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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MOISES TORTOLEDO, Petitioner, v. ERIC H. HOLDER, Jr., Attorney General, Respondent.	No. 07-74215 Agency No. A079-529-453 MEMORANDUM[*]

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

Submitted February 18, 2009[**]

Before: BEEZER, FERNANDEZ, and W. FLETCHER, Circuit Judges.

Moises Tortoledo, a native and citizen of Mexico, petitions pro se for review of the decision of the Board of Immigration Appeals denying his motion for leave to file a late motion to reopen seeking to challenge the underlying denial of his

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[*] This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

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

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application for cancellation of removal based on petitioner's failure to establish the requisite extreme hardship to his qualifying relatives. The BIA initially denied petitioner's motion to reopen because it was filed one day late. The BIA subsequently denied petitioner's request to file a late motion to reopen, and alternatively, held that the new evidence did not make a prima facie showing of the requisite level of hardship to warrant reopening.

Petitioner contends that his new evidence of hardship provided a prima facie case for his cancellation application. Petitioner offered new evidence of hardship that his United States citizen daughter was experiencing academic difficulties. We conclude that the BIA considered the new evidence, and acted within its broad discretion in determining that the evidence was insufficient to warrant reopening. *See Singh v. INS*, 295 F.3d 1037, 1039 (9th Cir. 2000) (the BIA's denial of motion to reopen shall be reversed only if it is "arbitrary, irrational, or contrary to law").

Petitioner further contends that the BIA violated his due process rights by denying his request to file an untimely motion to reopen where the motion was only one day late and was caused by an error on the part of Federal Express. As the government acknowledges, the BIA erred in its analysis of the untimeliness of

the motion. We do not address petitioner's due process claim because we uphold the BIA's alternate holding.

PETITION FOR REVIEW DENIED.