

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 25-2190

JESUS DIAZ,
Petitioner

v.

ATTORNEY GENERAL UNITED STATES OF AMERICA

On Petition for Review of a Final Order of the BIA
Immigration Judge Dennis Ryan, No. A072-254-027

Before: SHWARTZ, MASCOTT, and MCKEE, *Circuit Judges*
Submitted: May 14, 2026; Filed: Oct. 23, 2026

NONPRECEDENTIAL OPINION*

MCKEE, *Circuit Judge*.

Petitioner Jesus Diaz, a citizen of Mexico, seeks review of the Board of Immigration Appeals' order sustaining Diaz's charge of removability and denying his application for asylum,¹ withholding of removal under the Immigration and Nationality Act,² and protection under the Convention Against Torture.³ The Immigration Judge found that Diaz was removable under 8 U.S.C. § 1227(a)(2)(A)(ii) because he had been convicted of two crimes involving moral turpitude ("CIMT"). After determining that Diaz was removable,

* This is not an opinion of the full Court and, under 3d Cir. IOP 5.7, is not binding precedent.

¹ 8 U.S.C. § 1158(a)(1).

² *Id.* § 1231(b)(3)(A).

³ 8 C.F.R. § 1208.16(c).

the IJ concluded that Diaz had failed to establish that he was eligible for asylum, withholding of removal, or protection under the CAT. The BIA affirmed the IJ's conclusions. For the following reasons, we will deny the petition for review.⁴

I.

We begin with the threshold issue of removability. Diaz contends that the BIA erred in concluding that his conviction under Pennsylvania's terroristic-threats statute, 18 Pa. Cons. Stat. § 2706, qualifies as a removable CIMT.⁵ He argues that it is not possible to determine the specific provision of 18 Pa. Cons. Stat. § 2706(a) that provides the basis for his conviction, and therefore that we must assume that he was convicted of the provision that involves only the least culpable conduct. We disagree.

Our review of whether an offense constitutes a CIMT is a question of law subject to de novo review.⁶ Because Section 2706(a) is divisible,⁷ we apply the modified categorical approach to determine whether Diaz's conviction is a CIMT.⁸ Under the modified categorical approach, we may "consult a limited class of documents to determine which

⁴ We have jurisdiction to review final orders of removal under 8 U.S.C. § 1252(a). Noncitizens petition for review "with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings." 8 U.S.C. § 1252(b)(2).

⁵ Diaz does not contest that his conviction under Pennsylvania's theft-by-deception statute qualifies as a removable CIMT.

⁶ *Ildefonso-Candelario v. Att'y Gen.*, 866 F.3d 102, 104 (3d Cir. 2017). There are statutory exceptions to our jurisdiction to review final removal orders of people convicted of a CIMT under 8 U.S.C. § 1252(a)(2)(C). However, they do not apply here because Diaz raises questions of law under the § 1252(a)(2)(D) exception to subsection (a)(2)(C).

⁷ *United States v. Brown*, 765 F.3d 185, 192 (3rd Cir. 2014), *as amended* (Nov. 4, 2014).

⁸ *See id.*

alternative [elements] formed the basis of the defendant’s conviction.”⁹ These documents, known as *Shepard* documents, include, for example, “the charging document, plea agreement, and trial court judgment.”¹⁰

A review of the relevant documents establishes that Diaz was convicted of the subsection of the terroristic-threats statute that constitutes a CIMT. Specifically, the criminal information, a *Shepard* document,¹¹ charges Diaz with “Terroristic Threats” in violation of Section 2706(a)(1) for communicating “a threat to commit any crime of violence with the intent to terrorize another.”¹² And in the plea agreement, another *Shepard* document, Diaz acknowledges that he reviewed a copy of the criminal information before pleading guilty.

In the alternative, Diaz argues that even if the Court finds that he was convicted under Section 2706(a)(1), his crime is not categorically a CIMT. Again, we disagree. Our precedent, which holds that a conviction under Section 2706(a)(1) is “categorically morally turpitudinous,” squarely forecloses that argument.¹³

⁹ *Sasay v. Att’y Gen.*, 13 F.4th 291, 297 (3d Cir. 2021) (citation modified) (quoting *Descamps v. United States*, 570 U.S. 254, 257 (2013)).

