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47 F.4th 971
United States Court of Appeals, Ninth Circuit.

Oscar Oswaldo **GONZALEZ-CASTILLO**, Petitioner,
v.
Merrick B. **GARLAND**, Attorney General, Respondent.

No. 21-70112
|
Argued and Submitted April 12, 2022 San Francisco, California
|
Filed August 31, 2022

Synopsis

Background: Native and citizen of El Salvador filed petition for review of Board of Immigration Appeals (BIA) order affirming immigration judge's (IJ) denial of his applications for asylum, withholding of removal, and relief under Convention Against Torture (CAT).

Holdings: The Court of Appeals, Clifton, Senior Circuit Judge, held that:

[1] Interpol Red Notice did not by itself support IJ's finding that there were serious reasons for believing that noncitizen has committed serious nonpolitical crime;

[2] noncitizen failed to exhaust claim that his failure to comply with deadline could be excused on grounds not mentioned in his BIA brief;

[3] BIA failed to give reasoned consideration to potentially dispositive testimony in denying noncitizen's application for CAT relief; and

[4] IJ sufficiently developed record.

Petition granted and dismissed in part.

Procedural Posture(s): Review of Administrative Decision.

West Headnotes (12)

[1] Aliens, Immigration, and Citizenship Review of initial decision or administrative review

When Board of Immigration Appeals (BIA) adopts immigration judge's (IJ) decision and also adds its own comments, Court of Appeals reviews decisions of both BIA and IJ.

1 Cases that cite this headnote

[2] Aliens, Immigration, and Citizenship Substantial evidence in general

Aliens, Immigration, and Citizenship Law questions

Court of Appeals reviews Board of Immigration Appeals' (BIA) legal determinations de novo and its factual determinations for substantial evidence.

1 Cases that cite this headnote

[3] Aliens, Immigration, and Citizenship Substantial evidence in general

Substantial evidence review requires Court of Appeals to uphold Board of Immigration Appeals' (BIA) factual determination unless evidence compels contrary conclusion.

1 Cases that cite this headnote

[4] Aliens, Immigration, and Citizenship Weight and Sufficiency

Interpol Red Notice accusing native and citizen of El Salvador of committing "strikes" on behalf of criminal gang did not by itself constitute substantial evidence in support of immigration judge's (IJ) finding that there were serious reasons for believing that noncitizen had committed serious nonpolitical crime in El Salvador, and thus was ineligible for asylum or withholding or removal; Red Notice did not

articulate any specific crime of which noncitizen was accused, provided no details on what was "strike," lacked allegations about fact of alleged "strikes," did not identify alleged victim or place of "strike," and contained no information about element of crime, and "strike" was alleged to have occurred in El Salvador after noncitizen had entered United States. Immigration and Nationality Act §§ 208, 241, 8 U.S.C.A. §§ 1158(b)(2)(A)(iii), 1231(b)(3)(B)(iii).

[5] **Aliens, Immigration, and Citizenship** Weight and Sufficiency

Interpol Red Notice alone is ordinarily insufficient to establish probable cause that crime has occurred, for purposes of determining application of Immigration and Nationality Act's (INA) serious nonpolitical crime bar. Immigration and Nationality Act §§ 208, 241, 8 U.S.C.A. §§ 1158(b)(2)(A)(iii), 1231(b)(3)(B)(iii).

[6] **Aliens, Immigration, and Citizenship** Weight and Sufficiency

In order to establish that noncitizen committed serious nonpolitical crime outside of United States, such as might render him ineligible for asylum or withholding of removal, government must provide more than some evidence; rather, government must provide serious reasons for believing noncitizen committed crime before burden shifts to noncitizen to disprove existence of probable cause. Immigration and Nationality Act §§ 208, 241, 8 U.S.C.A. §§ 1158(b)(2)(A)(iii), 1231(b)(3)(B)(iii); 8 C.F.R. § 1240.8(d).

[7] **Aliens, Immigration, and Citizenship** Presentation and preservation of questions at administrative level

Noncitizen's general challenge in his brief to Board of Immigration Appeals (BIA) to immigration judge's (IJ) application of Immigration and Nationality Act's (INA) one-year deadline to deny his asylum application was insufficient to exhaust claim that his failure to comply with deadline could be excused on grounds not mentioned in his BIA brief, notwithstanding noncitizen's statement in his brief that "Immigration Judge erred in not considering the entirety and totality of my testimony, the evidence provided, all the relevant factors and all the evidence of record even if not specifically mentioned as well as the issue of judgment and decision." Immigration and Nationality Act § 208, 8 U.S.C.A. § 1158(a)(2)(D).

[8] **Aliens, Immigration, and Citizenship** Presentation and preservation of questions at administrative level

Although exhaustion requires that petitioner raise claims before Board of Immigration Appeals (BIA) before Court of Appeals may review them, especially where petitioner is pro se, general contentions can suffice as long as they put BIA on notice of contested issues.

[9] **Aliens, Immigration, and Citizenship** Standard for relief

To prevail under Convention Against Torture (CAT), applicant must show that it is more likely than not that he or she would be tortured if removed to proposed country of removal, and that torture will be inflicted by or at instigation of or with public official's consent or acquiescence.

