. CONCLUSION

For the reasons set forth above, we deny the petition in part and dismiss the petition in part.

PETITION DENIED IN PART AND DISMISSED IN PART.