

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

FERNANDA MARIA DA CONCEICAO,	:	
CUSTODIO,	:	
Petitioner,	:	
	:	Civil Action No. 3:02CV155(CFD)
v.	:	
	:	
IMMIGRATION AND	:	
NATURALIZATION SERVICE,	:	
Respondent.	:	

RULING AND ORDER

I. Introduction

In this action, Petitioner Fernanda Maria Da Conceicao Custodio (“Custodio”) seeks a writ of habeas corpus vacating a final order of deportation and remanding her case to the Board of Immigration Appeals (“BIA”) for consideration of a waiver of removal under § 212(h) of the Immigration and Naturalization Act (“INA”), codified at 8 U.S.C. § 1182(h). Custodio is currently in INS custody in the York Correctional Institute in Niantic, Connecticut, as she is subject to a final order of removal. Pending are Custodio’s Application for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 [Doc. #2],¹ Motion for Leave to Proceed In Forma Pauperis Pursuant to 28 U.S.C. § 1915 [Doc. # 6], and Motion for Appointment of Counsel

¹It appears that the proper authority for Custodio’s petition is 28 U.S.C. § 2241 because she is in INS custody, rather than 28 U.S.C. § 2254, which pertains to petitioners incarcerated for state offenses. See Sol v. INS, 274 F.2d 648, 650 n.4 (2d Cir. 2001) (“The District Court properly treated Sol’s habeas petition as filed pursuant to 28 U.S.C. § 2241, because Sol’s challenge was to the deportation proceedings initiated as a result of his state conviction, not the constitutionality of that underlying conviction.”). Further, elsewhere in her petition she references § 2241.

[Doc. # 7].

II. Background

Custodio, a Portuguese and Angolan citizen,² was admitted to the United States on March 18, 1974, and her status was adjusted to that of lawful permanent resident on September 11, 1974. She has been convicted of several state offenses, including larceny in the fourth degree, in violation of Conn. Gen. Stat. § 53a-125, and illegally obtaining or supplying drugs, in violation of Conn. Gen. Stat. § 21a-108(2). The INS charged Custodio with removability under INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii), on the grounds that she had been convicted of an aggravated felony (the larceny offense), and also under INA § 237(a)(2)(B)(i), 8 U.S.C.A. § 1227(a)(2)(B)(i), on the basis that she had been convicted of a controlled substance violation (the offense of illegally obtaining or supplying drugs). On March 1, 2000, an immigration judge found Custodio removable to Angola. She appealed to the BIA, which remanded her case in light of the Second Circuit's decision in St. Cyr v. INS, 229 F.3d 406 (2d Cir. 2000), aff'd 533 U.S. 289 (2001). On remand, Custodio requested relief under INA § 212(c), 8 U.S.C. § 1182(c) (1994), and cancellation of removal under INA § 240A(a), 8 U.S.C. § 1229b(a)(3), but the immigration judge found that Custodio was ineligible for such relief and also denied her requests as a matter of discretion. He ordered her to be removed to Portugal, or in the alternative, to Angola. Custodio appealed this decision to the BIA, which denied her requests and dismissed her appeal on May 31, 2001.

²She was born in Angola when that country was a colony of Portugal.

Custodio's petition for writ of habeas corpus contains two claims for relief. First, she states, "Because my country is Angola and is currently at Civil Strife." Second, she maintains that INA § 212(h) violates the equal protection clause of the Fifth Amendment to the United States Constitution.

III. Discussion

As an initial matter, in light of her affidavit demonstrating her inability to pay for legal services, Custodio's motion to proceed in forma pauperis under [Doc. # 6] is GRANTED. However, her motion to appoint counsel [Doc. # 7] is DENIED for the following reasons.

"In determining whether to appoint counsel, the district judge should first determine whether the indigent's position seems likely to be of substance." Hodge v. Police Officers, 802 F.2d 58, 61 (2d Cir.1986). A court also should consider several other factors in making this determination, but only if it finds the indigent's claim to be of substance.³ Id.; Cooper v. A. Sargenti Co., 877 F.2d 170, 172 (2d Cir.1989) (per curium). Here, the Court concludes that the petitioner's claims are not likely to be of substance. As explained below, her claim for relief under INA § 212(h) is no longer viable in light of the Second Circuit's decision in Jankowski-Burczyk v. INS, 291 F.3d 172 (2d Cir. 2002). As to her claim referring to "civil strife" in Angola, as explained below the materials attached to the government's response indicate that Custodio has not exhausted her administrative remedies with respect to this claim. Further, even if she could be subject to torture in Angola, the immigration judge ordered her removed to Portugal as well, and

³These factors include: the indigent's ability to investigate the crucial facts; whether conflicting evidence implicating the need for cross-examination will be the major proof presented to the fact finder; the indigent's ability to present the case or obtain private counsel; the complexity of the legal issues; the availability of counsel; and special reasons why appointment of counsel would be likely to lead to a more just determination. Cooper, 877 F.2d at 172.

she has not indicated that she feared any torture in that country. Accordingly, the motion to appoint counsel under § 1915 [Doc. # 7] is DENIED.

