

FOR PUBLICATION

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

BENITO ANTONIO VILLALOBOS SURA,
Petitioner,

v.

MERRICK B. GARLAND, Attorney
General,
Respondent.

No. 20-71839

Agency No.
A209-428-559

OPINION

On Petition for Review of an Order of the
Board of Immigration Appeals

Submitted June 30, 2021*
Pasadena, California

Filed August 17, 2021

Before: John B. Owens and Ryan D. Nelson, Circuit
Judges, and Alvin K. Hellerstein,** District Judge.

Opinion by Judge R. Nelson

* The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

** The Honorable Alvin K. Hellerstein, United States District Judge for the Southern District of New York, sitting by designation.

SUMMARY***

Immigration

Denying Benito Villalobos Sura's petition for review of a decision of the Board of Immigration Appeals, the panel held that substantial evidence supported the denial of withholding of removal under the serious nonpolitical crime bar, and the denial of protection under the Convention Against Torture based on the lack of government acquiescence.

The panel held that substantial evidence supported the Board's determination that there were "serious reasons to believe" Villalobos Sura committed four aggravated murders and was therefore statutorily ineligible for withholding of removal. The panel explained that Villalobos Sura did not dispute that the murders were both serious and nonpolitical, and thus the government needed to show only that there were "serious reasons to believe" or probable cause that he committed the murders. The panel explained that although this court has not held that a foreign arrest warrant or an Interpol Red Notice (a request to locate and provisionally arrest an individual pending extradition) alone can establish probable cause, it has held that arrest warrants and other government documents provide probable cause when supported by other evidence. The panel concluded that the government met its burden here. First, an arrest warrant declaring Villalobos Sura in contempt of court for failing to attend a pretrial hearing created an indication of reliability

*** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

by including Villalobos Sura's name and identifying information, explaining that that he was accused of aggravated murder, listing the names of the victims, and implying that the charged murders were gang related. Second, the Red Notice contained a brief description of events, alleging that Villalobos Sura and others used knives and firearms to kill four men for presumably being members of the MS-13 gang. Finally, Villalobos's own testimony supported the finding where he admitted that the identifying information in the documents fit his description, his testimony placed him within several miles of the murder at the time of the crime, and Villalobos Sura conceded that a Salvadoran arrest warrant requires a witness, suggesting the Salvadoran government had additional evidence.

After considering the foreign documents, the suspicious timing of Villalobos Sura's departure from El Salvador, and his unpersuasive testimony, the panel held that substantial evidence also supported the Board's determination that Villalobos Sura failed to establish by a preponderance of the evidence that the bar did not apply.

The panel held that Villalobos Sura failed to establish that any torture he may face would be caused by or with the consent or acquiescence of the Salvadoran government. The panel explained that Villalobos Sura's concession of safety combined with an inability to do more than speculate that the police would not protect him from gang violence provided substantial evidence to support the Board's denial of CAT protection.

COUNSEL

Marco A. Garzon, Argumedo Garzon Law Group, San Francisco, California, for Petitioner.

Daniel E. Goldman, Senior Litigation Counsel; Rebecca Hoffberg Phillips, Trial Attorney; Office of Immigration Litigation, Civil Division, United States Department of Justice, Washington, D.C.; for Respondent.

OPINION

R. NELSON, Circuit Judge:

We are asked to decide whether an Interpol Red Notice, among other evidence, creates a serious reason to believe an alien committed a serious nonpolitical crime before entering the United States. If so, Petitioner Benito Antonio Villalobos Sura is ineligible for withholding of removal unless he can show by a preponderance of the evidence that he did not commit the crime. Because substantial evidence supports the Board of Immigration Appeals' conclusion that the serious nonpolitical crime bar is applicable and Villalobos Sura failed to adequately attribute any future torture to the Salvadoran government, we deny his petition for withholding of removal or deferral of removal.

I

A

Villalobos Sura is a native and citizen of El Salvador. While serving in the Salvadoran Army, he resided in the town of San Miguel. As part of his service, he helped local

Salvadoran police arrest gang members, including members of MS-13.

In February 2016, two MS-13 members told him “[t]hat they had an order for [Villalobos Sura] to disappear and if [he] did not go on [his] own they will make [him] disappear.” They also called him “rana,” a Spanish word for “frog,” a derogatory term used by gang members for members of the military. Though he reported this incident to his supervising military officers, he did not report it to the police because he was concerned that some police officers were also members of the MS-13 gang.

