

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 16th day of August, two thousand twenty-four.

PRESENT:

DENNIS JACOBS,
RAYMOND J. LOHIER, JR.,
MARIA ARAÚJO KAHN,
Circuit Judges.

WILSON ABRAHAM BARRIOS
VENTURA,
Petitioner,

v.

MERRICK B. GARLAND, UNITED
STATES ATTORNEY GENERAL,
Respondent.

21-6442,
23-6138
NAC

FOR PETITIONER:

Daniel E. Jackson, Esq., Corfu, NY.

1 **FOR RESPONDENT:**

Bryan Boynton, Principal Deputy Assistant
Attorney General; Justin R. Markel, Senior
Litigation Counsel; Virginia Lum, Trial
Attorney, Office of Immigration Litigation,
United States Department of Justice,
Washington, DC.

7 UPON DUE CONSIDERATION of this petition for review of a Board of
8 Immigration Appeals (“BIA”) decision, it is hereby ORDERED, ADJUDGED, AND
9 DECREED that the petition for review in 21-6442 is DISMISSED AS MOOT and
10 the petition for review in 23-6138 is DENIED.

11 Petitioner Wilson Abraham Barrios Ventura (“Barrios”), a native and citizen
12 of Guatemala, seeks review of a January 10, 2023 decision of the BIA affirming a
13 December 1, 2020 decision of an Immigration Judge (“IJ”), which denied his
14 application for asylum, withholding of removal, and relief under the Convention
15 Against Torture (“CAT”).¹ *In re Barrios Ventura*, No. A 201 517 621 (B.I.A. Jan. 10,
16 2023), *aff’g* No. A 201 517 621 (Immigr. Ct. N.Y.C Dec. 1, 2020). We assume the
17 parties’ familiarity with the underlying facts and procedural history.

¹ Barrios initially sought review of the BIA’s July 21, 2021 decision, which the BIA’s January 10, 2023 decision vacated and amended. We grant both his unopposed motion for dismissal of that petition (21-6442) as moot, and his unopposed motion for waiver of administrative requirements in connection with the petition challenging the amended order (23-6138) and for decision based on the briefs filed in 21-6442.

1 We review the IJ's decision as modified by the BIA — i.e., without the
2 grounds for denying withholding of removal that the BIA declined to reach. *See*
3 *Xue Hong Yang v. U.S. Dep't of Just.*, 426 F.3d 520, 522 (2d Cir. 2005). We review
4 factual findings for substantial evidence, and we review questions of law and the
5 application of law to fact de novo. *Yanqin Weng v. Holder*, 562 F.3d 510, 513 (2d
6 Cir. 2009). “[T]he administrative findings of fact are conclusive unless any
7 reasonable adjudicator would be compelled to conclude to the contrary.”
8 8 U.S.C. § 1252(b)(4)(B). We review the denial of a continuance for abuse of
9 discretion. *Flores v. Holder*, 779 F.3d 159, 164 (2d Cir. 2015).

10 **I. Withholding of Removal²**

11 To establish eligibility for withholding of removal, Barrios had to show a
12 “clear probability” of persecution based on a protected ground — here his
13 “membership in a particular social group.” 8 C.F.R. § 1208.16(b). A cognizable
14 social group must have “a common immutable characteristic,” be “defined with
15 particularity,” and be “socially distinct within the society in question.” *Paloka v.*

² Barrios does not challenge the IJ's denial of his asylum claim as time-barred. *See Debieque v. Garland*, 58 F.4th 676, 684 (2d Cir. 2023) (“We consider abandoned any claims not adequately presented in an appellant's brief, and an appellant's failure to make legal or factual arguments constitutes abandonment.” (quotation marks omitted)).

1 *Holder*, 762 F.3d 191, 196 (2d Cir. 2014) (quoting *Matter of M-E-V-G-*, 26 I. & N.
2 Dec. 227, 237 (B.I.A. 2014)). Particularity requires that the group be “defined by
3 characteristics that provide a clear benchmark for determining who falls within
4 the group” and that membership not be “amorphous, overbroad, diffuse, or
5 subjective.” *Id.* (quoting *M-E-V-G-*, 26 I. & N. Dec. at 239). Social distinction
6 requires that “society as a whole” perceives the proposed “group as socially
7 distinct.” *Id.* (quoting *M-E-V-G-*, 26 I. & N. Dec. at 242).

