

**UNITED STATES DISTRICT COURT  
DISTRICT OF CONNECTICUT**

RAFAELA MERCEDES	:	
GOMEZ-DE LEON,	:	
Petitioner,	:	
	:	Civil Action No. 3:01CV1825(CFD)
v.	:	
	:	
IMMIGRATION AND	:	
NATURALIZATION SERVICE,	:	
Respondent.	:	

**RULING**

I.     Introduction

Pending is Rafaela Mercedes Gomez-DeLeon’s (“Gomez-DeLeon”) pro se petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241 [Doc. # 1]. In her petition, Gomez-DeLeon argues that the Board of Immigration Appeals (“BIA”) erred in denying her motions to reopen and reconsider its decision dismissing her appeal of an immigration judge’s finding that she was removable and ineligible for relief. Gomez-DeLeon also has raised additional arguments in the following supplemental filings: “Petitioner’s Response to INS for Dismissal of Habeas and Stay” [Doc. # 11]; “Petitioner’s Additional Submission for Consideration as Response to INS Response to Dismissal [Doc. #13]; “Submission of Widow’s Papers under 42 USC 1320b-7 and Section 201(b)(2)(a)(1)” [Doc. # 14]; “Motion to Incorporate Board’s Violation of Due Process and Equal Right Protection under Convention Against Torture” [Doc. # 16]; and “Response by Petitioner to the Government’s Reply 2/13/02” [Doc. # 18].<sup>1</sup> In several of these filings, it appears that Gomez-DeLeon is requesting that this Court reopen her removal proceedings to permit the

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<sup>1</sup>She also has filed a “Submission of Statement by Mr. Marco A. Chinchilla Ex-Narcotics Police Agent New Brunswick Police Dept.” [Doc. # 6] as support for some of her arguments.

INS to adjust her status, act on an immediate relative petition filed by one of her daughters, and determine that she is eligible for Social Security benefits.<sup>2</sup> For the following reasons, Gomez-DeLeon's petition is dismissed.

## II. Background

Gomez-DeLeon entered the United States from the Dominican Republic on or about May 3, 1984, and was admitted as a lawful permanent resident. Although now widowed, Gomez-DeLeon was married to a United States citizen, and has a number of children and grandchildren who are citizens of this country. On February 25, 1999, she was convicted in the United States District Court for the District of New Jersey of conspiracy to possess a controlled substance with intent to distribute, in violation of 21 U.S.C. § 841(a)(1) and § 846. Shortly after her conviction, the Immigration and Naturalization Service ("INS") began removal proceedings. On April 12, 2000, an immigration judge found Gomez-DeLeon removable to the Dominican Republic and ineligible for relief from removal. Gomez-DeLeon appealed this decision to the BIA. The BIA dismissed her appeal on October 3, 2000. Gomez-DeLeon filed a motion to reopen and reconsider the BIA decision on July 31, 2001, arguing that she lacked the mens rea to commit the drug offense and that she is entitled to a deferral of removal under the Convention Against Torture ("CAT")<sup>3</sup> because she needs medical care unavailable in the Dominican Republic.<sup>4</sup> The

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<sup>2</sup>Although Gomez-DeLeon refers to a due process and equal protection argument in the caption of one of her filings, she does not expand upon these contentions any further.

<sup>3</sup>United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, § 2242 of the Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA"), Pub. L. No. 105-277, Div. G, 112 Stat. 2681, 2681-821 (Oct. 21, 1998).

<sup>4</sup>Gomez-DeLeon also had argued that she was eligible for relief under INA § 212(c), 8 U.S.C. 1182(c)(1995), an argument rejected by the BIA, but she does not appear to raise that

BIA denied this motion on September 20, 2001. Around the time of that decision, Gomez-DeLeon submitted a supplemental memorandum in support of her motion to reopen and reconsider, which apparently argued that Gomez-DeLeon was eligible for relief from removal because of her assistance to New Jersey law enforcement officials. On November 15, 2001, the BIA denied her supplemental requests on the grounds that Gomez-DeLeon was not permitted to file a second successive motion to reopen under 8 C.F.R. § 3.2(c)(2) and because it found no error in its previous ruling with respect to reconsideration.<sup>5</sup> Gomez-DeLeon, who is currently incarcerated at the York Correctional Facility in Niantic, Connecticut, filed the instant petition on September 25, 2001.<sup>6</sup>