Despite the threat, Villalobos Sura continued his military service until it was completed in June or July 2016. He remained in his home in San Miguel until August 2016. He testified that he did not flee El Salvador earlier because he did not want to be absent without leave and have an arrest warrant issued against him.

In May 2016, several months before Villalobos Sura entered the United States, four men were murdered in Jucuapa, five kilometers from where Villalobos Sura was stationed. According to a later Interpol Red Notice,¹ an arrest warrant was issued in July 2017 for Villalobos Sura and four others asserting that they murdered four MS-13 gang members in Jucuapa with knives and firearms. The Special Examining Magistrates’ Court in San Miguel issued

¹ “A Red Notice is a request to locate and provisionally arrest an individual pending extradition. It is issued by [Interpol’s] General Secretariat at the request of a member country or an international tribunal based on a valid national arrest warrant. . . . [I]t is the closest instrument to an international arrest warrant in use today.” *Guan v. Barr*, 925 F.3d 1022, 1029 n.2 (9th Cir. 2019) (first alteration in original) (internal quotation marks and citations omitted).

an arrest warrant listing someone with Villalobos Sura's name, age, birthday, place of residence, and Salvadoran identification number to be in contempt of court *in absentia* for failure to appear to answer the charge of "aggravated murder" of the four victims.

Upon entering the United States in September 2016,² he was detained by border patrol, and removed to El Salvador because he lacked documentation. He told border patrol officers that he had no fear of returning to El Salvador. Upon his return to El Salvador, he stayed in a hotel in San Salvador.

Eight days later, he re-entered the United States and was placed in withholding-only proceedings before an Immigration Judge ("IJ") after he expressed a fear of returning to El Salvador. Villalobos Sura applied for withholding of removal and relief under the Convention Against Torture ("CAT").

Before an IJ, Villalobos Sura sought withholding of removal or deferral of removal as a former Salvadoran military member who received a death threat from gang members. During his hearing, Villalobos Sura conceded that he matched the identity of the person described in the arrest warrant and the Red Notice. He also acknowledged that he was stationed only five kilometers away from the site of the murders. But he denied any prior knowledge of either arrest warrant, any role in the murders, or even visiting the city of Jucuapa. He stated that "the higher rank officers from the army were in charge of going out with the police on foot patrol but [he] was [a] first class soldier so [he] was just

² As to the date he first entered the United States, Villalobos Sura has wavered between September and October 2016.

watching the parties and [] did not go with them.” Nor did he know what they did while on patrol. Villalobos Sura theorized that these unnamed military or police officers may have falsely accused him of murders they had committed.

Villalobos Sura testified that he feared returning to El Salvador and being placed in criminal custody based on false charges, where he would be vulnerable to the MS-13 gang and his former colleagues who framed him. He stated that such would be the case anywhere in El Salvador. He worried that a Salvadoran jail would be unable to protect him from gangs. On the other hand, he also expressed that he would feel safe if held in jail after being deported to El Salvador. Finally, Villalobos Sura declared that his experience working with police exposed him to the corrupt nature of the justice system in El Salvador. He alleges a Salvadoran judge can be bribed for \$200, eliminating any need for a witness to obtain an arrest warrant.

Villalobos Sura submitted evidence related to gang violence, general corruption in El Salvador, and documents outlining country conditions including the 2018 United States Department of State Human Rights Report for El Salvador, two reports from the International Crisis Group, and news articles. The government submitted the arrest warrant and the Red Notice.

B

After a merits hearing, the IJ ordered Villalobos Sura removed to El Salvador. Relying on the arrest warrant and the Red Notice, the IJ found Villalobos Sura statutorily ineligible for withholding of removal under the serious nonpolitical crime bar because the evidence raised serious reasons to believe that he committed aggravated murder. The IJ did not find any evidence negating the government’s

documents except Villalobos Sura's "own self-serving testimony." The IJ was not persuaded by Villalobos Sura's explanation that some unnamed officers may have framed him. The IJ also noted that there was "no apparent political tie or motive for" the murders. Because the IJ found Villalobos Sura's testimony insufficiently credible, he could not show by a preponderance of the evidence that the serious nonpolitical crime bar does not apply.