8 C.F.R. § 1208.18(a)(2).

[10] **Aliens, Immigration, and Citizenship** Remand

Board of Immigration Appeals (BIA) failed to give reasoned consideration to potentially dispositive testimony in denying Salvadoran citizen's application for relief under Convention Against Torture (CAT), thus warranting remand for further proceedings; in concluding there was no past torture, BIA found noncitizen was never arrested or detained by El Salvadorian

police without addressing noncitizen's testimony that he had been beaten by police multiple times when he was walking to school because they accused him of gang affiliation, which immigration judge (IJ) found credible, and BIA failed to mention highly probative or potentially dispositive evidence about severity of mistreatment, and seriousness of injuries, he suffered. 8 C.F.R. § 1208.18(a)(2).

1 Cases that cite this headnote

[11] Aliens, Immigration, and Citizenship Assistance of counsel

When noncitizen appears pro se, it is immigration judge's (IJ) duty to fully develop record; this means that IJ must scrupulously and conscientiously probe into, inquire of, and explore for all relevant facts.

[12] Aliens, Immigration, and Citizenship Conduct of hearing; fairness in general

Aliens, Immigration, and Citizenship Assistance of counsel

Immigration judge (IJ) sufficiently developed record in adjudicating Salvadoran citizen's pro se application for asylum, withholding of removal, and relief under Convention Against Torture (CAT), despite applicant's contention that IJ failed to probe nature of his physical injuries inflicted by Salvadoran military and police, mental harm he suffered, and government's acquiescence in gang violence; IJ asked what injury he suffered during his encounters with military, whether he sought medical care for those injuries, and whether he reported his encounters with gangs to police, and gave applicant opportunity at end of hearing to tell "anything more you would like [IJ] to know that perhaps was not asked of you."

***973** On Petition for Review of an Order of the Board of Immigration Appeals Agency No. AXXX-XX9-376

Attorneys and Law Firms

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Gregory D. Mack (argued), Senior Litigation Counsel; Sabatino F. Leo, Assistant Director; Brian Boynton, Acting Assistant Attorney General; Office of Immigration Litigation, Civil Division, United States Department of Justice, Washington, D.C.; for Respondent.

John P. Elwood, Kaitlin Konkel, and Sean A. Mirski, Arnold & Porter Kaye Scholer LLP, Washington, D.C., for Amicus Curiae Fair Trials Americas.

Before: Richard R. Clifton and Milan D. Smith, Jr., Circuit Judges, and Christina Reiss,* District Judge.

OPINION

CLIFTON, Circuit Judge:

***974** Petitioner Oscar **Gonzalez-Castillo** was found to be ineligible for withholding of removal by an Immigration Judge ("IJ") because there were "serious reasons to believe that [he] committed a serious nonpolitical crime" in his home country of El Salvador. 8 U.S.C. § 1231(b)(3)(B)(iii). The government only presented one piece of evidence supporting application of the serious nonpolitical crime bar, however. It was an INTERPOL Red Notice, described at greater length below. The Red Notice accused **Gonzalez-Castillo** of committing "strikes" on behalf of the gang MS-13, allegedly committed on a date when **Gonzalez-Castillo** was in the United States rather than in El Salvador, based on the date of entry found by the IJ.

We conclude that substantial evidence does not support the IJ's finding, affirmed by the Board of Immigration Appeals ("BIA"), that **Gonzalez-Castillo** is ineligible for withholding of removal based on the serious nonpolitical crime bar. This court has long interpreted "serious reasons to believe," the standard set by the statute for the serious nonpolitical crime bar, as equivalent to probable cause. In this case, the INTERPOL Red Notice cannot, by itself, establish probable cause. The allocation of the burden of proof in immigration proceedings does not change this outcome. We accordingly

grant Gonzalez-Castillo's petition for review in part and remand to the agency to consider whether Gonzalez-Castillo is eligible for withholding of removal.

We also grant the petition as to his claim under the Convention Against Torture ("CAT"), because the record reflects that the agency failed to consider all of Gonzalez-Castillo's testimony and statements about the harms he suffered in El Salvador at the hands of state actors, so we remand for more complete consideration of the CAT claim. We are not persuaded, however, by arguments in the petition for review challenging the evaluation of evidence that was discussed or by the argument that that the IJ failed sufficiently to develop the record.

We dismiss the petition in part as to his claim for asylum, because the arguments Gonzalez-Castillo raises on appeal with respect to the one-year bar for asylum relief were not exhausted before the BIA.

I. Background

Throughout his childhood and young adulthood, Gonzalez-Castillo experienced multiple run-ins with gangs and the police in his home community in El Salvador. He testified before the IJ that in 2012, at the ***975** age of 17, he was brutally beaten by police multiple times when he was walking to school because they accused him of gang affiliation. In 2013, he was stopped while on his way to school by gang members who beat him and kidnapped him for information about a man Gonzalez-Castillo did not know. He was again beaten by MS-13 members when he refused to help them collect rent that same year. Gonzalez-Castillo denied any gang affiliation.