In her habeas corpus petition and supplemental filings, Gomez-DeLeon makes several arguments. First, she contends that she is entitled to cancellation of removal pursuant to § 240A of the Immigration and Naturalization Act (“INA”), 8 U.S.C. § 1229b, and under Matter of Khourn, 1997 WL 706630, 21 I. & N. Dec. 1041 (1997) because her drug conviction is both a crime of moral turpitude and aggravated felony. Second, she maintains that she is eligible for withholding of removal or, in the alternative, deferral of removal, under the CAT and in accordance with Matter of Toboso-Alfonso, 1990 WL 547189 (BIA 1990) due to her medical

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issue here.

<sup>5</sup>Gomez-DeLeon states that she filed this second motion prior to the BIA’s decision to deny her first motion to reopen and reconsider, but the record provided to the Court indicates that it was not accepted for filing until October 5, 2001, fifteen days after the BIA’s ruling on the motion to reopen and reconsider.

<sup>6</sup>Gomez-DeLeon was sentenced to 37 months imprisonment as a result of the drug offense. She was remanded on February 26, 1999, the date of her sentencing. Accordingly, it appears that she has finished serving her sentence and is now in INS custody.

needs and her belief that her life would be threatened in the Dominican Republic as a result of her assistance to New Jersey law enforcement authorities. Third, she contends that she is entitled to relief under Toboso-Alfonso because she lacked the mens rea for her conviction of the drug offense. Fourth, she contends that the BIA's decisions were arbitrary and capricious and as such, denied her rights to due process and equal protection. Fifth, she maintains that removal proceedings should be reopened because she is eligible for adjustment of status under INA § 245(i), 8 U.S.C. § 1255(i), and particularly in light of the fact that she has filed an application for an adjustment of status and that her daughter has filed an immediate relative petition. Sixth, she argues that her status as a lawful permanent resident should be restored pursuant to INA § 201(b)(2)(a)(i), 8 U.S.C. § 1151(b)(2)(A)(i), because her husband passed away. Finally, she contends that as a widow, she is eligible for Social Security benefit payments. She apparently has raised the latter two issues in a third motion to reopen and for reconsideration, filed with the BIA on December 26, 2001. There is no indication from the record whether the BIA has acted upon this motion.

### III. Standard

The BIA's conclusions of law are reviewed de novo. Iavorki v. United States INS, 232 F.3d 124, 128 (2d Cir. 2000); Mardones v. McElroy, 197 F.3d 619, 624 (2d Cir. 1999). A decision by the BIA to deny a motion to reopen deportation proceedings is reviewed ““only to determine whether the decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.”” Fuentes-Argueta v. INS, 101 F.3d 867, 870 (2d Cir. 1996) (quoting Vargas v. INS, 938 F.2d 358, 360 (2d Cir.1991)). A court must consider the statement of reasons given to justify the decision to determine if the path the agency followed is discernable,

and if the determination was reached either for an impermissible reason or none at all. Vargas, 938 F.2d at 360. In general, arguments not raised before the immigration judge or the BIA are waived. See Correa v. Thornburgh, 901 F.2d 1166, 1171 (2d Cir. 1990).

#### IV. Discussion

##### A. Motions to reopen and reconsider generally

The BIA denied Gomez-DeLeon's first motion to reconsider the BIA's decision of October 3, 2000, which argued that she lacked the mens rea to commit the crime of which she was convicted, as untimely under the time limits set forth in 8 C.F.R. § 3.2(b)(2). It also determined that her motion to reopen to apply for asylum, withholding of removal and other relief under the CAT similarly was filed after the permissible time period set forth in 8 C.F.R. §§ 3.2(b)(2) and (c)(2). The BIA further recognized that this time period does not apply when there is evidence of changed circumstances in the country to which the individual is to be removed that could not have been presented or discovered at the previous hearing, and it concluded that Gomez-DeLeon did not produce such evidence. As to her second "motion"—the supplemental submission filed on October 5, 2001—the BIA stated that its original conclusion was not altered by the assistance Gomez-DeLeon gave to law enforcement authorities, and also concluded that to the extent she requested that removal proceedings be reopened, her submission was barred as an impermissible second successive motion to reopen.<sup>7</sup>

