03-40870-ag

To be Argued By:
JOHN H. DURHAM

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 03-40870-ag

RAHIEL AZIZ,

Petitioner,

-vs-

ALBERTO R. GONZALES
ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

ON PETITION FOR REVIEW FROM
THE BOARD OF IMMIGRATION APPEALS

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BRIEF FOR ALBERTO R. GONZALES ATTORNEY GENERAL OF THE UNITED STATES

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STATEMENT OF JURISDICTION

Petitioner is an alien subject to an administratively final order of removal. This Court ordinarily would have appellate jurisdiction under § 242(b) of the Immigration and Naturalization Act, 8 U.S.C. § 1252(b) (2004), to review petitioner's challenge to the Board of Immigration Appeals' October 16, 2002, final removal order. Petitioner, however, failed to raise the issues advanced in this petition for review before the Board of Immigration Appeals, and, therefore, this Court lacks jurisdiction to consider his claims. *See* Immigration and Nationality Act § 242(d)(1), 8 U.S.C. § 1252(d)(1).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the instant petition for review should be dismissed because of petitioner's failure to exhaust administrative remedies?

2. Whether the Immigration Judge correctly held that petitioner's conviction in the Supreme Court of the State of New York on six counts of the Criminal Sale of a Prescription for a Controlled Substance constituted an "aggravated felony" for immigration purposes?

3. Whether the instant petition should be remanded to the BIA for petitioner to make an "individualized showing" of reliance prior to a determination being made on his eligibility for § 212(c) relief?

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BRIEF FOR ALBERTO R. GONZALES[1]
Attorney General of the United States

[1] Pursuant to the provisions of Rule 43(c)(2) of the Federal Rules of Appellate Procedure relating to the automatic substitution of the name of a public officeholder, Attorney General Gonzales' name has been substituted as the Respondent in this matter.

Preliminary Statement

Petitioner Rahiel Aziz is a Pakistani citizen who was convicted in June 1992 of illegally selling prescriptions for Valium, a controlled substance. In 1997, federal immigration authorities sought to remove him on the grounds that he had been convicted of an aggravated felony and a controlled substance offense. The Immigration Judge ("IJ") hearing the matter ordered him removed, and the Board of Immigration Appeals ("BIA") affirmed.

Petitioner now seeks judicial review of that removal order, contending that selling Valium prescriptions - the offense for which he was convicted - is not an aggravated felony. In the alternative, he contends that he is categorically eligible to apply for discretionary relief from deportation pursuant to § 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c) (repealed 1996), under *Restrepo v. McElroy*, 369 F.3d 627 (2d Cir. 2004), on the grounds that he delayed filing a § 212© application in reliance on the continued availability of such relief to aggravated felons.

This Court should deny the petition without reaching the merits of any of these claims, because neither issue was even indirectly raised before the BIA. Assuming *arguendo* that this Court were to reach the merits, petitioner's convictions fall within the definition of a "drug trafficking crime," and hence of an "aggravated felony" for immigration purposes.

Finally, assuming the Court reaches petitioner's claim of eligibility for § 212(c) relief pursuant to this Court's decision in *Restrepo*, the matter should be remanded to the BIA with a directive to make an eligibility determination based on whether petitioner makes an individualized showing of his actual reliance on the availability of such relief.

Statement of the Case

On November 21, 1997, the Immigration and Naturalization Service ("INS") issued a Notice to Appear, charging petitioner Rahiel Aziz with removability based on his conviction for a controlled substance offense. Joint Appendix ("JA") at 153-55.

On April 17, 2001, the INS filed an additional charge of removability, alleging that petitioner's conviction was an aggravated felony. JA 150-52.

On April 16, 2002, petitioner filed a written application for § 212(c) relief. JA 87-111.

On May 16, 2002, an Immigration Judge ordered petitioner removed from the United States based upon his prior conviction in the Supreme Court of the State of New York on six counts of Criminal Sale of a Prescription for a Controlled Substance in violation of § 220.65 of the New York State Penal Laws. JA 23-24 (written order); 25-28 (oral decision and order).