Gonzalez-Castillo left El Salvador in 2014 [1] for the United States due to his fear of gangs. He did not apply for asylum. He testified that was because at the time he did not know English, and he was not knowledgeable about the immigration process. In February 2020, the government initiated removal proceedings against Gonzalez-Castillo. He applied for asylum, withholding, and CAT relief. Gonzalez-Castillo appeared without a lawyer and represented himself before the IJ and the BIA.

At the removal proceeding, the government introduced an INTERPOL Red Notice into the record as the only evidence that Gonzalez-Castillo had committed a serious nonpolitical crime in El Salvador. INTERPOL issues Red Notices pursuant to arrest warrants issued by member countries, but the Red Notice itself is not enough to establish probable cause in order to support an arrest in the United States. Instead, as we discuss further below, according to the Department of Justice, "the United States treats a foreign-issued Red Notice only as a formalized request by the issuing law enforcement authority to 'be on the look-out' for the fugitive in question, and to advise if they are located." About INTERPOL Washington: Frequently Asked Questions, U.S. Dep't of Justice, https://www.justice.gov/interpol-washington/frequently-asked-questions (last checked August 22, 2022).

The Red Notice introduced here identified Gonzalez-Castillo by name, birthdate, national identification number, and photograph. The section titled "Description of the incidents" reads as follows (all errors in original):

> FOR SEVERAL YEARS IN THE SETTLEMENTS AND CANTONS OF THE MUNICIPALITIES OF OZATUIN, TECAPAN, OF THE DEPARTMENT OF USULUTAN, EL SALVADOR AND ITS SURROUNDINGS, THE PRESENCE OF THE MARA SALVATRUCHA MS-13 HAS BEEN ESTABLISHED THROUGH A HIERARCHICAL STRUCTURE FROM WHICH VARIOUS CLIQUES HAVE SPRUNG "WHAT IS RECOGNIZED AS A PROGRAM" AMONGST THESE [ARE] THE CLIQUE MOLINOS LOSOS SALVATRUCHOS (MLS) OF THE SHULTON PROGRAM, WHICH IS COMPOSED OF MEMBERS WHO HAVE A SPECIFIC COMMAND ROLE AND OTHER SUBORDINATES WITHIN SAID CRIMINAL STRUCTURE, WHICH IS DEDICATED TO COMMITTING ALL KINDS OF ILLEGAL ACTIVITY, INCLUDING HOMICIDES OF RIVAL GANGS, ROBBERY, EXTORTION, RAPE, SALES OF DRUGS, THREATS AND OTHERS, WHO EXERCISE CRIMINAL DOMAIN IN THE SECTOR WHERE THE CRIMINAL STRUCTURE OPERATES, CAUSING FEAR AND TERROR TO CITIZENS IN GENERAL AS A RESULT, THE AFOREMENTIONED OSCAR OSWALDO **GONZALEZ CASTILLO**, ALIAS "El OSWALDO OR LOBO" BEING ***976** AN ACTIVE MEMBER OF SAID ORGANIZATION.

The Red Notice alleges that the "incident" occurred on January 1, 2015, in Usulutan, El Salvador. The section "Additional information about the case" says: "MS-13 TERRORIST, RESPONSIBLE FOR STRIKES WITHIN THE CRIMINAL ORGANIZATION, ACCORDING TO

THE WITNESS IN THE PROTECTION SCHEME, CODE NAME 'SAULO' CRIMINAL CASE, 47-02-18-6." The "Crime classification" is listed as "TERRORIST ORGANIZATIONS," and the "penal legislation [or] disposition that sanction[s] the crime" is designated "Art. 13 LECAT," a law which is not in the record. Gonzalez-Castillo admitted that the Red Notice identified him, but he claimed that the Red Notice was fabricated because it was issued years after he left El Salvador, and he denied gang membership.

The IJ denied all relief. The IJ found Gonzalez-Castillo largely credible except that the court did not credit Gonzalez-Castillo's denials of the allegations in the Red Notice. The IJ held that Gonzalez-Castillo was ineligible for asylum because he failed to file his application within one year of arrival and he "d[id] not identify any exceptional circumstances or material changed circumstances that would excuse the late filing of his application," explaining that unfamiliarity with English and the worsening conditions in El Salvador did not suffice. The IJ also held that Gonzalez-Castillo was barred from both asylum and withholding of removal based on the serious nonpolitical crime bar, concluding that the Red Notice was sufficient evidence to support the bar. The IJ determined that this case was on all fours with the BIA's published opinion in *Matter of W-E-R-B-*, 27 I&N Dec. 795 (BIA 2020), which also applied the serious nonpolitical crime bar based on a Red Notice alone. Finally, the IJ held that Gonzalez-Castillo did not meet his burden of establishing his entitlement to CAT relief.

The BIA affirmed, citing *Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994), with some added comments. [2]

II. Discussion

[1] We have jurisdiction over the petition's exhausted claims pursuant to 8 U.S.C. § 1252. "When the BIA adopts the IJ's decision with a citation to *Matter of Burbano* and also adds its own comments, as it did here, we review the decisions of both the BIA and the IJ." *Gonzaga-Ortega v. Holder*, 736 F.3d 795, 800 (9th Cir. 2013).

