

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 25-3561

RAFAEL ANTONIO AGUILAR-AYALA,
Petitioner

v.

ATTORNEY GENERAL UNITED STATES OF AMERICA

On Petition for Review of an Order of the
Board of Immigration Appeals
(Agency No. A209-228-644)
Immigration Judge: David Cheng

Submitted Pursuant to Third Circuit LAR 34.1(a)
September 1, 2026

Before: MATEY, MONTGOMERY-REEVES, and NYGAARD, *Circuit Judges*

(Opinion filed September 4, 2026)

OPINION*

PER CURIAM

Rafael Antonio Aguilar-Ayala petitions for review of an order of the Board of Immigration Appeals (BIA). For the following reasons, we will deny the petition.

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

Aguilar-Ayala, a native and citizen of El Salvador, entered the United States without inspection in June 2016. A month later, he was charged with removability as a noncitizen not in possession of a valid immigrant visa or other entry document. *See* 8 U.S.C. § 1182(a)(7)(A)(i)(I). Through counsel, Aguilar-Ayala conceded the charge and filed an I-589 application for asylum, withholding of removal, and protection under the Convention Against Torture (CAT). To make out a *prima facie* case for asylum or withholding of removal, a petitioner must show that he was persecuted, or has a well-founded fear of persecution, “on account” of a statutorily protected ground, including “race, religion, nationality, membership in a particular social group, or political opinion.” 8 U.S.C. § 1101(a)(42)(A). Aguilar-Ayala claimed fear of harm in El Salvador by the Mara Salvatrucha (“MS-13”) gang on account of his membership in three particular social groups (PSGs): (1) “employees of small business who have been subjected to extortion threats and subsequent violence from MS-13 gang members for failing to meet their demands”; (2) “members of [Aguilar-Ayala’s] nuclear family”; and (3) “employees of small business who have failed to meet extortion demands.” A.R. at 145. He also claimed a fear of harm based on his political opinion, and a fear of torture by MS-13.

At the start of an individual hearing on the I-589 application in January 2020, the Immigration Judge (IJ) indicated that he deemed credible the “detailed” affidavit that Aguilar-Ayala had filed in support of his application, and, therefore, that he was willing to accept it as Aguilar-Ayala’s testimony.¹ A.R. at 126-27; 608-14. The Government did

¹ In his sworn affidavit, Aguilar-Ayala averred that he and his family have been targeted by MS-13 in his hometown, Acajutla, Sonsonate, El Salvador. As a teenager, he was

not object. After consulting with counsel, Aguilar-Ayala decided to stand on his written application and declined the opportunity to testify at the hearing.

In addition to country conditions evidence, Aguilar-Ayala submitted affidavits from his family, including one from his brother Pablo, which described the threats from MS-13 consistently with the allegations in Aguilar-Ayala's affidavit. The IJ concluded

aware that the gang members "control[ed] everything" in Acajutla. A.R. at 608. They pressured Aguilar-Ayala's father, who drove for a living, to drive them around. To avoid getting killed or supporting their illegal activities, including extortion and murders, his father stopped working and "kept a low profile." *Id.* Aguilar-Ayala stated that he was contacted by "El Diente," who asked him to "do a favor" for the gang and help with an errand. A.R. at 609. Aguilar-Ayala made up an excuse, hung up the phone, and changed his phone number. He "kept [his] distance" from MS-13, avoiding friends who were in the gang.

Aguilar-Ayala's brothers, Jose Carlo and Pablo, also were approached by the gang. In 2013, MS-13 member "El Jefe" ordered Jose Carlo to join the gang or he "would suffer." A.R. at 610. Six months later, Jose Carlo fled to the United States. Around that time, Aguilar-Ayala started working for Pablo at his phone repair shop, which gang members frequented, demanding that their phones be fixed by a certain date and time or else [Aguilar-Ayala and Pablo] would "suffer the consequences." *Id.* The gang "claimed" the business as their own, meaning that the repair shop "belonged to MS-13." *Id.* In April 2016, MS-13 started to target and threaten Aguilar-Ayala and Pablo. It demanded that Pablo pay \$100 every Thursday. A gang member threatened that if Pablo did not pay, they would kill him and his family members, specifically mentioning by name Aguilar-Ayala (and accurately describing what he was wearing at the time) and his nephew. Pablo closed the store down, and the brothers kept a low profile.