The IJ alternatively denied withholding of removal on the merits. She found that the isolated threat did not amount to past persecution and that Villalobos Sura's decision to finish his military service and remain in El Salvador after his service for a month or two meant that he could not show a clear probability of future persecution. The IJ also rejected some of Villalobos Sura's proposed social groups as non-cognizable.

On the deferral of removal CAT claim, the IJ found that Villalobos Sura failed to establish probability of torture as he could not show past persecution or a clear probability of future persecution. The IJ also found that he had not shown "it would be the government or government officials who would subject him to torture." The IJ acknowledged Villalobos Sura's claims of a corrupt judicial system, country reports, and other background information detailing general corruption in El Salvador, but also relied on the efforts El Salvador made to combat gang violence. The IJ noted that Villalobos Sura's testimony showed he did not fear any harm from government officials if he was jailed in El Salvador.

C

On appeal, the Board of Immigration Appeals ("BIA") adopted and affirmed the decision of the IJ. The BIA agreed

that the government had met its burden for the serious nonpolitical crime bar and that Villalobos Sura failed to show that the bar did not apply given his testimony was unpersuasive when compared to the Salvadoran arrest warrant and the Red Notice. Therefore, the BIA affirmed the IJ's determination that Villalobos Sura was ineligible for withholding of removal. As this resolved his withholding of removal claims, the BIA did not address the IJ's alternative reasons for denying withholding of removal on the merits.

The BIA also agreed with the IJ's reasoning for denying deferral of removal under CAT. The BIA highlighted that Villalobos Sura did not show he was more likely than not to be tortured by or with the acquiescence of the Salvadoran government despite the country conditions evidence. This petition timely followed.

II

We review the legal determinations of the BIA de novo and the factual determinations for substantial evidence. *See Guan*, 925 F.3d at 1031. Substantial evidence review requires us to uphold the BIA's determination unless "the evidence compels a contrary conclusion." *Parada v. Sessions*, 902 F.3d 901, 909 (9th Cir. 2018) (citation omitted). When the BIA incorporates portions of the IJ's decision, we treat the incorporated portions as part of the BIA's decision. *See id.*

III

A

If "there are serious reasons to believe that [an] alien committed a serious nonpolitical crime outside the United States before the alien arrived in the United States," the alien

is ineligible for withholding of removal under 8 U.S.C. § 1231(b)(3)(A), *see id.* § 1231(b)(3)(B)(iii), and withholding of removal under CAT, *see* 8 C.F.R. §§ 1208.16(c)(4), (d)(2). We have interpreted the “serious reasons” standard as “tantamount to probable cause.” *Go v. Holder*, 640 F.3d 1047, 1052 (9th Cir. 2011).

The government has the initial burden of introducing evidence that the bar may apply. *See* 8 C.F.R. §§ 1208.16(d)(2), 1240.8(d). If the government meets its burden, then the applicant has the burden to rebut the bar by a preponderance of the evidence. *See id.*; *Matter of W-E-R-B-*, 27 I. & N. Dec. 795, 799 (BIA 2020) (concluding “the burden shifted to the [applicant] to prove by a preponderance of the evidence that the serious nonpolitical crime bar does not apply—in other words, to show that there are not serious reasons for believing that he committed a serious nonpolitical crime”). Thus, if substantial evidence supports the agency’s findings that the government met its burden and that the petitioner did not, the BIA’s decision must be upheld. *See Guan*, 925 F.3d at 1031–32.

1

To begin, Villalobos Sura does not dispute that the murders were both serious and nonpolitical. Thus, the government need show only that there are “serious reasons to believe” he committed the murders.

The arrest warrant and the Red Notice provided by the government, combined with the incredibility of Villalobos Sura’s testimony, establish the requisite probable cause. Probable cause exists when there is a “fair probability” that the defendant committed the alleged crime. *Silva-Pereira v. Lynch*, 827 F.3d 1176, 1189 (9th Cir. 2016) (citation omitted); *see also Maryland v. Pringle*, 540 U.S. 366, 371

(2003) (defining probable cause as “a reasonable ground for belief of guilt” that is “particularized with respect to the person” (citation omitted)).

While we have not held that a foreign arrest warrant alone can establish probable cause, we have held that arrest warrants and other government documents provide probable cause when supported by other evidence. In *Silva-Pereira*, 827 F.3d at 1188–89, we held that a foreign indictment containing specific facts related to the alleged crime, along with eyewitness testimony, created probable cause. Similarly, we have upheld a finding of probable cause based on a petitioner’s admission coupled with a Chinese arrest warrant. *Guan*, 925 F.3d at 1030, 1032.