[2] **[3]** "We review the legal determinations of the BIA de novo and the factual determinations for substantial evidence. Substantial evidence review requires us to uphold the BIA's determination unless 'the evidence compels a contrary conclusion.' " *Villalobos Sura v. Garland*, 8 F.4th 1161, 1167 (9th Cir. 2021) (citations omitted).

A. The Serious Nonpolitical Crime Bar to Withholding and Asylum

The BIA concluded that the serious nonpolitical crime bar prevented Gonzalez-Castillo from receiving asylum and withholding of removal based on the Red Notice. We disagree.

> The [Immigration and Nationality Act ("INA")] bars an applicant from obtaining asylum and withholding relief when "there are serious reasons" to believe that he or she "committed a serious ***977** nonpolitical crime" before arriving in the United States. 8 U.S.C. §§ 1158(b)(2)(A)(iii) (asylum), 1231(b)(3)(B)(iii) (withholding). We interpret " 'serious reasons' to believe" as being tantamount to probable cause.

Go v. Holder, 640 F.3d 1047, 1052 (9th Cir. 2011) (citation omitted).

We considered the significance of a Red Notice to the serious nonpolitical crime bar last year in *Villalobos Sura*, where we noted that "we have never held that a Red Notice alone is sufficient to constitute probable cause." *Villalobos Sura*, 8 F.4th at 1167. In that case, the Red Notice did not stand alone. The evidence in *Villalobos Sura* consisted of the Red Notice, an arrest warrant, [3] and the petitioner's own testimony, which, taken together, identified the petitioner and described the crime of which he was accused, including the specifics of the event and the names of the victims. *Id.* at 1168. We explained that "[t]hough this [was] far from concrete evidence of his guilt, the documents, combined with Villalobos Sura's testimony, [were] substantial evidence supporting the BIA's determination" that there was probable cause that Villalobos Sura committed the crime. *Id.*

[4] Here, we are faced with a case in which nothing more than this Red Notice supported application of the serious nonpolitical crime bar. This Red Notice does not suffice to establish probable cause, both because of the contents of this particular Red Notice and because of the features of Red Notices generally. The Red Notice cannot constitute substantial evidence in support of the finding that "there are serious reasons for believing that the alien has committed a

serious nonpolitical crime outside the United States." 8 U.S.C. § 1158(b)(2)(A)(iii).

The Red Notice in this case contains errors that cast doubt on its reliability, and it fails to articulate any specific crime of which **Gonzalez-Castillo** is accused. Probable cause requires a "fair probability" that the noncitizen committed a serious nonpolitical crime. *Silva-Pereira v. Lynch*, 827 F.3d 1176, 1189 (9th Cir. 2016). In *Silva-Pereira*, we held that a Guatemalan indictment met that bar because "it alleges specific facts connecting [the petitioner] to the crime." *Id.* at 1188. Likewise, in *Villalobos Sura*, the evidence collectively established the specific crime (murder), the location of the murders ("several miles" from where the petitioner was stationed at the time), the names of the victims, and that the crimes were gang related. 8 F.4th at 1168. In *Go*, the noncitizen "explicitly admitted under oath to being involved in a scheme to finance 'drug transactions' while living in the Philippines," which this court held to be "sufficient to establish probable cause." 640 F.3d at 1053.

By contrast, while the Red Notice here describes the structure and misdeeds of MS-13 in Usulutan generally, the only allegation about **Gonzalez-Castillo's** involvement in the gang's activities is that he is "responsible for strikes within the criminal organization" according to an anonymous witness (capitalization altered). There is no further detail on what is a "strike."[4] Moreover, the Red Notice lacks allegations ***978** about the facts of **Gonzalez-Castillo's** "strikes," such as the identity of any victim or where he carried out a "strike." The "penal legislation" identified by the Red Notice, Art. 13 LECAT, is not in the record. All the Notice indicates is that the crime is related to "terrorist organizations" and is punishable by up to 15 years' incarceration, but there is no information on what, exactly, constitute the elements of the crime. In short, the Red Notice does not "allege[ ] specific facts connecting [**Gonzalez-Castillo**] to the crime," or, for that matter, to any concretely identifiable crime at all. *Silva-Pereira*, 827 F.3d at 1188.

Moreover, the date of the incident is identified in the Red Notice as January 1, 2015, which is after **Gonzalez-Castillo** had entered the U.S. Although the government argues that **Gonzalez-Castillo's** account of when he entered the U.S. is "unreliab[le]" because "he claimed that he entered in 2013 and 2014," the IJ found as a factual matter that **Gonzalez-Castillo** entered the U.S. on July 7, 2014. The government further argues that January 1, 2015 "appears simply a placeholder for a pattern of criminal activity that Petitioner participated in over a longer period of time." Even assuming such to be true, that the Red Notice itself uses a placeholder further drives home that it lacks "specific facts" tying **Gonzalez-Castillo** to a particular crime, *id.*, for a placeholder is, by definition, an indeterminate proxy used in lieu of a specific fact.