Motions for reconsideration must be filed within 30 days of the mailing of the BIA's

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<sup>7</sup>The Court was not provided with a copy of her second motion to reopen and reconsideration, but it appears that she raised in that motion the issue of her assistance to law enforcement authorities and the consequences of her actions should she be removed to the Dominican Republic.

decision. See 8 C.F.R. § 3.2(b). In this case, the BIA's decision was mailed on October 3, 2000, and thus any motion for reconsideration should have been filed by November 2, 2000. Gomez-DeLeon's first motion for reconsideration was filed on July 31, 2001, a considerably later date. Her second motion for reconsideration, filed on or about October 5, 2001, also was filed late.

Motions to reopen generally must be filed within 90 days of the date on which the final administrative decision was rendered in the proceeding sought to be reopened. See 8 C.F.R. § 3.2(c)(2). The BIA denied Gomez-DeLeon's motion to reopen on the basis that it was filed more than 90 days after the final decision that is the subject of the motion. Again, Gomez-DeLeon's motions were clearly filed beyond this 90 day limit. However, there are several exceptions to this rule. The exception that is relevant in this case is § 3.2(c)(3)(ii), which provides that the time limit does not apply when a motion to reopen is filed "[t]o apply or reapply for asylum or withholding of deportation based on changed circumstances arising in the country of nationality or in the country to which deportation has been ordered, if such evidence is material and was not available and could not have been discovered or presented at the previous hearing." The "changed circumstances" exception does not apply in this case, as Gomez-DeLeon did not in her motion to reopen and reconsider present any argument that the circumstances in the Dominican Republic have changed since the previous hearing. As to her contention that the Dominican Republic will be unable to provide her with adequate medical treatment, there is no indication from the record that her condition arose or worsened since the previous hearing. Thus, the alleged lack of medical treatment cannot be considered a changed circumstance. In addition, there is no indication that she could not have presented her argument that she would be subject to reprisal as the result of her assistance to New Jersey law enforcement officials at the previous

hearing. Accordingly, the BIA's decision to deny the motion was neither arbitrary nor capricious.

Further, Gomez-DeLeon is not alleging torture under the CAT as a matter of law.<sup>8</sup> See Soto v. Ashcroft, NO. 00CV5985 AJP, 2001 WL 1029130, at \*7 (S.D.N.Y. Sept. 7, 2001) (district courts have jurisdiction under 28 U.S.C. § 2241 to review petitioner's CAT claim "insofar as he alleges that as a matter of law his return to the Dominican Republic would violate the treaty"). An individual may be protected under the CAT by withholding or deferral of removal to the country of torture. 8 C.F.R. § 208.16(c)(4). To qualify for this protection, an applicant must establish "that it is more likely than not that he or she would be tortured if removed to the proposed country of removal." Id. at § 208.16(c)(2). Gomez-DeLeon maintains that she would be subject to torture if removed to the Dominican Republic based on Matter of Toboso-Alfonso, 1990 WL 547189 (BIA 1990). In that case, Toboso-Alfonso, who was under a final order of deportation, presented evidence that he would be tortured on the basis of his sexual orientation if he were deported to his native Cuba. The court found that such torture, inflicted because of an individual's membership in a specific social group, qualified as a basis for relief under the CAT. Gomez-DeLeon argues that she also is a member of a specific social group facing torture: a group comprised of individuals with criminal backgrounds who are targeted for blackmailing and extrajudicial killings by government officials in the Dominican Republic.

Torture is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from

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<sup>8</sup>The Court notes that several courts have found that they lack jurisdiction to review discretionary denials of relief under the CAT. See, e.g., Herndandez-Osoria v. Ashcroft, No. 01CV5545(SAAS), 2002 WL 193574, at \*5 (S.D.N.Y. Feb. 7, 2002); McDaniel v. United States INS, 142 F. Supp. 2d 219 (D. Conn. 2001); Akhtar v. Reno, 123 F. Supp. 2d 191, 197 (S.D.N.Y. 2000). In those cases, however, the BIA had reached the merits of the petitioners' arguments. Here, the BIA's denial was for procedural reasons.

him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

Id. at 8 C.F.R. § 208.18(a)(1). “The applicant for withholding of removal pursuant to the Convention [Against Torture] bears the burden of proof to ‘establish that it is more likely than not that he or she would be tortured if removed to the proposed country of removal.’” Ali v. Reno, 237 F.3d 591, 596 (6th Cir. 2001) (quoting C.F.R. § 208.16(c)(2)). In evaluating this risk, the court must consider the possibility of future torture, as well as evidence of past torture on the applicant. Id.

