

DEC 27 2010

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ELMER RICARDO SALAZAR VAIL,

Petitioner,

v.

ERIC H. HOLDER, Jr., Attorney General,

Respondent.

No. 05-75628

Agency No. A079-537-653

MEMORANDUM\*

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

Submitted December 14, 2010\*\*

Before: GOODWIN, WALLACE, and THOMAS, Circuit Judges.

Elmer Ricardo Salazar Vail, a native and citizen of Guatemala, petitions pro se for review of the Board of Immigration Appeals’ (“BIA”) order summarily affirming an immigration judge’s (“IJ”) decision denying his application for asylum and withholding of removal, and affirming the IJ’s decision denying 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 concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

motion to reopen. We have jurisdiction under 8 U.S.C. 1252. We review for substantial evidence factual findings, *Zehatye v. Gonzales*, 453 F.3d 1182, 1184-85 (9th Cir. 2006), and we review for abuse of discretion the denial of a motion to reopen, *Malty v. Ashcroft*, 381 F.3d 942, 945 (9th Cir. 2004). We review de novo claims of due process violations in removal proceedings. *Vasquez-Zavala v. Ashcroft*, 324 F.3d 1105, 1107 (9th Cir. 2003). We deny the petition for review.

Substantial evidence supports the IJ's determination that the police harassment Vail suffered while a student did not establish past persecution or a well-founded fear of future persecution on account of a protected ground. *See INS v. Elias-Zacarias*, 502 U.S. 478, 481-84 (1992). Accordingly, Vail's asylum and withholding of removal claims fail. *See Barrios v. Holder*, 581 F.3d 849, 855-56 (9th Cir. 2009).

The agency did not abuse its discretion by denying Vail's motion to reopen because Vail failed to demonstrate the evidence he submitted was previously unavailable. *See* 8 C.F.R. § 1003.2(c)(1).

Vail's contention that the agency violated due process by failing to consider the entirety of the evidence he submitted fails, because he has not overcome the presumption that the agency did review the record. *See Fernandez v. Gonzales*, 439 F.3d 592, 603 (9th Cir. 2006). Because the agency did not abuse its discretion

in denying the motion to reopen, denial of an evidentiary hearing did not violate due process. *See* 8 U.S.C. § 1229a(c)(7) (stating that motion to reopen shall state the new facts that will be proved at a hearing to be held if the motion is granted, and shall be supported by affidavits or other evidentiary material); *see also Lata v. INS*, 204 F.3d 1241, 1246 (9th Cir. 2000) (requiring error to prevail on a due process claim).

Finally, Vail's contention that the BIA violated due process by affirming the IJ's decision without opinion is foreclosed by *Falcon Carriche v. Ashcroft*, 350 F.3d 845, 848 (9th Cir. 2003) (BIA's summary affirmance procedure does not violate due process).

**PETITION FOR REVIEW DENIED.**