A. Waiver under INA § 212(h)

As to Custodio's second claim for relief, § 212(h) provides that the Attorney General may exercise his discretion to grant a waiver of removal of some criminal grounds for removal under certain circumstances. See 8 U.S.C. § 1182(h). However, such waivers are not available to lawful permanent residents ("LPRs") who have committed aggravated felonies after admittance to the United States. See 8 U.S.C. § 1182(h).⁴ Non-LPRs, however, are eligible for the waivers.

As an initial matter, the government argues that this Court is without jurisdiction to consider Custodio's petition because she did not request § 212(h) relief before the immigration judges or BIA panels that previously considered her case. An alien must exhaust all administrative remedies "available as of right" before he or she seeks review of a final order of removal. See 8 U.S.C. § 1252(d)(1); Barton v. Ashcroft, 171 F. Supp. 2d 86, 91 (D. Conn. 2001). This exhaustion requirement is jurisdictional in nature. See Mejia-Ruiz v. INS, 51 F.3d 358, 362 (2d Cir.1995) (under former 8 U.S.C. § 1105a(c) (1988)); see also Townsend v. United States Dept. of Justice (INS), 799 F.2d 179, 181 (5th Cir.1986) ("[w]hen exhaustion is statutorily

⁴The statute provides, in relevant part:

No waiver shall be granted under this subsection in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if either since the date of such admission the alien has been convicted of an aggravated felony or the alien has not lawfully resided continuously in the United States for a period of not less than 7 years immediately preceding the date of initiation of proceedings to remove the alien from the United States.

8 U.S.C. § 1182(h).

mandated, the requirement is jurisdictional”). Some courts in similar cases have excepted petitioners from the exhaustion requirement based on futility, commenting that neither an immigration judge nor the BIA is permitted to consider constitutional claims and thus raising such issues at those stages would be futile. See, e.g., Barton, 171 F. Supp. 2d at 91-92. Further, at least one court held that § 1252(d) did not apply to a habeas petition similar to the one at issue here because the exhaustion requirement pertained only to appeals to Courts of Appeals of final orders of removal. See, e.g., Jankowski v. INS, 138 F. Supp. 2d 269, 275 (D. Conn. 2001), rev’d on other grounds, Jankowski-Burczyk v. INS, 291 F.3d 172. Here, the immigration hearing transcripts provided by the government suggest that Custodio did not raise the § 212(h) issue below. However, the BIA’s first decision of October 26, 2000 remanding Custodio’s case to the immigration judge for consideration in light of St. Cyr explains why Custodio is ineligible for waiver of removal under § 212(h). Thus, there is a possibility that Custodio could have raised this argument in one of the previous proceedings. Given her pro se status, the Court will consider this reference as sufficient evidence of exhaustion.⁵

Custodio argues that even though she was a LPR, she should be eligible for relief under § 212(h) because the distinction between LPRs and non-LPR’s violates the equal protection clause of the Fifth Amendment. However, the Second Circuit recently decided that this distinction does not violate equal protection, see Jankowski-Burczyk, 291 F.3d 172, and thus Custodio’s argument must fail. Further, even if this section does violate the equal protection clause, Custodio has been convicted of a drug offense. It is clear that all individuals, LPRs and non-LPRs alike, who have been convicted of drug offenses other than “a single offense of simple possession

⁵The Court does not reach the issue of whether such exhaustion is required.

of 30 grams or less of marijuana” cannot avail themselves of § 212(h). 8 U.S.C. § 1182(h).⁶

Thus, Custodio’s claim for § 212(h) relief must fail.

B. “Civil strife” claim

As to her statement that her native country is currently in civil strife, the Court interprets it as a possible claim for relief under the Convention Against Torture (“CAT”), under which an individual may be protected by withholding or deferral of removal to the country of torture. 8 C.F.R. § 208.16(c)(4). It appears from the materials submitted by the government in this case that Custodio has not previously raised this claim in any INS proceedings, and thus she has not exhausted her administrative remedies with respect to it. Further, the immigration judge ordered her to be removed to Angola *or* Portugal. Thus, even if she feared torture upon her return to Angola, she also could be removed to Portugal. Thus, even if she had exhausted her administrative remedies, she has not demonstrated that she would be subject to torture upon removal. Accordingly, this claim is also must fail.

IV. Conclusion

For the forgoing reasons, Custodio’s Application for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 [Doc. #2] is DISMISSED. Her Motion for Leave to Proceed In Forma Pauperis Pursuant to 28 U.S.C. § 1915 [Doc. # 6] is GRANTED, and Motion for Appointment of Counsel [Doc. # 7] is DENIED. The Clerk is directed to close this case.

⁶In the proceedings before the second immigration judge, there was much discussion of whether this offense pertained to sale of narcotics or simple possession. There is no indication in the record that this offense involved marijuana, and thus that distinction is of no moment to Custodio’s § 212(h) argument.

SO ORDERED this _____ day of June 2002, at Hartford, Connecticut.

CHRISTOPHER F. DRONEY
UNITED STATES DISTRICT JUDGE