8 Barrios argues that the agency overlooked a proposed social group related
9 to alcoholism. But as the Government points out, he did not exhaust a claim
10 based on alcoholism before the agency. *See Ud Din v. Garland*, 72 F.4th 411, 419–
11 20 & n.2 (2d Cir. 2023) (issue exhaustion is “mandatory in the sense that a court
12 must enforce the rule if a party properly raises it” (quotation marks omitted)).
13 Barrios’s counseled pre-hearing brief to the IJ mentioned alcoholism as a
14 characteristic that would make him more vulnerable to police and criminal abuse
15 in Guatemala, but it did not articulate a particular social group on that basis, and
16 the issue was not pursued at his hearing. And contrary to Barrios’s argument
17 here, his general argument to the BIA—that the IJ inadequately analyzed his
18 claim—did not mention alcoholism and thus did not exhaust an argument that the

1 IJ overlooked an alcoholism-related particular social group. *See id.*

2 The agency did not err in concluding that Barrios’s proffered particular
3 social group of people subject to extortion by criminal organizations was not
4 particular or socially distinct, given the country conditions evidence that
5 “[e]xtortion is incredibly common” and affects “all sectors of society,” including
6 bus and taxi drivers, small business owners, street vendors, hospitals, government
7 offices, churches, musical groups, schoolchildren, and others. Certified
8 Administrative Record at 375–76; *see Melgar de Torres v. Reno*, 191 F.3d 307, 313 (2d
9 Cir. 1999) (noting that general crime and violence in a country is not a stated
10 ground for asylum and withholding of removal). Rather than challenging that
11 conclusion, Barrios argues that the agency failed to consider a subgroup suggested
12 by his pre-hearing brief: Guatemalans subject to extortion who fail to pay. That
13 argument is without merit because a withholding applicant “must clearly indicate
14 on the record before the [IJ] what enumerated ground(s) [he] is relying upon in
15 making [his] claim” and “has the burden to clearly indicate the exact delineation
16 of any particular social group(s) to which [he] claims to belong.” *Matter of W-Y-*
17 *C- & H-O-B-*, 27 I. & N. Dec. 189, 191 (B.I.A. 2018) (quotation marks omitted).
18 Barrios, who was represented by counsel, referred to failure to pay extortion as a

1 reason he would be vulnerable to harm in his pre-hearing brief, but he did not
2 articulate a group including this characteristic in the brief or at his hearing.

3 The agency also did not err in concluding that Barrios’s proposed particular
4 social group of people returning to Guatemala from the United States was not
5 cognizable. Barrios contends that the agency erroneously relied on *Matter of W-*
6 *G-R-*, 26 I. & N. Dec. 208 (B.I.A. 2014), to evaluate his particular social groups,
7 citing out-of-circuit precedent for the proposition that *Matter of W-G-R* improperly
8 included factors relevant to social distinction in its definition of particularity, and
9 that a group may be defined with particularity even if its members are diverse in
10 terms of other characteristics. *See Amaya v. Rosen*, 986 F.3d 424, 432–34 (4th Cir.
11 2021). We have recognized, however, that there is “considerable overlap”
12 between the particularity and social distinction standards, explaining that
13 particularity turns on whether members of the society in question generally agree
14 on who is included. *Ordonez Azmen v. Barr*, 965 F.3d 128, 134–35 (2d Cir. 2020)
15 (quoting *Matter of M-E-V-G-*, 26 I. & N. Dec. at 240). Even assuming that the
16 diversity of the group does not preclude a finding that it is defined with
17 particularity, the agency did not err in concluding that it is not socially distinct.
18 Barrios asserted that people returning from the United States are perceived as

1 potentially lucrative crime victims, and this description of the perceived group
2 undercuts his claim that it is cognizable: “When the harm visited upon members
3 of a group is attributable to the incentives presented to ordinary criminals rather
4 than to persecution, the scales are tipped away from considering those people a
5 ‘particular social group’ within the meaning of the INA.” *Ucelo-Gomez v.*
6 *Mukasey*, 509 F.3d 70, 73 (2d Cir. 2007).