Unlike in *Go*, 640 F.3d at 1053, and *Villalobos Sura*, 8 F.4th at 1168, **Gonzalez-Castillo** has not corroborated the contents of the Red Notice with any of his testimony. *See also* *Guan v. Barr*, 925 F.3d 1022, 1032 (9th Cir. 2019) (relying on petitioner's testimony to hold that there was probable cause). He has denied gang membership and contends that the Red Notice was falsified. Similarly, although there is no dispute that the Red Notice was generated pursuant to an arrest warrant issued by a magistrate in El Salvador, the original arrest warrant itself is not in the record. *See* *Villalobos Sura*, 8 F.4th at 1168. The probable cause bar "can be met without an explicit admission of guilt," *Silva-Pereira*, 827 F.3d at 1189, but the absence of any admission here, or any other corroborating evidence, leaves only the flawed Red Notice.

[5] Turning next to issues with Red Notices generally, it does not appear to us a Red Notice alone is ordinarily sufficient to establish probable cause that a crime has occurred. "Since a Red Notice is not independently vetted for factual and legal justification, its reliability corresponds with that of the foreign nation's arrest warrant." *Villalobos Sura*, 8 F.4th at 1168 (citation omitted). The Department of Justice takes the position that a Red Notice "does not meet the requirements for arrest under the 4th Amendment to the Constitution." About INTERPOL Washington: Frequently Asked Questions, U.S. Dep't of Justice, https:// www.justice.gov/interpol-washington/frequently-asked-que stions (last checked August 22, 2022). That is, of course, probable cause, the standard we have defined as analogous to the "serious reason to believe" standard to support application of the serious nonpolitical crime bar.

Other circuits have recognized that a Red Notice alone is not enough to establish probable cause. *See* *Radiowala v. Att'y Gen. United States*, 930 F.3d 577, 580 n.1 (3d Cir. 2019)

("Congress has not seen fit to prescribe that an Interpol Red Notice alone is an independent basis for removal.... Relatedly, the Department of Justice's view is that, by itself, a Red Notice is not a sufficient basis for arresting someone, for its issuance often falls short of what the Fourth Amendment requires."); ***979** *Hernandez Lara v. Barr*, 962 F.3d 45, 48 n.3 (1st Cir. 2020) ("In the United States, an INTERPOL Red Notice alone is not a sufficient basis to arrest the 'subject' of the notice 'because it does not meet the requirements for arrest under the 4th Amendment to the Constitution.' " (citation omitted)); *see also* *Hernandez-Lara v. Lyons*, 10 F.4th 19, 24–25 (1st Cir. 2021) (same). In short, "[t]he parties did not cite, and we could not find, a case in which a court has found a Red Notice, alone, is sufficient to meet this [probable cause] standard." *Barahona v.* ***Garland***, 993 F.3d 1024, 1028 (8th Cir. 2021).

Of course, as the government argues in its answering brief, a Red Notice "constitutes documentary evidence like any other, and an [IJ] should be entitled to give it weight." An IJ is certainly so entitled, as we held in *Villalobos Sura*. We do not adopt a per se rule that a Red Notice is never sufficient to warrant application of the bar. But given the nature of a Red Notice and the issues with this particular Red Notice, we conclude that the Red Notice in this case lacks sufficient probative value to support a probable cause finding.

The government also argues that we must affirm the BIA because of the burden-shifting framework of the INA and its implementing regulations. All the government needs to show, it contends, is "some evidence" that the serious nonpolitical crime bar *might* apply, at which point it is **Gonzalez-Castillo's** burden to prove "by a preponderance of the evidence that such grounds do not apply." *Matter of W-E-R-B-*, 27 I&N Dec. at 797 (citing 8 C.F.R. § 1240.8(d)). In essence, the government argues that by presenting "some evidence" in the form of the Red Notice, even if scant, it has shifted the burden to disprove the existence of probable cause on to **Gonzalez-Castillo**.

The Eighth Circuit addressed, and rejected, this reasoning in *Barahona v.* ***Garland***, in which it granted the noncitizen's petition on direct review of the published *W-E-R-B-* decision. The *Barahona* court reasoned that the statute itself, which states that there must be "serious reasons for believing" the noncitizen committed a crime, requires something more than merely "some evidence" supporting application of the bar. 993 F.3d at 1027–28. Accordingly, "[t]he BIA erred in this case when it failed to make a probable cause finding." *Id.* at 1028.

[6] We agree with the Eighth Circuit. The burden-shifting framework of 8 C.F.R. § 1240.8(d) cannot override the statutory requirement that there be "serious reasons" to believe that the bar applies. 8 U.S.C. §§ 1158(b)(2)(A)(iii), 1231(b)(3)(B)(iii). To apply the bar, the agency must find that there are serious reasons to believe that the petitioner committed a serious nonpolitical crime, and to do so, there must be evidence supporting a finding of probable cause.

This is consistent with our decision in *Villalobos Sura*. Although we acknowledged in that case that the burden shifting framework applied, we did not suggest that the agency could find the bar applied based on only "some evidence," as *W-E-R-B-* had held. Indeed, we said, "Thus, the government need show only that there are 'serious reasons to believe' [the petitioner] committed the murders," and evaluated whether the evidence in the record sufficed to meet that bar, i.e., to "establish the requisite probable cause." *Id.* at 1167. Nothing about *Villalobos Sura* suggests that something less than probable cause can warrant application of the bar, even if it is ultimately the petitioner's task to persuade the agency that "serious reasons" do not exist.

