

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 24-1996

DAVID CANAHUI AQUINO; MAYRA ISABEL ACETUN IXCOPAL;
L. S. C. A.; D. E. C. A.,
Petitioners
v.

ATTORNEY GENERAL UNITED STATES OF AMERICA

On Petition for Review of an Order of the
Board of Immigration Appeals
(Agency Nos. A220-933-831; A220-933-832; A220-933-833; A220-933-834)
Immigration Judge: Nicole Lane

Submitted Pursuant to Third Circuit L.A.R. 34.1(a) on
January 21, 2025

Before: HARDIMAN, McKEE, and AMBRO, *Circuit Judges*

(Opinion filed: January 30, 2025)

OPINION*

McKEE, *Circuit Judge*.

* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

Petitioners David Canahui Aquino, Mayra Isabel Acetun Ixcopal, and their two children seek review of an order of the Board of Immigration Appeals denying their applications for asylum, withholding of removal, and relief under the Convention Against Torture.¹ We will deny the petition for review.²

I.³

¹ Petitioners have waived any challenge to their denial of relief under the CAT by failing to raise the claim on appeal. See *Ying Chen v. Att’y Gen.*, 676 F.3d 112, 117 (3d Cir. 2011) (“[B]ecause petitioners do not challenge the denial of CAT relief in their brief before this Court, we deem that issue waived and do not address it.”). Additionally, they have failed to exhaust their withholding of removal and procedural due process claims by failing to raise these issues to the BIA. See *Inestroza-Tosta v. Att’y Gen.*, 105 F.4th 499, 520 (3d Cir. 2024) (recognizing that, pursuant to 8 U.S.C. § 1252(d)(1), a petitioner must exhaust all administrative remedies for each issue raised and declining to reach a claim that the petitioner failed to exhaust).

While “exhaustion of administrative remedies is not always required when the petitioner advances a due process claim,” exhaustion is required when a “due process claim amounts to a procedural error correctable through the administrative process.” *Sewak v. I.N.S.*, 900 F.2d 667, 670 (3d Cir. 1990). In *Bonhometre v. Gonzales*, the petitioner raised a claim of procedural error that he had not presented to the BIA. 414 F.3d 442, 447 (3d Cir. 2005). “[T]hough argued in the language of procedural due process, [it was] essentially [a] claim that the IJ failed in its duty to completely develop th[e] case.” *Id.* at 448. We held that the exhaustion requirement applied because the BIA was “eminently capable of addressing” the claim. *Id.* As in *Bonhometre*, the exhaustion requirement applies to Petitioners’ claim that the IJ committed a procedural error by failing to develop the record of the case because it is an issue that could have been addressed by the BIA.

² We have jurisdiction to review the BIA’s order under 8 U.S.C. § 1252.

³ If the BIA “‘affirmed and partially reiterated’ the IJ’s determinations, we review both decisions.” *Blanco v. Att’y Gen.*, 967 F.3d 304, 310 (3d Cir. 2020) (quoting *Sandie v. Att’y Gen.*, 562 F.3d 246, 250 (3d Cir. 2009)). “If the BIA relied on only some of the grounds given for denying relief, we review only those grounds.” *Id.* “In reviewing decisions of the BIA, this Court applies a deferential standard of review.” *Chavarria v. Gonzalez*, 446 F.3d 508, 515 (3d Cir. 2006). While we review legal determinations de novo, *Blanco*, 967 F.3d at 310, “factual findings are subject to substantial-evidence review and may not be set aside ‘unless any reasonable adjudicator would be compelled to conclude to the contrary,’” *Galeas Figueroa v. Att’y Gen.*, 998 F.3d 77, 91 (3d Cir. 2021) (quoting 8 U.S.C. § 1252(b)(4)(B)).

To obtain asylum, an applicant bears the burden of establishing that s/he is a “refugee,” which is defined, in pertinent part, as any person “who is unable or unwilling to return to” his/her country of nationality “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.”⁴ Petitioners are citizens of Guatemala who seek asylum based on membership in a particular social group. “To be legally cognizable, a proposed social group must be (1) composed of members who share a common, immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question.”⁵ We agree with the BIA that Petitioners’ proposed social groups are not legally cognizable.

Petitioners’ first proposed social group, “Guatemalans who were threatened by gang members and refused to give protection money,”⁶ is impermissibly defined by the alleged persecution. “[U]nder the statute a ‘particular social group’ must exist independently of the persecution suffered by the applicant for asylum.”⁷ For past persecution, “the persecution must have been ‘on account of’ a protected ground. INA § 101(a)(42)(A). Therefore, the ‘particular social group’ must have existed before the persecution began.”⁸ The proffered social group is not legally cognizable because it did not exist before the persecution began.

⁴ 8 U.S.C. § 1101(a)(42)(A).

⁵ *Radiowala v. Att’y Gen.*, 930 F.3d 577, 583 (3d Cir. 2019).

⁶ Opening Br. 16.

⁷ *Lukwago v. Ashcroft*, 329 F.3d 157, 172 (3d Cir. 2003).

⁸ *Id.*

Petitioners' other proposed social group, "Guatemalans who are economically stable,"⁹ is not defined with particularity. To meet the particularity requirement, a proposed group must "have 'discrete and ... definable boundaries' that are not 'amorphous, overbroad, diffuse, or subjective.'"¹⁰ It cannot "be 'too vague and all encompassing' to set discernible parameters."¹¹ Economic stability is too vague and subjective of a characteristic to define a group with particularity. The proffered social group is not legally cognizable because it does not have definable boundaries. Therefore, the BIA properly affirmed the IJ's denial of Petitioners' asylum claim.¹²

II.

For the above reasons, we will deny the petition for review.

⁹ Opening Br. 20.

¹⁰ *S.E.R.L. v. Att'y Gen.*, 894 F.3d 535, 552 (3d Cir. 2018) (quoting *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 239 (BIA 2014)).

¹¹ *Id.* (quoting *Escobar v. Gonzales*, 417 F.3d 363, 368 (3d Cir. 2005)); see also *Ucelo-Gomez v. Mukasey*, 509 F.3d 70, 74 (2d Cir. 2007) ("[C]lass status does not establish a social group with sufficient particularity."); *In re A-M-E & J-G-U-*, 24 I. & N. Dec. 69, 76 (BIA 2007) (rejecting "wealthy Guatemalans" as a particular social group because "[t]he characteristic of wealth or affluence is simply too subjective, inchoate, and variable to provide the sole basis for membership in a particular social group").

¹² Even if Petitioners had exhausted their withholding of removal claim, the outcome would still be the same because "an [applicant] who fails to qualify for asylum is necessarily ineligible for withholding of removal." *Valdiviezo-Galdamez v. Att'y Gen.*, 663 F.3d 582, 591 (3d Cir. 2011).