Likewise, we have never held that a Red Notice alone is sufficient to constitute probable cause. While a Red Notice was issued for the petitioner in *Guan*, that decision did not reference the Red Notice when upholding the probable cause finding. *See id.* at 1029–30, 1032. Since a Red Notice is not independently vetted for factual and legal justification, *United States v. Mohamud*, 843 F.3d 420, 424 n.5 (9th Cir. 2016), its reliability corresponds with that of the foreign nation’s arrest warrant.³ By contrast, the BIA has determined in at least one case that a Red Notice may be

³ Two of our sister circuits have also held that a Red Notice, without more, is insufficient to create probable cause to arrest someone. *See Radiowala v. Att’y Gen.*, 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. . . . [T]he Department of Justice’s view is that, by itself, a Red Notice is not a sufficient basis for arresting someone [because it] often falls short of what the Fourth Amendment requires.”); *Hernandez Lara v. Barr*, 962 F.3d 45, 48 n.3 (1st Cir. 2020) (recognizing a “Red Notice alone is not a sufficient basis to arrest the ‘subject’ of the notice” (citation omitted)).

sufficient for the serious nonpolitical crime bar to apply. *Matter of W-E-R-B-*, 27 I. & N. Dec. at 797–800.

Here, the BIA based its finding of a “serious reason to believe” Villalobos Sura committed the murders on the Salvadoran arrest warrant, the Red Notice, and Villalobos Sura’s concessions. It is undisputed that the BIA’s precedent in *Matter of W-E-R-B-* establishes that a Red Notice can be sufficient for probable cause. Still, Villalobos Sura contends that because the government did not submit documents demonstrating the credibility of the warrants and Red Notice, this case is distinguishable. While our precedent has not answered whether a Red Notice alone is sufficient, we need not decide that today. Our prior decisions in *Guan* and *Silva-Pereira* guide us, as each relied on foreign documents buttressed with other evidence.

Those foreign documents are much like the arrest warrant and Red Notice here. The arrest warrant declaring Villalobos Sura in contempt of court for failing to attend a pretrial hearing creates an indication of reliability because it 1) states Villalobos Sura’s name and identifying information; 2) explains that he is accused of aggravated murder; 3) lists the names of the victims; and 4) implies that the charged murders were gang related. We recognize that the initial arrest warrant for the aggravated murders is not a part of the record; however, in conjunction with the Red Notice, the arrest warrant for contempt of court is sufficient. As noted previously, the Red Notice contains a brief description of events, alleging that Villalobos Sura and others used knives and firearms to kill four men for presumably being members of the MS-13 gang.

Villalobos Sura’s testimony also supports a probable cause finding. He admitted that the identifying information in the documents fit his description. His testimony placed

him within several miles of the murder at the time of the crime. Further strengthening the government's case, Villalobos Sura conceded that a Salvadoran arrest warrant requires a witness, suggesting the Salvadoran government had additional evidence. Though this is far from concrete evidence of his guilt, the documents, combined with Villalobos Sura's testimony, are substantial evidence supporting the BIA's determination of a "fair probability" he committed the murders. *Silva-Pereira*, 827 F.3d at 1189 (citation omitted).

2

Substantial evidence also supports the BIA's determination that Villalobos Sura failed to show there are not serious reasons to believe he committed the murders. Because the government has met its burden, Villalobos Sura can prevail only upon showing, by a preponderance of the evidence, that the bar to withholding of removal does not apply. *See* 8 C.F.R. § 1208.16(d)(2). Under the substantial evidence standard, reversal is only appropriate where the evidence "compels a reasonable factfinder to conclude that the BIA's decision is incorrect" in deciding that a petitioner failed to meet the preponderance of the evidence standard. *Baghdasaryan v. Holder*, 592 F.3d 1018, 1022 (9th Cir. 2010) (cleaned up).

To substantiate his claim that he did not commit a serious, nonpolitical crime, Villalobos Sura provided testimony and specific country conditions reports. He testified that an arrest warrant can be procured without a witness for a bribe of \$200, and he provided a State Department report stating that the Salvadoran judiciary is "burdened by inefficiency and corruption." He likewise alleged that some of his superiors would slip away on patrol for hours, and these individuals may have framed him. And

he argues that his testimony is credible given his professional experience working with law enforcement in El Salvador.