Here, Gomez-DeLeon did not present any evidence that she would be tortured on the basis of her criminal background, but instead relies only on conclusory allegations that she would be subject to shootings and blackmail by government officials. This is insufficient as a matter of law to entitle her to CAT relief. See Soto, 2001 WL 1029130, at \*8 (explaining that an INS determination that petitioner would not be tortured upon return to the Dominican Republic was supported by substantial evidence where the only evidence of such torture were newspaper articles about conditions in the country and the petitioner’s own allegations).

Gomez-DeLeon also argues that she would be tortured by drug traffickers upset with her for cooperating with drug enforcement officials in the United States. As the government points out, however, the definition of torture under the CAT is pain and suffering inflicted by public officials. Thus, the actions Gomez-DeLeon describes, which would allegedly be perpetrated by drug dealers rather than government officials, cannot be considered torture under the CAT.

Finally, Gomez-DeLeon also appears to contend that she would face torture in the Dominican Republic because that country is unable to properly care for her mental health needs. Again, she has not produced any evidence that this alleged torture will be inflicted by public officials, or that it would be for “such purposes as obtaining . . . information or a confession, punishing . . . her for an act . . . she or a third person has committed or is suspected of having committed, or intimidating or coercing . . . [DeLeon] or for any reason based on discrimination of any kind.” Accordingly, her CAT claims fail as a matter of law.

Gomez-DeLeon also contended in her motion to reopen and reconsider that she lacked the mens rea to support her narcotics conviction and thus is entitled to relief from removal. As explained above, the BIA’s decision denying her motion to reopen and for reconsideration on this basis was proper in light of the time limits provided in the immigration statutes.

Further, 28 U.S.C. § 2241 is an improper vehicle for this type of claim.<sup>9</sup> “A motion pursuant to [section] 2241 generally challenges the *execution* of a federal prisoner’s sentence, including such matters as the administration of parole, computation of a prisoner’s sentence by prison officials, prison disciplinary actions, prison transfers, type of detention and prison conditions.” Jiminian v. Nash, 245 F.3d 144, 146 (2d Cir. 2001) (citing Chambers v. United States, 106 F.3d 472, 474-75 (2d Cir. 1997) (describing situations where a federal prisoner would properly file a section 2241 petition)). In contrast, a motion under 28 U.S.C. § 2255 is considered “the proper vehicle for a federal prisoner’s challenge to [the imposition of] his

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<sup>9</sup>In her “Motion to Incorporate,” Gomez-DeLeon appears also to argue that the BIA’s November 15, 2001 decision failed to consider the arguments she made in her September 20, 2001 filing, and that this constituted a denial of her rights to due process and equal protection. However, her submissions were clearly filed after the time limits provided for motions to reopen and reconsider.

conviction and sentence.” Id. at 146-47. Thus, a federal prisoner challenging the imposition of his or her sentence must do so by a motion filed pursuant to § 2255 rather than a petition filed pursuant to § 2241. See Triestman v. United States, 124 F.3d 361, 373 (2d Cir. 1997). There is an exception to this general rule, known as the “savings clause” of § 2255, which provides that a prisoner can challenge his or her conviction and sentence under § 2241 if he or she can establish that the remedy afforded under § 2255 is “inadequate or ineffective to test the legality of his detention.” 28 U.S.C. § 2255.

Section 2255 contains a one-year limitations period commencing at the latest of the dates on which the judgment of conviction becomes final, “the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed...,” or “the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review.” 28 U.S.C. § 2255. This limitation appears to apply in Gomez-DeLeon’s case, as her conviction became final more than one year ago. However, the applicability of this limitation does not necessarily mean that the exception applies as well. A motion pursuant to § 2255 is not inadequate or ineffective simply because a prisoner is procedurally barred from filing a section 2255 motion. Triestman, 124 F.3d at 376. Instead, § 2255 “may be inadequate or ineffective in circumstances in which ‘the petitioner cannot, for whatever reason, utilize § 2255, and in which the failure to allow for collateral review would raise serious constitutional questions.” Jiminian, 245 F.3d at 147 (quoting Triestman, 124 F.3d at 377). In particular, the Second Circuit has afforded relief under the exception where a section 2255 motion was not available and the petitioner was claiming “actual innocence” of the crime of which he was

convicted. See id. at 380. Here, Gomez-DeLeon’s claim of lack of mens rea appears to involve an “actual innocence” argument, as she maintains that she lacked the requisite mens rea for the drug conviction.