Once, Aguilar-Ayala ventured out on his bike and four tattooed men blocked his path with their car. The gang members threw him to the ground, kicked, punched, and beat him "all over [his] body." A.R. at 612. One gang member held a gun to Aguilar-Ayala's head and told him that he "did not know with whom [he] was messing with." *Id.* The gang told him that he and Pablo needed to pay, and that next time they would kill him and not show mercy. Not long after, Aguilar-Ayala and Pedro left for the United States. Aguilar-Ayala noted that, six months before leaving, his cousin Manuel was kidnapped in the middle of the night and never seen again. Aguilar-Ayala stated that many individuals are kidnapped like Manuel for refusing to join the gang.

that the evidence corroborated the facts of Aguilar-Ayala's claims, but nevertheless denied all applications for relief.

The IJ determined that Aguilar-Ayala's assault did not amount to past persecution. As to future persecution, the IJ concluded that the proposed PSGs were not cognizable. The IJ also found that MS-13 threatened Aguilar-Ayala because of its desire for economic gain and, thus, that he would not face harm "on account of" his political opinion or his status as an employee of a business or a member of his nuclear family. Finally, the IJ determined that Aguilar-Ayala had not shown that he would more likely than not face torture if removed to El Salvador. The BIA affirmed the IJ's determinations and dismissed Aguilar-Ayala's appeal. Aguilar-Ayala timely petitioned for review.

We have jurisdiction pursuant to 8 U.S.C. § 1252(a). We review the Agency's legal determinations de novo and its factual findings for substantial evidence. *See Herrera-Reyes v. Att'y Gen.*, 952 F.3d 101, 106 (3d Cir. 2020). Under the substantial-evidence standard, factual findings "are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." *Nasrallah v. Barr*, 590 U.S. 573, 584 (2020) (quotation marks and citation omitted).

In his pro se brief, Aguilar-Ayala challenges the Agency's determination that his PSG "members of [his] nuclear family" was not cognizable because it was not socially distinct.² *See* Petitioner's Br. at 3-4, 11, 24-25; *see also S.E.R.L. v. Att'y Gen.*, 894 F.3d

² Aguilar-Ayala does not raise any challenge in his brief to the Agency's determination that his business-based PSGs were non-cognizable. He has therefore forfeited any such challenge. *See In re Wettach*, 811 F.3d 99, 115 (3d Cir. 2016).

535, 547 (3d Cir. 2018) (recognizing that, to be cognizable, a PSG must be, inter alia, “socially distinct within the society in question” (citation omitted)). But even assuming, as the BIA did, that that proposed PSG was cognizable, substantial evidence supports the Agency’s determination that Aguilar-Ayala had not shown that he suffered harm or would suffer harm “on account” of his family. *See Gonzalez-Posadas v. Att’y Gen.*, 781 F.3d 677, 685-66 (3d Cir. 2015) (noting that, for asylum or withholding of removal, a noncitizen must establish both that the proposed PSG is cognizable and “that his membership in that group is ‘one central reason’ why was he was or will be targeted for persecution” (citation omitted)).

The IJ found that the gang’s motive for targeting Aguilar-Ayala was purely economic. Aguilar-Ayala argues that the Agency misapplied the standard by failing to recognize that his PSG need only be “one central reason” for persecuting him. *See Ndayshimiye v. Att’y Gen.*, 557 F.3d 124, 129 (3d Cir.2009) (noting that a noncitizen must demonstrate that persecution was at least in part motivated by the protected ground). Specifically, he maintains that the IJ should have considered that MS-13 had mixed motives for targeting him – both because of “the gang’s financial motive” and because his family “resist[ed] gang authority.” Petitioner’s Br. at 13. “A persecutor may have more than one central motivation for his [] actions.” *Thayalan v. Att’y Gen.*, 997 F.3d 132, 143 (3d Cir. 2021). But the IJ explicitly found that there was “no evidence that the gang members persecuted [Aguilar-Ayala] due to his membership in the Ayala family.” A.R. at 56. The BIA found no clear error with that fact finding, and the record does not compel a different result. *See Thayalan*, 997 F.3d at 142 (noting that whether a

persecutor is motivated by a protected ground is reviewed for substantial evidence).