But the Supreme Court recently held that an IJ's and BIA's failure to expressly make an adverse credibility determination does not mean that a reviewing court must treat that testimony as credible. *Garland v. Dai*, 141 S. Ct. 1669, 1677 (2021). Thus, if the record contains evidence that a "reasonable factfinder could find sufficient" to discredit the testimony, the reviewing court must accept the agency's findings. *Id.* Thus, Villalobos Sura's testimony is not per se credible.

Sufficient evidence in the record supports the IJ's decision to discredit Villalobos Sura's testimony and other evidence. The IJ found Villalobos Sura's testimony to be "self-serving" and "unpersuasive" when compared to the evidence presented by the government. The testimony also lacked specific allegations of who framed him, instead only generally speculating that his superiors may have committed the murders. And the IJ found Villalobos Sura's decision to flee El Salvador "soon after these alleged events occurred" to be suspicious given that he could have left several months earlier if he were motivated to flee by the gang threat. This suspicion is not unreasonable. These findings were adopted and incorporated by reference by the BIA.⁴

⁴ Villalobos Sura argues that the agency ignored his evidence, but in most instances, he merely accuses the IJ of improperly weighing the evidence. The IJ expressed that she reviewed and considered all evidence, but she found his testimony to be unpersuasive. Moreover, the IJ considered the country reports and news articles and gave them little weight when addressing future persecution.

After considering the foreign documents, the suspicious timing of Villalobos Sura's departure from El Salvador, and his unpersuasive testimony, substantial evidence supports the BIA's conclusion that Villalobos Sura failed to show by a preponderance of evidence that there were not serious reasons to believe he committed the murders.

B

While the serious nonpolitical crime bar defeats Villalobos Sura's withholding of removal claims, it does not preclude eligibility for deferral of removal under CAT. *See* 8 C.F.R. § 1208.17(a). That said, we deny Villalobos Sura's deferral of removal claim because "[s]ubstantial evidence supports the BIA's finding that it is not more likely than not that [he] will be tortured in El Salvador" by or with the consent or acquiescence of the Salvadoran government. *Del Cid Marroquin v. Lynch*, 823 F.3d 933, 937 (9th Cir. 2016); *see also Barajas-Romero v. Lynch*, 846 F.3d 351, 363 (9th Cir. 2017) (explaining that CAT relief requires the alien to "prove not only that torture will more likely than not occur, but also that there is sufficient state action involved in the torture"). "[D]eferral of removal provides a less permanent form of protection than withholding of removal and one that is more easily and quickly terminated if it becomes possible to remove the alien consistent with Article 3 of the CAT" *United States v. Reyes-Bonilla*, 671 F.3d 1036, 1051 (9th Cir. 2012) (alteration in original) (citation omitted).

While the BIA agreed with the totality of the IJ's reasoning for denying deferral of removal, it specified that Villalobos Sura failed to establish that any torture he may face would be caused by or with the consent or acquiescence of the Salvadoran government. That reason alone is enough to deny deferral of removal. The IJ explained that when Villalobos Sura was asked if he would be safe if he were held

in a Salvadoran jail, he answered affirmatively.⁵ We hold that Villalobos Sura’s concession of safety combined with an inability to do more than speculate that the police would not protect him from gang violence provide substantial evidence sufficient to support the BIA’s decision to deny deferral of removal.

IV

Substantial evidence—including a Red Notice, an arrest warrant, and Villalobos Sura’s various concessions—supports the BIA’s finding that there are “serious reasons to believe” Villalobos Sura committed four aggravated murders. Villalobos Sura’s documentary evidence of corruption and self-serving testimony do not compel a contrary conclusion. Moreover, substantial evidence supports the BIA’s decision to deny deferral of removal because Villalobos Sura failed to adequately attribute any potential future torture to the Salvadoran government.

PETITION DENIED.

⁵ Villalobos Sura also suggested he would be at risk of harm from gangs in jail because of police corruption and impoverished conditions. Such speculation cannot compel the court to ignore his contradictory concession of safety. See *Matter of Z-Z-O-*, 26 I. & N. Dec. 586, 592 (BIA 2015) (“Where there are two permissible views of the evidence, the factfinder’s choice between them cannot be clearly erroneous.” (citation omitted)).