

**UNITED STATES DISTRICT COURT  
DISTRICT OF CONNECTICUT**

DAVID SCALE,	:	
Petitioner	:	
	:	
v.	:	Civil Action No.
	:	3:02CV2048 (CFD)
JOHN ASHCROFT,	:	
Respondent	:	

**RULING ON HABEAS CORPUS PETITION**

Pending is the petitioner’s petition for habeas corpus and stay of removal pursuant to 28 U.S.C. § 2241 [Document #1].<sup>1</sup> The petitioner claims that the Immigration Judge and the Board of Immigration Appeals erred in determining that he was removable and ineligible for section 212(c) relief because the INS failed to establish that he committed a weapons offense under the relevant immigration laws. The respondent has filed an opposition to the petition for habeas corpus, claiming that this court lacks jurisdiction over this claim because it was never raised before the Immigration Judge or the Board of Immigration Appeals. For the reasons below, the petition for writ of habeas corpus and request for stay of removal are DENIED.

I. Background

The petitioner, David Scale (“Scale”), is a citizen and native of Jamaica. His immigration status was adjusted to Lawful Permanent Resident on December 11, 1991. On November 7, 1994, Scale was arrested by New York police and on March 14, 1995, Scale pled guilty and was convicted in

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<sup>1</sup>Section 2241 provides that “[w]rits of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions.” 28 U.S.C. § 2241.

New York state court for the offense of criminal possession of a weapon in the third degree, in violation of New York Penal Law § 265.02(04).<sup>2</sup> He was sentenced to five years probation.

On August 19, 1998, the Immigration and Naturalization Service (“INS”)<sup>3</sup> commenced removal proceedings against Scale. On January 16, 2001, by oral decision, an Immigration Judge (“IJ”) denied Scale’s application for cancellation of removal, denied Scale’s application for waiver under § 212(c) of the Immigration and Nationality Act (“INA”),<sup>4</sup> and ordered Scale to be removed from the United States to Jamaica. The IJ held that Scale was subject to removal because, according to the “stop time rule” in section 240A(d)(1) of the INA,<sup>5</sup> his continuous residence for purposes of

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<sup>2</sup>In 1995, § 265.02(04) provided: “A person is guilty of criminal possession of a weapon in the third degree when ... (4) He possesses any loaded firearm. ... Criminal possession of a weapon in the third degree is a class D felony.” New York Penal Law § 265.00(03) defined “firearm” as “(a) any pistol or revolver; or (b) a shotgun having one or more barrels less than eighteen inches in length; or (c) a rifle having one or more barrels less than sixteen inches in length; or (d) any weapon made from a shotgun or rifle whether by alteration, modification, or otherwise if such weapon as altered, modified, or otherwise has an overall length of less than twenty-six inches.”

<sup>3</sup>On March 1, 2003, the INS’s enforcement functions were transferred from the Department of Justice into the Department of Homeland Security.

<sup>4</sup>Section 212(c) of the INA (formerly codified at 8 U.S.C. § 1182(c)) was repealed by section 304(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”). Section 212(c) had stated: “Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General ....” The explicit language of this provision granted the Attorney General discretionary authority only to admit excludable aliens, but it was consistently interpreted by both the courts and the Board of Immigration Appeals to authorize the Attorney General to grant discretionary relief from deportation as well. See INS v. St. Cyr, 533 U.S. 289, 295-96 (2001).

<sup>5</sup>This section provides:

For purposes of this section, any period of continuous residence or continuous physical presence in the United States shall be deemed to end (A) except in the case of an alien who applies for cancellation of removal under subsection (b)(2) of this section, when

cancellation ended when he committed the weapons offense referred to in section 237(a)(2)(C) of the INA.<sup>6</sup> The IJ held further that Scale was not eligible for section 212(c) relief based on his weapons possession conviction and his not having been a permanent resident for seven years. Scale filed an appeal to the Board of Immigration Appeals (“BIA”) on August 2, 2001. On October 29, 2002, the BIA affirmed the IJ’s ruling without opinion.

Scale filed the instant habeas corpus petition on November 19, 2002. As noted above, he claims in the petition that the IJ and BIA erred in determining that he was removable and ineligible for section 212(c) relief because the INS did not prove that he was convicted of a firearms offense under section 237(a)(2)(C). Because he was convicted under a New York state statute that prohibits possession of a loaded firearm, but makes no distinction between shotguns and other firearms, and because 18 U.S.C. § 921(a)(4)(B) defines “weapon” to specifically exclude shotguns,<sup>7</sup> Scale argues,

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the alien is served a notice to appear under section 1229(a) of this title, or (B) when the alien has committed an offense referred to in section 1182(a)(2) of this title that renders the alien inadmissible to the United States under section 1182(a)(2) of this title or removable from the United States under section 1227(a)(2) or 1227(a)(4) of this title, whichever is earliest.

8 U.S.C. § 1229b(d)(1).

<sup>6</sup>That section provides for deportation based on conviction for certain "firearm offenses":

Any alien who at any time after admission is convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry, any weapon, part, or accessory which is a firearm or destructive device (as defined in section 921(a) of Title 18) in violation of any law is deportable.