Aguilar-Ayala repeatedly averred that the gang demanded payment from him and his brother and threatened harm when that payment was not received; the record thus supports finding that MS-13 continued to target his family when they refused to comply with its demands and not because of his family. Therefore, the IJ did not commit legal error in failing to find a nexus to his family-based PSG. In light of that conclusion, we need not address Aguilar-Ayala's other claims regarding persecution.

Finally, Aguilar-Ayala challenges the denial of CAT relief on several grounds. To establish his CAT claim, Aguilar-Ayala had to show that he is "more likely than not" to be tortured by MS-13 "at the instigation of or with the consent or acquiescence of" an El Salvadoran public official. 8 C.F.R. §§ 1208.16(c)(2); 1208.17(a); 1208.18(a)(1); *Sevoian v. Ashcroft*, 290 F.3d 166, 174-75 (3d Cir. 2002). In analyzing a CAT claim, the Agency must ask (1) "what is likely to happen to the petitioner if removed" and whether "what is likely to happen amount[s] to the legal definition of torture," and (2) "how public officials will likely act in response to the harm the petitioner fears" and whether that response "qualifies as acquiescence under the governing regulations." *Myrie v. Att'y Gen.*, 855 F.3d 509, 516 (3d Cir. 2017).

Aguilar-Ayala argues that the agency erred by collapsing the two-step inquiry and requiring that he show "direct government participation." Petitioner's Br. at 17-18. And the Government argues that the Agency properly conducted the two-step analysis of *Myrie*. See Gov'ts Br. at 29-30. Both are mistaken. The IJ denied CAT relief solely under the first step of *Myrie*, finding that Aguilar-Ayala had not shown that he was more

likely than not to be tortured by MS-13 upon his return, and the BIA affirmed on that basis. The Agency never addressed the issue of whether the Government would instigate, consent, or acquiesce to torture. However, as discussed below, the Agency's failure to address the second step of *Myrie* was harmless where Aguilar-Ayala did not meet his burden at *Myrie*'s first step. *See Quinteros v. Att'y Gen.*, 945 F.3d 772, 786 (3d Cir. 2019) (noting that the Agency "must answer" both steps when evaluating a CAT claim); *see also Li Hua Yuan v. Att'y Gen.*, 642 F.3d 420, 427 (3d Cir. 2011) (discussing harmless error analysis).

Aguilar-Ayala argues that the Agency did not "meaningfully analyze escalation risk or the coercive context of MS-13 territorial enforcement" in denying his CAT claim. Petitioner's Br. at 18. He emphasizes the Agency's failure to consider the gang's "punitive and coercive" assault on him and the country conditions evidence demonstrating "patterns of torture or impunity." *Id.* at 18-19. However, the IJ determined that Aguilar-Ayala had not shown a likelihood of torture, finding it speculative that MS-13 would discover that he had returned to El Salvador and attack him. The IJ noted that more than four years had passed since Aguilar-Ayala left El Salvador, and there was no evidence that MS-13 was looking for him. *See id.* The IJ also emphasized that Aguilar-Ayala's family continues to reside in, and travel around, El Salvador. *See id.* Substantial evidence supports this basis for denying CAT relief. Although Aguilar-Ayala was the victim of gang violence in El Salvador, and the IJ concluded that the country conditions evidence corroborated his claims, the evidence is insufficient to compel a finding that he faced a particularized risk of torture by MS-13

upon his return. *See In re S-V-*, 22 I. & N. Dec. 1306, 1313 (BIA 2000) (“[T]he existence of a consistent pattern of gross, flagrant, or mass violations of human rights in a particular country does not, as such, constitute a sufficient ground for determining that a particular person would be in danger of being subjected to torture upon his or her return to that country.”); *see also Hernandez Garmendia v. Att’y Gen.*, 28 F.4th 476, 484 (3d Cir. 2022) (“The specter of torture must be supported by specific evidence that the individual applicant is more likely than not to be singled out.”); *cf. Aguilar-Quintanilla v. McHenry*, 126 F.4th 1065, 1071 (5th Cir. 2025) (remanding for consideration of CAT claim where the IJ failed to consider affidavits – “key pieces of evidence” showing “that the Salvadoran government is actively searching for [the petitioner] and that his risk under the state of exception is substantially greater than the average citizen’s”).

Based on the foregoing, we will deny the petition for review.