Substantial evidence does not support the finding that there are serious reasons ***980** to believe **Gonzalez-Castillo** committed a serious nonpolitical crime. We grant **Gonzalez-Castillo's** petition, in part, as to his application for withholding of removal.

B. The One-Year Bar to Asylum

The BIA also concluded that **Gonzalez-Castillo** was independently barred from receiving asylum relief by reason of his untimely asylum application, which was filed more than five years after he arrived, long after the one-year deadline under the INA. 8 U.S.C. § 1158(a)(2)(B).

A late asylum application may be entertained if the applicant shows "changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing an application." 8 U.S.C. § 1158(a)(2)(D). The agency considered whether the reasons **Gonzalez-Castillo** gave to the IJ for his untimely application, his lack of English proficiency and worsening

conditions in El Salvador, met this standard, concluding they did not. Before this court, Gonzalez-Castillo does not challenge those conclusions.

[7] Instead, he argues that the IJ failed to consider two different reasons that might have excused the one-year bar: (1) the Red Notice was itself a changed circumstance and (2) the IJ failed to develop the record as to whether Gonzalez-Castillo's sexual identity might excuse the late filing. We agree with the government that both of these possible grounds for excusing the one-year deadline are waived.

[8] Gonzalez-Castillo was pro se before the agency, which means this court must "construe [the claims] liberally." *Ren v. Holder*, 648 F.3d 1079, 1083 (9th Cir. 2011). Although exhaustion requires that the petitioner raise claims before the agency before this court may review them, "especially where the petitioner is *pro se*, general contentions can suffice as long as they put the BIA on notice of the contested issues." *Id.* (citations and quotation marks omitted). Even applying the liberal construction standard, however, Gonzalez-Castillo never alerted the agency to the two possible grounds for excusing the filing deadline that are now raised in his briefing to this court. Gonzalez-Castillo's BIA brief argued only that the conditions in El Salvador or his mental health concerns warranted application of the changed circumstances exception. It made no mention of the Red Notice or of his sexual identity (an issue which was raised elsewhere in the brief) with respect to the one-year bar.

Gonzalez-Castillo contends that simply challenging application of the one-year bar, which his BIA brief undeniably does, was enough to exhaust these arguments because "the petitioner may raise a general argument in the administrative proceeding and then raise a more specific legal issue on appeal." *Bare v. Barr*, 975 F.3d 952, 960 (9th Cir. 2020). He particularly points to *Zhang v. Ashcroft*, 388 F.3d 713 (9th Cir. 2004) (per curiam), in support of his position. In that case, we held that mentioning CAT was enough to preserve a challenge to the denial of CAT relief. *Id.* at 721. But there, the petitioner was raising the straightforward question of whether the denial of CAT relief was erroneous based on the reasoning employed by the agency. *See id.* "[Petitioner] was challenging the IJ's Convention determination, and the agency had an opportunity to pass on this issue." *Id.*

Here, by contrast, Gonzalez-Castillo raises new grounds altogether to excuse the untimely asylum application. This is not a case in which the petitioner described the substance of the argument in his brief without using the correct legalese, which would suffice for purposes of exhaustion. *E.g.*, ***981** *Moreno-Morante v. Gonzales*, 490 F.3d 1172, 1173 n.1 (9th Cir. 2007) (issue was exhausted when the petitioner did not make "this precise statutory argument" that his grandchildren met the statutory definition of child but did generally argue that he had "a de facto parent-child relationship with his grandchildren"); *Diaz-Jimenez v. Sessions*, 902 F.3d 955, 960 (9th Cir. 2018) (issue was exhausted where the brief invoked the statutory text that furnished the argument without "mak[ing] the precise argument we now consider"). Instead, nothing in the BIA brief suggested these alternative reasons for excusing the one-year bar or afforded the agency the opportunity to "pass on [these] issue[s]" before they reached this court. *Zhang*, 388 F.3d at 721.

Gonzalez-Castillo also argues that the following language in his BIA brief exhausted the arguments he now raises: "I argue that the Immigration Judge erred in not considering the entirety and totality of my testimony, the evidence provided, all the relevant factors and all the evidence of record even if not specifically mentioned as well as the issue of judgment and decision." Pointing to "the entirety" of the testimony does not, however, " 'put the BIA on notice' as to the specific issues so that the BIA has 'an opportunity to pass on those issues.' " *Figueroa v. Mukasey*, 543 F.3d 487, 492 (9th Cir. 2008) (brackets omitted) (quoting *Zhang*, 388 F.3d at 721).

The arguments Gonzalez-Castillo now raises in support of excusing the one-year bar to asylum are waived, and we dismiss the petition in part.