7 **II. CAT Relief**

8 A CAT applicant has the burden to establish that he will “more likely than
9 not” be tortured “by, or at the instigation of, or with the consent or acquiescence
10 of, a public official acting in an official capacity or other person acting in an official
11 capacity.” 8 C.F.R. §§ 1208.16(c)(2), 1208.18(a)(1). To establish acquiescence, the
12 applicant must show that “the public official, prior to the activity constituting
13 torture, [will] have awareness of such activity and thereafter breach his or her legal
14 responsibility to intervene to prevent such activity.” *Id.* § 1208.18(a)(7); *see*
15 *Khouzam v. Ashcroft*, 361 F.3d 161, 171 (2d Cir. 2004) (“[T]orture requires only that
16 government officials know of or remain willfully blind to an act and thereafter
17 breach their legal responsibility to prevent it.”); *Pierre v. Gonzales*, 502 F.3d 109, 118
18 (2d Cir. 2007) (“A *private* actor’s behavior can constitute torture under the CAT

1 without a government's specific intent to inflict it if a government official is aware
2 of the persecutor's conduct and intent and acquiesces in violation of the official's
3 duty to intervene.").

4 "The testimony of the applicant, if credible, may be sufficient to sustain the
5 burden of proof without corroboration." 8 C.F.R. § 1208.16(c)(2). But in addition
6 to credibility, the agency must determine whether the testimony "is persuasive,
7 and refers to specific facts sufficient to demonstrate that the applicant has satisfied
8 the applicant's burden of proof." 8 U.S.C. § 1229a(c)(4)(B). "[I]n some cases . . .
9 an applicant may be generally credible but his testimony may not be sufficient to
10 carry the burden of persuading the fact finder of the accuracy of his claim of crucial
11 facts if he fails to put forth corroboration that should be readily available." *Wei*
12 *Sun v. Sessions*, 883 F.3d 23, 28 (2d Cir. 2018); *see also Pinel-Gomez v. Garland*, 52
13 F.4th 523, 529–30 (2d Cir. 2022) (explaining that the agency may find testimony
14 credible but "still decide that the testimony falls short of satisfying the applicant's
15 burden of proof, either because it is unpersuasive or because it d[oes] not include
16 specific facts sufficient to demonstrate that the applicant is" eligible for relief from
17 removal (quotation marks omitted)). "Where the [IJ] determines that the
18 applicant should provide evidence which corroborates otherwise credible

1 testimony, such evidence must be provided unless the applicant demonstrates that
2 the applicant does not have the evidence and cannot reasonably obtain the
3 evidence.” 8 U.S.C. § 1229a(c)(4)(B). Before denying a claim solely based on a
4 lack of corroboration, the IJ must “(1) point to specific pieces of missing evidence
5 and show that it was reasonably available, (2) give the applicant an opportunity to
6 explain the omission, and (3) assess any explanation given.” *Wei Sun*, 883 F.3d at
7 31.

8 With these principles in mind, we conclude that the agency did not err in
9 determining that Barrios failed to present sufficient evidence to meet his burden
10 of proof as to his claim that extortionists threatened to kill him in Guatemala, and
11 then continued to threaten to kill him and his family if he did not make payments
12 from the United States. Barrios submitted a supporting letter that contradicted
13 his testimony about the first incident with the extortionists, thereby calling the
14 reliability of his testimony into question. And significant aspects of his claim
15 were not corroborated—that he received threats from extortionists after coming to
16 the United States, and that his mother used the money he sent to pay extortion.
17 The record does not compel the conclusion that such evidence was unavailable.
18 Barrios alleged that he received written threats, and he never claimed that they

1 were no longer accessible to him; and while he did not have a legible letter from
2 his mother, he never claimed that he could not have obtained one. Barrios
3 responds that he had insufficient time to obtain corroboration and that the agency
4 failed to develop the record as to why corroboration was lacking. But the absence
5 of letters from his family and copies of threatening messages was raised in his
6 hearing, so he had an opportunity to respond, and he never requested additional
7 time to submit corroboration.

