

SEP 29 2009

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CARLOS ANTONIO GUTIERREZ,

Petitioner,

v.

ERIC H. HOLDER Jr., Attorney General,

Respondent.

No. 06-71337

Agency No. A094-228-984

MEMORANDUM*

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

Submitted September 14, 2009**

Before: SILVERMAN, RAWLINSON, and CLIFTON, Circuit Judges.

Carlos Antonio Gutierrez, a native and citizen of El Salvador, petitions for review of the Board of Immigration Appeals’ order dismissing his appeal from an immigration judge’s (“IJ”) decision denying his application for asylum,

* 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).

withholding of removal, protection under the Convention Against Torture (“CAT”), and for a waiver of inadmissibility under INA § 212(h). We have jurisdiction under 8 U.S.C. § 1252. We review for substantial evidence findings of fact, *Hoxha v. Ashcroft*, 319 F.3d 1179, 1182 n.4 (9th Cir. 2003), and de novo questions of law, *De Martinez v. Ashcroft*, 374 F.3d 759, 761 (9th Cir. 2004). We deny the petition for review.

The agency found that Gutierrez was not eligible for asylum based on his conviction of an aggravated felony. Gutierrez does not challenge this dispositive determination in his opening brief.

Substantial evidence supports the agency’s denial of withholding of removal because Gutierrez failed to demonstrate it is more likely than not he would be persecuted if returned to El Salvador. *See Hoxha*, 319 F.3d at 1185.

Substantial evidence supports the agency’s denial of CAT protection because Gutierrez failed to show it is more likely than not he would be tortured if returned to El Salvador. *See Arteaga v. Mukasey*, 511 F.3d 940, 948-49 (9th Cir. 2007).

Gutierrez’s contentions that: (1) the Attorney General exceeded his authority in promulgating the standard that governed the agency’s review of his application for a waiver under 8 U.S.C. § 1182(h); (2) the agency erred by applying the

“exceptional and extremely unusual hardship” standard under 8 C.F.R.

§ 1212.7(d); (3) 8 C.F.R. § 1212.7(d) cannot be applied retroactively; and (4) his conviction under California Penal Code § 288(a) is not a crime of violence are foreclosed by *Mejia v. Gonzales*, 499 F.3d 991, 995-99 (9th Cir. 2007).

The record does not support Gutierrez’s contention that he was deprived of a fair hearing. *See Lata v. INS*, 204 F.3d 1241, 1246 (9th Cir. 2000) (requiring error and substantial prejudice to establish a due process violation).

Finally, Gutierrez waived his contention that the IJ violated his due process rights by denying his request for a continuance because he failed to raise it in his opening brief. *See Bazuaye v. INS*, 79 F.3d 118, 120 (9th Cir. 1996) (per curiam) (declining to reach issue raised for the first time in the reply brief).

PETITION FOR REVIEW DENIED.