C. Convention Against Torture

[9] Gonzalez-Castillo also challenges the agency's denial of his torture claim. "To prevail under the CAT, an applicant must show that it is more likely than not that he or she would be tortured if removed to the proposed country of removal." *Go*, 640 F.3d at 1053 (quotation marks and citation omitted). "Torture is an extreme form of cruel and

inhuman treatment and does not include lesser forms of cruel, inhuman or degrading treatment or punishment that do not amount to torture." *Xochihua-Jaimes v. Barr*, 962 F.3d 1175, 1183 (9th Cir. 2020) (quoting 8 C.F.R. § 1208.18(a)(2)). "The applicant must also demonstrate that the torture will be inflicted by or at the instigation of or with the consent or acquiescence of a public official." *Go*, 640 F.3d at 1053 (quotation marks and citation omitted). Here, the BIA affirmed and adopted the IJ's determination that the harm **Gonzalez-Castillo** suffered at the hands of state actors did not rise to the level of torture, and even if his injuries by gang members did, that harm was not inflicted with the consent or acquiescence of a state actor.

[10] We grant the petition as to CAT relief because the agency's analysis of this claim evinces a failure to give "reasoned consideration" to all "potentially dispositive testimony and documentary evidence" related to **Gonzalez-Castillo's** claim of torture at the hands of El Salvadorian police and military.[5] *Cole v. Holder*, 659 F.3d 762, 772 (9th Cir. 2011). Although we do not ***982** require the agency to "discuss each piece of evidence submitted," here, the agency's analysis of the evidence indicates "that something is amiss" for two reasons. *Martinez v. Clark*, 36 F.4th 1219, 1231 (9th Cir. 2022) (citation omitted).

First, the agency "misstat[ed] the record," *id.* (citation omitted), when it concluded that **Gonzalez-Castillo** was "never arrested or detained." This finding conflicts with **Gonzalez-Castillo's** testimony, which the IJ found credible. **Gonzalez-Castillo** testified at the hearing before the IJ that "the detectives and the police, they would detain me," and he stated in his written account that the police took him into custody, beat him, and threatened to kill him. *See Arrey v. Barr*, 916 F.3d 1149, 1161 (9th Cir. 2019) (remanding to the agency where unrebutted, credible testimony ran counter to the agency's factual finding).

Second, the agency "fail[ed] to mention highly probative or potentially dispositive evidence" about the severity of the mistreatment, and the seriousness of the injuries, **Gonzalez-Castillo** suffered. *Martinez*, 36 F.4th at 1231 (citation omitted). The IJ concluded, and the BIA affirmed, that **Gonzalez-Castillo** was subject to "inhumane treatment" because "he was regularly beaten by the military on his way to school, and that as a result, he suffered bruises and inflammation." And the IJ stated, "The police also interrogated the Respondent in connection with a gang murder the Respondent had witnessed. He explained that the police were aggressive and threatened him during the interrogation." But **Gonzalez-Castillo's** written statement documented considerably more serious harm. He said that officers would "take [**Gonzalez-Castillo**] into custody, cover their faces and torture [him] and ask [him] to give names and the amount of members involved in 'MS-13.' " He also wrote that police held him at gunpoint and threatened to turn him in to an organized crime death squad. And **Gonzalez-Castillo** claimed that officials also would "raid [his] house at odd hours of the night" and "aggressively hit [him] with their [r]ifles, which left a scar on the left side of [his] face."

Past torture is a principal factor in deciding the likelihood of future torture. *Nuru v. Gonzales*, 404 F.3d 1207, 1218 (9th Cir. 2005). But in concluding there was no past torture here, the agency "mischaracterized the record," and accordingly, "it failed to give reasoned consideration to the potentially dispositive testimony .... We must therefore remand for the agency to reconsider [the] CAT claim in light of [that evidence.]" *Cole*, 659 F.3d at 773. Accordingly, we grant the petition as to CAT relief and remand to the agency for further proceedings.

D. The IJ's Duty to Develop the Record

[11] **Gonzalez-Castillo** contends that the agency failed to adequately develop the record.[6] "[W]hen the alien appears pro ***983** se, it is the IJ's duty to fully develop the record." *Agyeman v. INS*, 296 F.3d 871, 877 (9th Cir. 2002) (quotation marks and citation omitted). This means that "the IJ must scrupulously and conscientiously probe into, inquire of, and explore for all the relevant facts." *Zamorano v. **Garland***, 2 F.4th 1213, 1226 (9th Cir. 2021) (quotation marks and citation omitted).

In *Jacinto v. INS*, 208 F.3d 725 (9th Cir. 2000), for instance, we held that the petitioner was denied a full and fair adjudication when the IJ's questioning appeared hostile and did not allow the petitioner to "present her own [ ] narrated statement that might have added support to her claim." *Id.* at 734.