8 In addition, substantial evidence supports the agency's conclusion that
9 Barrios is not more likely than not to be tortured by or with the acquiescence of a
10 public official. Barrios gave only vague information about the extortionists'
11 identities, and he did not allege that they had connections to a particular gang or
12 to a public official. Without evidence of such connections, the record does not
13 compel the conclusion that his abusers are more likely than not to learn of his
14 return to Guatemala, locate him, and torture him. *See Quintanilla-Mejia v. Garland*,
15 3 F.4th 569, 593–94 (2d Cir. 2021) (“[S]ubstantial evidence review does not
16 contemplate any judicial reweighing of evidence. Rather, it requires us to ask
17 only whether record evidence compelled a[] . . . finding different from that reached
18 by the agency.”). And while Barrios testified that the police did not follow up on

1 his mother's 2005 report regarding the first two incidents with the extortionists,
2 that fact does not compel the conclusion that the police would acquiesce to his
3 torture, particularly as Barrios left Guatemala shortly thereafter, and there is no
4 information about whether his mother returned to the police to request protection.
5 The country conditions evidence shows that extortion and related violence are
6 widespread and that many police officers are involved in criminal acts. But it also
7 shows that the government has taken steps to curb criminal violence, and thus
8 does not alone establish that Barrios is more likely than not to be singled out for
9 torture. *See Mu Xiang Lin v. U.S. Dep't of Just.*, 432 F.3d 156, 160 (2d Cir. 2005)
10 (requiring "particularized evidence" beyond general country conditions to
11 support a CAT claim); *cf. Quintanilla-Mejia*, 3 F.4th at 593–94 (finding that the
12 record did not compel the conclusion that the Salvadoran government would
13 acquiesce to gang torture where the petitioner had not reported prior gang assaults
14 to the government, and country conditions evidence showed that gang violence
15 persisted—including instances of involving police misconduct—but also that the
16 government was taking steps to combat gang violence).³

³ Because these findings provide substantial evidence for the agency's conclusion that Barrios did not demonstrate likely torture, we do not reach the agency's additional findings regarding a lack of detail in his testimony.

1 **III. Continuance**

2 Finally, the agency did not abuse its discretion in denying a continuance.

3 While an IJ “may grant a motion for continuance for good cause shown,” 8 C.F.R.

4 § 1003.29, the movant “bears the burden of establishing good cause,” *Matter of L-*

5 *A-B-R-*, 27 I. & N. Dec. 405, 413 (A.G. 2018). Barrios asked to adjourn the hearing

6 for two reasons: so that his attorney could appear in person, and to have his

7 written statement translated. But his attorney then agreed both to proceed

8 telephonically and to the translation of the statement by the interpreter. Barrios

9 argues that the IJ should have granted a continuance to allow him to obtain

10 additional corroboration, or that it should have extended the time for such

11 corroboration after his hearing. But he did not request a continuance or extension

12 on those grounds from the IJ. To the contrary, Barrios’s attorney stated that there

13 was nothing Barrios wanted to add to the record. In view of that representation,

14 the IJ did not abuse his discretion in failing to grant a continuance or extension.

15 See *Wei Sun*, 883 F.3d at 31 (IJ was not required to grant a continuance where

16 applicant “did not seek a continuance from the IJ despite being asked to explain

17 why the corroboration identified by the IJ was missing”).

1 For the foregoing reasons, Barrios's motions are GRANTED, the petition in
2 21-6442 is DISMISSED AS MOOT, and the petition in 23-6138 is DENIED. Any
3 remaining motions and applications are DENIED and stays VACATED.

4 FOR THE COURT:
5 Catherine O'Hagan Wolfe,
6 Clerk of Court