On October 16, 2003, the Board of Immigration Appeals affirmed the IJ's removal order. JA 2.

On November 7, 2003, Aziz filed a timely petition for review with this Court in a pleading entitled "Petition for Review from the Board of Immigration Appeals Denying a Request for 212C [sic] Relief."

Statement of Facts

A. Background

Petitioner Aziz is a citizen and native of Pakistan. JA 5, 25, 82, 136. He was born on April 1, 1965, in that country, and entered the United States on November 8, 1983. *Id.* At the time removal proceedings were initiated against him, petitioner was a lawful permanent resident ("LPR") of this country. JA 155.

On or about June 4, 1992, petitioner was convicted, after a full jury trial, on six counts of Criminal Sale of Prescriptions for a Controlled Substance, § 220.65 of the New York Penal Law, and on or about June 30, 1992, was sentenced to 3 to 9 years of incarceration on each count to be served concurrently. JA 120; 122-27; 128-35.

Petitioner's convictions were affirmed on appeal by the Supreme Court of the State of New York Appellate Division: First Department in a decision entered on October 7, 1993. JA 114-17; *People v. Dias*, 602 N.Y.S.2d 353 (N.Y. App. Div. 1993). As reflected in the New York Appellate Division's opinion, petitioner had worked as the office manager for a psychiatrist (and co-defendant) named P. Kitshen Dias. An undercover investigation conducted by the New York Attorney General's Office used three separate undercover agents who posed as "patients" and attempted to secure

prescriptions for Valium. Each presented him/herself to petitioner as a drug addict, JA 116, negotiated with petitioner for the amount of Valium they wanted, JA 115, agreed to a price of approximately $1.00 per pill to be paid for writing the prescriptions, JA 115, and, following a perfunctory examination of the "patients" by the co-defendant psychiatrist Dr. Dias, the agreed-upon dosage and amount of Valium was then prescribed by Dias.[2]

On or about June 5, 1995, he was released on parole, which expired on or about June 2, 2001. JA 112.

B. Petitioner's Removal Proceedings

On November 27, 1997, the INS served Aziz with a Notice to Appear charging that he was removable from the United States pursuant to § 237(a)(2)(B)(i) of the INA, 8 U.S.C. § 1227(a)(2)(B)(i), as an alien who had been

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[2] In *People v. Lipton*, 429 N.E.2d 1059 (N.Y. 1981), a decision which preceded the 1986 enactment of the state statute under which Aziz and Dias were convicted, the Court of Appeals of New York had aptly written that "a physician who flagrantly disregards his sworn professional obligation and abuses the public's trust by allowing large quantities of dangerous drugs to enter illicit channels is no less a 'pusher' than the layperson on the street who does not have the benefit of a license and medical degree." In enacting New York Penal Law § 220.65, the Governor's Approval Memorandum noted that it had been "convincingly documented that large quantities of dangerous and highly abused controlled substances have been prescribed by drug-peddling physicians." *See* N.Y. Penal Law § 220.65 (West, WESTLAW through 2005 legislation) (1999 Practice Commentary).

convicted of a controlled substance offense based on his June 30, 1992, conviction for the Criminal Sale of a Prescription for a Controlled Substance. JA 153-54. In particular, the INS alleged that Aziz's conviction on the New York charges constituted offenses under a "law or regulation of a State . . . relating to a controlled substance (as defined in Section 102 of the Controlled Substances Act [21 U.S.C. 802])," and which was not a single offense relating to personal use possession of marijuana. JA 155. On April 17, 2001, the INS added the charge that petitioner was removable under 237(a)(2)(A)(iii) of the INA, 8 U.S.C § 1227(a)(2)(A)(iii), as an alien who had been convicted of an aggravated felony. JA 150-51.