In *Zamorano*, by contrast, we held that the IJ made no error where "the IJ asked pertinent questions directed to determining whether [the petitioner] was eligible for [ ] relief based on a fear of persecution upon return to Mexico." 2 F.4th at 1226. The petitioner's answers gave the IJ "nothing left ... to do, because [the petitioner's] own testimony established there was no basis for [relief]." *Id.*

[12] **Gonzalez-Castillo** points to three areas of testimony that the IJ allegedly failed to probe: first, "the nature of his physical injuries inflicted by Salvadoran military and police," second, the mental harm he suffered, and third, "the government's acquiescence in gang violence."[7] Our review of the record confirms that the IJ's questioning gave **Gonzalez-Castillo** sufficient opportunities to address these issues. First, the IJ asked "what injury did you suffer" during his encounters with the military and whether he sought medical care for those injuries. The IJ also asked whether **Gonzalez-Castillo** reported his encounters with gangs to the police. **Gonzalez-Castillo** could have answered that doing so would have been fruitless, as he now argues, but he answered instead that he lived too far from the city and feared gang retaliation. And at the end of the hearing, the IJ gave him the opportunity to "tell [the IJ] anything more you would like [the IJ] to know that perhaps was not asked of you."

The IJ asked "pertinent questions directed to determining whether [the petitioner] was eligible for [ ] relief." *Zamorano*, 2 F.4th at 1226. The IJ also gave **Gonzalez-Castillo** the opportunity to provide, in his own words, any further information. *See* *Jacinto*, 208 F.3d at 734. An IJ's duties to develop the record do not "detract from the alien's statutory burden of proof" or "transform IJs into attorneys for aliens appearing pro se." *Zamorano*, 2 F.4th at 1226 (citation omitted). The IJ sufficiently developed the record here.

III. Conclusion

For the foregoing reasons, the petition is dismissed in part, as to asylum, because **Gonzalez-Castillo's** arguments as to the one-year bar are waived.

The BIA's conclusion that there are serious reasons to believe that **Gonzalez-Castillo** committed a serious nonpolitical crime is not supported by substantial evidence, however. The petition for review is granted in part, and this matter is remanded to the agency to consider the merits of **Gonzalez-Castillo's** withholding claim. The petition is also granted in part as to the claim for relief under CAT, and we remand to ***984** the BIA for resolution of that claim based on a more complete review of the evidence.

PETITION GRANTED IN PART, DISMISSED IN PART; REMANDED FOR FURTHER PROCEEDINGS.[8]

All Citations

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Footnotes

* The Honorable Christina Reiss, United States District Judge for the District of Vermont, sitting by designation.

1 The record contains multiple dates for **Gonzalez-Castillo's** entry into the U.S., but the IJ found that he arrived on July 7, 2014.

2 **Gonzalez-Castillo** filed several motions with the BIA while his appeal was pending, asking for the BIA to "remand to afford him the opportunity to apply for a U visa and cancellation of removal," in addition to filing "supplemental evidence." The BIA denied all motions.

3 Although the arrest warrant in the record was not for the underlying murder, the court concluded that "in conjunction with the Red Notice, the arrest warrant for contempt of court [was] sufficient." *Villalobos Sura*, 8 F.4th at 1168.

4 Indeed, the interpreter asked during the hearing, “And Your Honor, this is the interpreter, how could I paraphrase strikes?” The court responded, “You're responsible for acts within the criminal organization.” “Acts” is even vaguer than “strikes.” That the IJ could not more specifically articulate what a “strike” meant is telling.

5 We find no error, however, in the BIA's conclusion that the harm **Gonzalez-Castillo** suffered by gang violence, if it did rise to the level of torture, was not done with the acquiescence of a public official. The IJ asked **Gonzalez-Castillo** if he had reported the gang violence “to the police or any authorities.” He responded that he had not “because we live at the edge of a volcano and it's very difficult for us to go to the city to report any kind of crime. And also, because of fear about the gangs that if they find out that we go and report, that they would kill my family.” At most, the evidence shows “a general ineffectiveness on the government's part to investigate and prevent crime,” which “will not suffice to show acquiescence.” *Xochihua-Jaimes*, 962 F.3d at 1184 (citation omitted).

Finally, **Gonzalez-Castillo** argues that the IJ failed to consider his increased risk of torture based on the Red Notice, which identifies him as a gang member, his status as a deportee, and his sexual identity. The brief points to the documentary country conditions evidence in support of these arguments. While “country conditions alone can play a decisive role in granting relief under the Convention,” the record evidence here “does not meet the high threshold of establishing that it is more likely than not that [the petitioner] will be tortured by or with the consent or acquiescence of a public official.” *Mukulumbutu v. Barr*, 977 F.3d 924, 927 (9th Cir. 2020) (citation omitted). Nor does the IJ's decision suggest he failed to consider this evidence. The decision explicitly addressed the relevant evidence of violence and concluded that it “does not on its own compel a finding that such harm is more likely than not to occur in the Respondent's specific case.”

6 The government contends **Gonzalez-Castillo** also waived this argument by failing to raise it before the BIA. Construing his filings liberally, the BIA was sufficiently on notice of the argument that the IJ failed to consider all relevant evidence, and we have jurisdiction to consider its merits. *Ren*, 648 F.3d at 1083–84.

7 **Gonzalez-Castillo** also suggests that the IJ should have developed the record further with respect to other possible bases for excusal of the one-year bar. When the IJ asked **Gonzalez-Castillo** to speak to his failure to apply for asylum when he first arrived in the U.S., he did not mention any of those additional reasons.

8 Costs are taxed against the government.

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