Even if this exception applies, however, the Court does not have jurisdiction to examine whether Gomez-DeLeon had the mens rea to commit the drug offense at issue. As the government points out in its brief, this Court is not empowered to look behind a prisoner’s conviction “to review the factual innocence of a defendant who voluntarily plead guilty to the crime for which the defendant is being deported.” De Kopilchak v. I.N.S., No. CIV. 7931 RCC JCF, 2000 278074, at \*1 (S.D.N.Y. Mar. 14, 2000); see also Lennon v. INS, 527 F.2d 187, 194 n.16 (2d Cir. 1975) (“Whether Lennon himself lacked guilty knowledge is immaterial. It is ‘elementary’ . . . that in a deportation proceeding we cannot go behind a guilty plea to try the case anew.”); Barnaby v. Reno, 142 F. Supp. 2d 277, 278 (D. Conn. 2001). Therefore, this Court cannot consider DeLeon’s claim of innocence and this claim will be dismissed. Further, even if DeLeon had a credible claim of actual innocence, she appears to have finished serving her sentence for the drug offense, which also could deprive this Court of jurisdiction to consider her habeas corpus petition. See Cuevas v. People of the State of New York, No. 01 CIV 2550(RWS), 2002 WL 206985, at \*2 (Feb. 11, 2002) (“A habeas petitioner who has completed his sentence and was the subject of an INS deportation order cannot attack his underlying state court criminal conviction in a federal habeas proceeding because he was no longer in custody with respect to the expired state conviction.”); Tocci v. United States, 178 F. Supp. 2d 176, 180 (N.D.N.Y. 2001) (“Where, as here, a petitioner has completed service of his or her sentence, the

‘in custody’ requirement cannot be satisfied by the pendency of immigration proceedings.”).<sup>10</sup>

Gomez-DeLeon also argues that her drug conviction, as a crime of moral turpitude, makes her eligible for cancellation of removal under INA § 240A, 8 U.S.C. § 1229b. While she has not submitted any evidence that it was raised before the immigration judge or the BIA, she did cite Khourn, the case on which she relies for her “moral turpitude” argument, in connection with her mens rea claim. Given that Gomez-DeLeon is proceeding pro se, the Court will consider this reference sufficient for exhaustion purposes.<sup>11</sup>

In that case, the BIA explained that Khourn, an alien convicted of a controlled substance offense, previously had been granted a waiver of deportation under § 212(c) of the INA, 8 U.S.C. § 1182.<sup>12</sup> Khourn, 21 I. & N. Dec. at 1042. Several years later, Khourn was convicted of theft and again charged with deportability under § 241(a)(2)(A)(ii) of the INA, on the ground that he had been convicted of two crimes of moral turpitude: the controlled substance offense and the theft. Id. The immigration judge presiding over his deportation proceeding found for Khourn on the basis that the drug offense was not a crime of moral turpitude. Id. On appeal, the BIA found that the drug offense was a crime of moral turpitude that, together with the theft, would subject Khourn to deportation. Id. at 1048-49. Thus, the fact that the controlled substance offense had

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<sup>10</sup>The Court could have jurisdiction under the common law writ of error coram nobis, but DeLeon has not raised this and the Court does not find that she satisfies the requirements for such a writ to issue. See Tocci, 178 F. Supp. 2d at 181.

<sup>11</sup>The Court notes that some authority indicates that the exhaustion requirement does not apply to motions to reopen because such motions seek discretionary relief, rather than relief available as of right. See Zheng v. Reno, 27 F. Supp. 2d 476, 477 (S.D.N.Y. 1998) (citing Arango-Arandondo v. INS, 13 F.3d 610, 614 (2d Cir. 1994)).