8 U.S.C. § 1227(a)(2)(C). This section will be referred to as 237(a)(2)(C) of the INA.

<sup>7</sup>That section defines “destructive device” to include:

any type of weapon (other than a shotgun or a shotgun shell which the Attorney General finds is generally recognized as particularly suitable for sporting purposes) by whatever name known which will, or which may be readily converted to, expel a projectile by the

the INS did not prove that he was convicted of a weapons offense under 237(a)(2)(C) of the INA. The respondent INS argues that (1) this claim was never raised before the Immigration Judge or the Board of Immigration Appeals, and thus, this Court lacks jurisdiction over the petition; and, (2) Scale was convicted of a qualifying firearms offense under 237(a)(2)(C).

## II. Discussion

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) (providing for judicial review of orders of removal, and stating in relevant part that “[a] court may review a final order of removal only if-- (1) the alien has exhausted all administrative remedies available to the alien as of right”); 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 mandated, the requirement is jurisdictional”). Courts 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.

Here, the record reveals that Scale did not raise before the IJ the issue of whether the INS proved that he was convicted for possession of a firearm under 237(a)(2)(C). Though Scale argues

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action of an explosive or other propellant, and which has any barrel with a bore of more than one-half inch in diameter . . . .  
18 U.S.C. § 921(a)(4)(B).

that he raised the issue by claiming at the IJ hearing that his conviction was “not an ag fel,” Scale was not ordered removable or inapplicable for section 212(c) relief based on his having committed an “aggravated felony” under section 237(a)(2)(A)(iii),<sup>8</sup> but rather, for having committed a firearms offense under section 237(a)(2)(C). He does not appear to have raised before the IJ any issue regarding whether his conviction was a qualifying firearms offense. Rather, as the IJ concluded in its oral decision, he appears to have “admi[tted] that he is subject to removal as charged by the [INS] based on the weapons possession.”

However, Scale does appear to have raised this issue before the BIA. Though his appellate brief titles his argument as concerning whether his conviction was for an “aggravated felony,” he goes on to argue in the brief that the INS did not sustain its burden of proof as to whether his New York state conviction was a qualifying firearms offense under the INA section.

Without deciding whether Scale exhausted this issue, however, the Court concludes that the record reveals that Scale was convicted of a qualifying firearm offense under section 237(a)(2)(C). Scale improperly relies on the definition of “destructive device” under 18 U.S.C. § 921(a)(4)(B), which excludes certain shotguns. Section 921(a)(3) of Title 18, however, defines “firearm” as “any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive ... *or* any destructive device.” (Emphasis added.) Although the definition of “destructive device” which follows at § 921(a)(4)(B) may exclude certain shotguns, there is no parallel exclusion for such shotguns in the definition of “firearm” in 18 U.S.C. § 921(a)(3). Finally, all firearms

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<sup>8</sup>8 U.S.C. § 1227(a)(2)(A)(iii) provides that “[a]ny alien who is convicted of an aggravated felony at any time after admission is deportable.”

which are included within the New York statute which was the basis for Scale's conviction are also within the federal definition found at 18 U.S.C. § 921(a)(3) and imported into 237(a)(2)(C).

Therefore, even if Scale's conviction for possession of a weapon in the third degree was based on possession of a loaded shotgun, such a conviction would be sufficient to constitute a firearms offense under section 237(a)(2)(C).<sup>9</sup>

Moreover, Scale's weapons offense rendered him statutorily ineligible for section 212(c) relief. When Scale pled guilty to possession of a weapon in 1995, a deportee could seek relief under section 212(c) only if (1) the ground for deportation was congruent with a ground for exclusion listed in section 212(a); or (2) the ground for deportation was one that could not possibly be analogous to a ground of exclusion. See Cato v. INS, 84 F.3d 597, 600 (2d Cir.1996). However, a deportee was not eligible for 212(c) relief if the ground of deportation was one that "could conceivably have an analogous ground of exclusion under section 212(a) but ... Congress has not chosen to include that ground in section 212(a)." Id. Firearms convictions under section 237(a)(2)(C) had no analogue in section 212(a) even though Congress could have included weapons offenses as grounds of exclusion. See id. (holding that weapons offender was ineligible for 212(c) relief because the weapons offense ground for deportation was not listed as ground for exclusion and it was not offense that could not conceivably have exclusion counterpart); see also Drax v. Reno, 338 F.3d 98, 108-09 (2d Cir. 2003) (holding that attempted

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<sup>9</sup>The Court notes that the record of conviction, the grand jury indictment, and other documents from Scale's alien file clearly indicate that Scale plead guilty to and was convicted of possessing a loaded .357 magnum revolver. However, in Dickson v. Ashcroft, 2003 WL 22078562, at \*3 (2d Cir. Sept. 9, 2003), the Second Circuit recently held that this analysis is limited to a consideration of the "branch of the statute" under which Scale was convicted, here (4) of § 265.02, not the underlying facts of the conviction.

weapons possession was a deportable offense for which section 212(c) relief was unavailable because there was not mirroring ground of exclusion under section 212(a)). Therefore, Scale was statutorily ineligible for section 212(c) relief at the time of his firearms conviction.

Accordingly, the Court cannot conclude that the decisions of the IJ and BIA were erroneous as a matter of law or lacked factual support, and the petition must be denied.

III. Conclusion

For the foregoing reasons, the petition for writ of habeas corpus and stay of removal [Doc. #1] is DENIED. The Clerk is directed to close the case.

SO ORDERED this \_\_\_\_ day of September 2003, at Hartford, Connecticut.

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**CHRISTOPHER F. DRONEY**  
**UNITED STATES DISTRICT JUDGE**