¹⁰ *Avila v. Att’y Gen.*, 826 F.3d 662, 666 (3d Cir. 2016) (citing *Shepard v. United States*, 544 U.S. 13, 16 (2005)).

¹¹ *See Evanson v. Att’y Gen.*, 550 F.3d 284, 292–93 (3d Cir. 2008) (reviewing the criminal information as the relevant charging document under the modified categorical approach).

¹² AR 538.

¹³ *Javier v. Att’y Gen.*, 826 F.3d 127, 131–32 (3d Cir. 2016). Diaz argues that *Javier* is a not precedential opinion and is not binding on us. Diaz’s argument is meritless. While it is true that *Javier* was originally not precedential, we granted the government’s motion for publication on August 3, 2016, and we have subsequently cited *Javier* as binding precedent. *See Larios v. Att’y Gen.*, 978 F.3d 62, 70 (3d Cir. 2020) (noting that *Javier*

II.

Having concluded that Diaz is removable, we turn to whether the BIA properly denied his application for asylum, withholding of removal, and CAT protection.

A. Asylum

To be granted asylum, one must prove that s/he is a “refugee” as defined in the Immigration and Nationality Act.¹⁴ The INA defines a refugee as one who (1) is being persecuted based on his or her “race, religion, nationality, membership in a particular social group, or political opinion,” and (2) can establish past persecution or a well-founded fear of future persecution if returned to his or her country of nationality.¹⁵

Whether an asylum applicant has demonstrated past persecution is reviewed for substantial evidence.¹⁶ Diaz sought to establish past persecution based on an incident that occurred in 2015. During a visit to his family’s property in Mexico, a cartel member approached him about joining the cartel and helping it conduct illicit activities in Pennsylvania, where Diaz resided. Diaz declined, and the cartel member told Diaz that he “never want[ed] to see [him] again.”¹⁷

Here, the BIA correctly concluded that Diaz failed to establish past persecution. Even if we interpret this statement as a threat, the single threat that Diaz received did not result in physical harm. Although a threat may constitute persecution, “we have refused to

“settled that a threat to commit any crime of violence with intent to terrorize another is a CIMT” (citation modified)).

¹⁴ 8 U.S.C. § 1158(b)(1).

¹⁵ *Id.* § 1101(a)(42)(A).

¹⁶ *See Urias-Orellana v. Bondi*, 607 U.S. 537, 539 (2026).

¹⁷ AR 152.

extend asylum protection for threats that, while sinister and credible in nature, were not highly imminent or concrete or failed to result in any physical violence or harm.”¹⁸

As to future persecution, the BIA determined that Diaz waived any challenge to the IJ’s determination that he could avoid future persecution by internally relocating within Mexico. Because the BIA did not abuse its discretion in finding this claim waived, and because the government properly raised an exhaustion challenge, we do not consider it here.¹⁹

Accordingly, we see no error in the BIA’s decision to affirm the IJ’s denial of Diaz’s application for asylum.

B. Withholding of Removal

To be eligible for withholding of removal, an applicant must show a clear probability that s/he would “more likely than not” face persecution because of his or her race, religion, nationality, membership in a particular social group, or political opinion.²⁰ Because this standard is more rigorous than the “well-founded fear” standard for asylum eligibility, an applicant who cannot satisfy the asylum standard “will necessarily be unable to meet the standard for withholding of removal.”²¹

¹⁸ *Chavarria v. Gonzalez*, 446 F.3d 508, 518 (3d Cir. 2006).

¹⁹ *See Sanchez v. Att’y Gen.*, 147 F.4th 348, 352 (3d Cir. 2025), *as amended* (Mar. 24, 2026) (explaining that we review BIA waiver determinations for an abuse of discretion); *Aguilar v. Att’y Gen.*, 107 F.4th 164, 168–69 (3d Cir. 2024) (explaining that we will enforce the exhaustion requirement when it is properly raised by the government).

²⁰ *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 430 (1987); *Gomez-Zuluaga v. Att’y Gen.*, 527 F.3d 330, 348 (3d Cir. 2008).