<sup>12</sup>This provision has since been repealed.

been previously waived did not mean that it could not be considered, together with the theft conviction, as a basis of deportability under § 241(a)(2)(A)(ii). Gomez-DeLeon appears to argue that because her own drug conviction is a crime of moral turpitude, it provides a basis for cancellation of removal, much as Khourn's drug conviction was grounds for a waiver under § 212(c). Khourn, however, simply does not support this proposition, as its holding is limited to determining whether the drug offense at issue was a crime of moral turpitude, and the Court will not expand it further.<sup>13</sup>

Accordingly, to the extent that her petition seeks review of the BIA's denial of her motions to reopen and for reconsideration, the petition is denied.

B. Adjustment of status

Gomez-DeLeon also argues that removal proceedings should be reopened to permit her to apply for an adjustment of status. She appears to contend that the fact that she has been convicted of a crime of moral turpitude entitles her or one of her children to file a Form I-130, known as an immediate relative petition, which would entitle her to such an adjustment. She bases her argument on INA § 245(i), 8 U.S.C. § 1255(i), Matter of Rainford, 20 I. & N. Dec. 598, 1992 WL 323809 (BIA) (1992), and Matter of Grinberg, 20 I. & N. Dec. 911, 1994 WL 681671 (BIA) (1994).

“[T]he Attorney General may adjust the status of the alien to that of an alien lawfully

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<sup>13</sup>Gomez-DeLeon also cites Vargas v. INS, 938 F.3d 358 (2d Cir. 1991) in support of her petition. In that case, the court held that a BIA decision denying the petitioner's request to reopen removal proceedings was arbitrary and capricious because the BIA treated the motion as a second request for §212(c) relief rather than a motion to submit information that would assist the BIA in reaching a correct decision on the petitioner's first request. See Vargas, 938 F.3d at 362. Vargas is distinguishable from the instant case, where the BIA's decision to deny the motion to reopen and reconsider its October 3, 2000 decision was based on the expiration of time limits.

admitted for permanent residence if--(A) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence; and (B) an immigrant visa is immediately available to the alien at the time the application is filed.” 8 U.S.C. § 1255(i). An immigrant visa may be immediately available if an alien’s parent, child or spouse files, and the INS approves, an immediate relative petition on his or her behalf. See INA § 201(b)(2)(A)(1), 8 U.S.C. § 1151(b)(2)(A)(i); Johnson v. Vomacka, No. 97 CIV 5687, 2000 WL 1349251 (TPG), at \* 5 (S.D.N.Y. Sept. 20, 2000).<sup>14</sup> Approval of an immediate relative petition “affords the alien the right to apply for an adjustment of immigrant status.” Burger v. McElroy, No. 97 CIV. 8775(RPP), 1999 WL 787661, at \*2 (S.D.N.Y. Sept. 30, 1999) (citing 8 C.F.R. § 245.2(a)(2)).

As an initial matter, failure to raise adjustment of status before an immigration judge or the BIA strips the district court of jurisdiction.<sup>15</sup> See Cinqemani v. Ashcroft, No. 00-CV-1460, 2001 WL 939664, at \* 5 n.4 (E.D.N.Y. Aug. 16, 2001); Sadowski v. United States INS, 107 F. Supp. 2d 451, 454-55 (S.D.N.Y. 2000). Here, there is no indication that Gomez-DeLeon raised this argument before the INS or BIA in her removal proceedings, and thus it appears that this Court

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<sup>14</sup>8 U.S.C. § 1151(b)(2)(A)(i) provides, in relevant part,

[A]n alien who was the spouse of a citizen of the United States for at least 2 years at the time of the citizen's death and was not legally separated from the citizen at the time of the citizen's death, the alien (and each child of the alien) shall be considered, for purposes of this subsection, to remain an immediate relative after the date of the citizen's death but only if the spouse files a petition under section 1154(a)(1)(A)(ii) of this title within 2 years after such date and only until the date the spouse remarries.

<sup>15</sup>The court also does not have jurisdiction to review the merits of an adjustment application. See INA § 242(a)(2)(B), 8 U.S.C. § 1252(a)(2)(B). Here, however, Gomez-DeLeon does not appear to seek such review, as no decision has been rendered on her application.

lacks jurisdiction over her claim. However, even if this Court has jurisdiction to consider whether to reopen removal proceedings so she could apply for adjustment, Gomez-DeLeon is not entitled to an adjustment of status. Section 1255(i), which was initially given a sunset date of January 14, 1998, was effective until April 30, 2001. As a result, applications for adjustment of status may not be granted if they were filed after April 30, 2001. See Futeryan-Cohen v. INS, 140 F. Supp. 2d 646, 656 (E.D. Va. 2001). Here, the petition is dated December 15, 2001, several months after the filing deadline.

