

DEC 27 2010

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

<p>MARTIN HERRERA,</p> <p style="text-align: center;">Petitioner,</p> <p>v.</p> <p>ERIC H. HOLDER, Jr., Attorney General,</p> <p style="text-align: center;">Respondent.</p>
--

No. 07-73364

Agency No. A041-308-542

MEMORANDUM*

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

Submitted December 14, 2010**

Before: GOODWIN, WALLACE, and W. FLETCHER, Circuit Judges.

Martin Herrera, a native and citizen of Mexico, petitions for review of the Board of Immigration Appeals' order dismissing his appeal from an immigration judge's removal order. We have jurisdiction under 8 U.S.C. § 1252. We review for substantial evidence the agency's factual findings, and review de novo

* 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).

questions of law and constitutional claims. *Khan v. Holder*, 584 F.3d 773, 776 (9th Cir. 2009). We deny the petition for review.

Substantial evidence supports the agency's determination that Herrera was convicted under Cal. Penal Code § 273.5(a) and sentenced to 365 days in jail. *See* 8 U.S.C. § 1229a(c)(3)(B) (listing permissible documents for proof of conviction). Because a conviction for violating Cal. Penal Code § 273.5 is categorically a crime of violence under 18 U.S.C. § 16(a), *see Banuelos-Ayon v. Holder*, 611 F.3d 1080, 1083 (9th Cir. 2010), and Herrera was sentenced to a term of imprisonment of one year, the agency did not err in concluding that Herrera had been convicted of an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) and therefore was statutorily ineligible for cancellation of removal. *See* 8 U.S.C. § 1229b(a)(3). Herrera's contention that his offense may not be considered an aggravated felony because it was classified as a misdemeanor under California law is unavailing. *See United States v. Gonzalez-Tamariz*, 310 F.3d 1168, 1170-71 (9th Cir. 2002). Herrera has waived any challenge to the agency's determination that his conviction is also a crime involving moral turpitude. *Martinez-Serrano v. INS*, 94 F.3d 1256, 125960 (9th Cir. 1996).

Herrera's contention that the agency's decision violated its own regulations fails because he is unable to demonstrate prejudice. *See Kohli v. Gonzales*, 473

F.3d 1061, 1066-67 (9th Cir. 2007) (“When presented with allegations that an agency has violated its own regulation . . . the claimant must show he was prejudiced by the agency’s mistake.”). Herrera’s due process challenge to the agency’s decision also fails. *See Lata v. INS*, 204 F.3d 1241, 1246 (9th Cir. 2000) (requiring error and prejudice to prevail on a due process claim).

Herrera’s remaining contentions are unpersuasive.

PETITION FOR REVIEW DENIED.