²¹ *Gomez-Zuluaga*, 527 F.3d at 348–49.

For the same reasons that Diaz’s application for asylum fails, his application for withholding of removal also fails. Accordingly, the BIA was correct to affirm the IJ’s denial of Diaz’s application for withholding of removal.

C. CAT Protection

To be eligible for protection under the CAT, a claimant must establish that s/he would “more likely than not” be tortured if s/he were removed to the proposed country of removal.²² This inquiry relies on a two-pronged analysis.²³ The first prong requires that the IJ answer two questions: “(1) what is likely to happen to the petitioner if removed; and (2) does what is likely to happen amount to the legal definition of torture?”²⁴ The second prong requires the IJ to evaluate “whether an applicant has established that public officials will acquiesce to the feared torturous acts of a non-state actor.”²⁵ This in turn requires a second two-part inquiry. The IJ must determine (1) “how public officials will likely act in response to the harm the petitioner fears,” and (2) “whether the likely response from public officials qualifies as acquiescence under the governing regulations.”²⁶

The BIA determined that Diaz’s failure to challenge the IJ’s determination that he could avoid future persecution by internally relocating within Mexico was dispositive to his claim that he would be tortured. Contrary to the BIA’s determination, we note that, for

²² *Kamara v. Att’y Gen.*, 420 F.3d 202, 212–13 (3d Cir. 2005).

²³ *Saban-Cach v. Att’y Gen.*, 58 F.4th 716, 733 (3d Cir. 2023) (citing *Myrie v. Att’y Gen.*, 855 F.3d 509, 516 (3d Cir. 2017)).

²⁴ *Id.* (quoting *Myrie*, 855 F.3d at 516).

²⁵ *Id.* (citation modified) (quoting *Myrie*, 855 F.3d at 516).

²⁶ *Myrie*, 855 F.3d at 516.

a CAT claim, the ability to internally relocate is not dispositive, as it is only one of many factors considered in assessing whether it is more likely than not that an applicant would be tortured upon return to the country of removal.²⁷

Diaz, however, has not challenged that determination on appeal and, even if he had, remand would be futile. Although a reviewing court generally may only consider the grounds invoked by an administrative agency in deciding a case, we recognize an exception to that rule when remand would be futile.²⁸ Where, as here, the BIA is “unable as a matter of law to grant the relief sought,” we may deny a petition for review based on grounds other than those relied upon by the BIA in the first instance.²⁹

To qualify for CAT protection, Diaz needed to show that he would more likely than not be tortured if he returned to Mexico. Diaz has not met that standard. As the IJ noted, Diaz has no history of facing torture, and he offers no specifics as to how the government would acquiesce to any future torture he might face. Furthermore, although the country reports Diaz cites reflect generalized gang violence throughout Mexico, their sweeping

²⁷ See *Kaplun v. Att’y Gen.*, 602 F.3d 260, 270 (3d Cir. 2010) (citing 8 C.F.R. § 208.16(c)(3)). Other factors that may be considered include evidence of past torture inflicted upon the applicant, 8 C.F.R. § 208.16(c)(3)(i), evidence of gross, flagrant or mass violations of human rights within the country of removal, *id.* § 208.16(c)(3)(iii), and other relevant information regarding conditions in the country of removal, *id.* § 208.16(c)(3)(iv).

²⁸ See *Ricketts v. Att’y Gen.*, 955 F.3d 348, 352 (3d Cir. 2020); see also *Li Hua Yuan v. Att’y Gen.*, 642 F.3d 420, 427 (3d Cir. 2011) (explaining that an error by the BIA does not necessitate a remand when “it is highly probable that the error did not affect the outcome of the case”).

²⁹ *Ricketts*, 955 F.3d at 352.

findings are “insufficient to demonstrate that it is more likely than not that a particular civilian”—here, Diaz—“will be tortured.”³⁰

Accordingly, the BIA was correct to affirm the IJ’s denial of Diaz’s application for protection under the CAT.

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For the foregoing reasons, we will DENY the petition for review.

³⁰ *Tarrawally v. Ashcroft*, 338 F.3d 180, 188 (3d Cir. 2003).