Further, Gomez-DeLeon is not admissible because of her drug conviction, see 8 U.S.C. § 1182(a)(2)(A)(i)(II), and she is not eligible for a waiver of inadmissibility, under INA § 212(h), 8 U.S.C. § 1182(h) for the same reason. See Hernandez-Osoria, No. 01 CIV 5545(SAAS), 2002 WL 193574, at \*3 (S.D.N.Y. Feb. 7, 2002).<sup>16</sup>

C. Lawful Permanent Resident Status

Gomez-DeLeon also argues that she is entitled to relief from removal because she has submitted to the INS a Form 1-360, entitled “Petition for Amerasian, Widow(er), or Special

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<sup>16</sup>Gomez-DeLeon cites Matter of Rainford in connection with her adjustment argument. That case involved an individual convicted of a weapons offense rather than a drug offense. The BIA held that such a conviction did not prevent one from applying for adjustment of status. The Court also concludes that Matter of Grinberg does not support Gomez-DeLeon’s arguments, as it applies to INS § 245, which is no longer in effect for petitions filed before the above date.

In her most recent filing, she also cites several additional cases to support her argument that removal proceedings should be opened in this case. See, e.g., Rogan v. Reno, 75 F. Supp. 2d 63 (E.D.N.Y. 1999); Prado v. Reno, 198 F.3d 286 (1st Cir. 1999); In re Matter of Rodarte-Espinoza, 21 I. & N. Dec. 150, 1995 WL 788984 (BIA) (1995). In those cases, however, the INS already had acted on an immediate relative petition, and in Prado and Rodarte-Espinoza, the petition already had been approved. That is not the case here.

Immigrant,” which qualifies her for lawful permanent resident status.<sup>17</sup> It appears a widow may file this form to be classified as an immediate relative of a deceased spouse of an American citizen, subject to certain restrictions, for purposes of applying for an adjustment of status. See 8 C.F.R. §§ 204.2(b), (c). There is no evidence that the INS has acted on that petition by Gomez-DeLeon, and thus it appears that Gomez-DeLeon has not exhausted her administrative remedies.

However, to the extent that she seeks reopening of removal procedures so that this form may be considered, her claim must fail for the same reasons as those explained above—namely, that adjustment is not available to her because she has been convicted of a drug offense.

D. Social Security Benefits

Finally, Gomez-DeLeon argues that she is entitled to Social Security benefits if she remains in the United States, or to a lump sum payment of such benefits should she be removed to the Dominican Republic. In support of her argument, she cites 42 U.S.C. § 1320b-7. This section encompasses “the Systematic Alien Verification for Entitlements program (“SAVE”), . . . [which] is an existing federal eligibility system used to verify status for various federal-state cooperative programs such as the Aid to Families with Dependent Children (“AFDC”), Food Stamps, Medicaid and Unemployment Compensation programs under which eligibility is dependent on lawful immigration status.” League of United Latin American Citizens v. Wilson, 908 F. Supp. 755, 770 (C.D. Cal. 1995). As the government points out, however, Gomez-DeLeon has not followed the procedure provided for in 20 C.F.R. § 404.900 for applying for Social Security benefits, and this Court does not have the authority to award social security benefits.

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<sup>17</sup>Although the government maintains that Gomez-DeLeon made misleading or possibly false statements in connection with her Form I-360, the Court need not address that claim here.

V. Conclusion

For the foregoing reasons, the petition [Doc. # 1] is dismissed and the Clerk is ordered to close this case. The Court's stay should remain in effect to permit Gomez-DeLeon to file an appeal of this decision to the United States Court of Appeals for the Second Circuit. If she does not file such an appeal within ten days of the date of this order, the Court's stay will be vacated automatically.

SO ORDERED this \_\_20th\_\_ day of June 2002 at Hartford, Connecticut.

\_\_\_\_\_/s/\_\_\_\_\_  
Christopher F. Droney  
United States District Judge