UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

IBRAHIM MADKOUR,	:
Petitioner,	:
	:
-vs-	: Civil No. 3:02cv343 (PCD)
	:
JOHN ASHCROFT, Attorney General of	:
the United States,	:
Respondent.	:

RULING ON PETITION FOR WRIT OF HABEAS CORPUS

Petitioner seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2241. For the reasons set forth herein, the petition is dismissed for want of jurisdiction.

I. BACKGROUND

On September 21, 1999, petitioner, a Lebanese citizen and lawful permanent resident, was convicted of possession, manufacture, delivery and advertisement of drug paraphernalia in violation of ARIZ. REV. STAT. § 13-3415(A).[1] On June 26, 2000, petitioner was notified that his conviction for

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[1] ARIZ. REV. STAT. § 13-3415(A) provides that "[i]t is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture,

violation of a law relating to a controlled substance rendered him subject to removal pursuant to § 237(a)(2)(B)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(B)(i).

In proceedings before the Immigration Judge ("IJ"), at which petitioner was represented by counsel for a portion thereof, petitioner sought a waiver of removal under Article 3 of the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or

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compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale or otherwise introduce into the human body a drug in violation of this chapter. Any person who violates this subsection is guilty of a class 6 felony."

Punishment. G.A. Res. 39/46, Annex, 39 U.N. GAOR Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984). On April 12, 2001, the IJ denied his application for waiver. On January 28, 2002, the Board of Immigration Appeals ("BIA") affirmed the IJ's finding that petitioner was removable for the conviction and that he was ineligible for relief from deportation.[2]

In his habeas petition, petitioner argues that the Arizona offense was an impermissible basis for an order of removal. Specifically, petitioner argues that "[b]ecause [his] offense is not covered [by] 21 U.S.C. § 802 [defining terms as used in the Controlled Substances Act, 84 Stat. 1242, 21 U.S.C. § 801 *et seq.*], he has not been convicted of a removable offense."

II. DISCUSSION

Respondent argues that petitioner's failure to raise the question of whether ARIZ. REV. STAT. § 13-3415(A) constitutes a "law or regulation . . . relating to a controlled substance (as defined in section 802 of Title 21)" pursuant to § 237(a)(2)(B)(i) deprives this Court of subject matter jurisdiction for failure to exhaust administrative remedies. Petitioner responds that he did not concede the issue before either the IJ or BIA, thus he may raise the issue in the present petition.

Generally, an alien is required to exhaust all claims before seeking judicial review of a final order of removal. *See* 8 U.S.C. § 1252(d)(1)("[a] court may review a final order of removal only if . . . the alien has exhausted all administrative remedies available to the alien as of right"). There appears to be no dispute that the present issue was not presented to either the IJ or BIA, and no apparent justification for the failure to present the same. Having failed to so present the issue, which is not

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[2] The BIA specifically stated that "the respondent does not challenge his removability under section 237(a)(2)(B)(i) of the Immigration and Nationality Act."

alleged to be more than a question of statutory interpretation, the petitioner has failed to exhaust administrative remedies.

There may be the occasion on which it is appropriate to review questions not presented to administrative agencies, such as when the issue is of constitutional magnitude, *see Howell v. INS*, 72 F.3d 288, 291 (2d Cir.1995); *Arango-Aradondo v. INS*, 13 F.3d 610, 614 (2d Cir. 1994); *Xiao v. Barr*, 979 F.2d 151, 154 (9th Cir. 1992), and the agency is not empowered to review such claims, *see Rabiu v. INS*, 41 F.3d 879, 882 (2d Cir. 1994) (BIA lacks authority to address constitutional claims). This, however, is not such an occasion. At best, petitioner alleges a due process violation premised entirely upon a misinterpretation of a statute, specifically whether a state criminal conviction constitutes a "law or regulation . . . relating to a controlled substance." The BIA was well within its jurisdiction to resolve the alleged misinterpretation, and has frequently done so. *See, e.g.*, *Hughes v. Ashcroft*, 255 F.3d 752, 757 (9th Cir. 2001). Having failed to raise the question before either the IJ or BIA, this Court is without authority to address the present petition.

III. CONCLUSION

The petition for writ of habeas corpus (Doc. 1) is **dismissed**. The Clerk shall close the file.

SO ORDERED.

Dated at New Haven, Connecticut, December ____, 2002.

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Peter C. Dorsey
United States District Judge