Hearings related to the removal petition were held before Immigration Judges on April 12, 2001, JA 30-37 (which was adjourned so that copies of certain records could be obtained for petitioner, JA 35); July 19, 2001, JA 38-52 (which was adjourned for the parties to prepare briefs on whether petitioner's convictions were for aggravated felonies and whether § 212(c) relief was available, JA 46-47, 50); November 29, 2001, JA 54-67 (which was adjourned so the parties could gather additional documents, JA 55); March 2, 2002, JA 68-71 (which was adjourned so petitioner could file a memorandum concerning the aggravated felony issue, JA 70-71); and May 16, 2002, JA 72-79, during which the IJ rendered his decision and ordered petitioner's removal. JA 25-28, 74-75. In reaching his decision, the IJ found that petitioner was removable on both grounds advanced by the INS (that is, conviction of a controlled substance offense and conviction of an aggravated felony), JA 74, and that petitioner was not eligible for § 212(c) relief because he

had not pleaded guilty to the New York offense, but rather had been convicted after a full jury trial. JA 74-75.

The IJ specifically asked petitioner whether he was seeking any other form of relief (e.g., asylum, withholding of removal, Convention Against Torture), and petitioner's counsel expressly answered "no." JA 75-76, 28.

Petitioner filed a timely notice of appeal with the BIA, JA 12-13, and on or about October 23, 2002, petitioner filed his Brief in Support of Appeal. JA 5-8. Petitioner raised no claims before the BIA regarding the availability of § 212(c) relief and/or whether his felony conviction in the Supreme Court of the State of New York constituted a controlled substance offense or an aggravated felony. JA 5-6. On October 16, 2003, the BIA affirmed, without opinion, the decision of the IJ. JA 1-2.

SUMMARY OF ARGUMENT

Petitioner claims that he is eligible for § 212(c) relief, and further argues that in any event his convictions for the Criminal Sale of a Prescription for a Controlled Substance does not constitute an aggravated felony.[3]

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[3] Petitioner concedes that the New York case involves convictions for controlled substance offenses under 8 U.S.C. § 1227(a)(2)(B)(i), and as such are offenses on which he can be removed. Petitioner's Brief at 4. Pursuant to the provisions of 8 U.S.C. § 1252(a)(2)(C), the Court has no jurisdiction to review a final order of removal against an alien which is based on a conviction covered by 8 U.S.C. § 1227(a)(2)(B) (controlled substance offenses).

1. Petitioner failed to exhaust his administrative remedies by raising these claims before the BIA in any form. Accordingly, this Court lacks jurisdiction to consider his claims. *See* 8 U.S.C. § 1252(d)(1).

2. Even if the Court were to consider petitioner's claims, his first argument should be rejected because the applicable statutes make clear that his New York state conviction on a six-count indictment charging him with felony drug offenses constitutes a conviction for an "aggravated felony" under § 101(a)(43)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(B). As an aggravated felon, and a person convicted of a controlled substance offense after his entry into the United States, petitioner is removable under Sections 237(a)(2)(A)(iii) and (a)(2)(B)(i) of the INA, respectively.

3. As to petitioner's further claim that he is entitled to § 212(c) relief in accordance with this Court's decision in *Restrepo v. McElroy*, 369 F.3d 627 (2d Cir. 2004), the record below is devoid of any suggestion that petitioner delayed in applying for such relief until April 2002 in reliance on such relief being available. Accordingly, if the Court elects to reach this question, the Court should reject petitioner's invitation to adopt a "categorical approach" to making 212(c) relief available to aliens who were convicted of removable offenses after a trial and prior to the enactment of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"). Instead, the Court should remand so that in the first instance the decision can be made by an IJ based on an individualized showing by petitioner of actual reliance.

ARGUMENT

I. The Court Lacks Jurisdiction to Consider Petitioner's Claims Since He Failed to Exhaust His Administrative Remedies Before the BIA

A. Statement of Facts

On October 23, 2002, petitioner filed a two-page brief with the BIA in connection with his appeal from the IJ's order of removal. JA 5-6. Nowhere did the brief argue that the New York convictions were not aggravated felonies, or that they did not constitute controlled substance offenses. Nor did petitioner argue in his brief that he was entitled to a § 212(c) hearing. Instead, it simply set forth the equities of petitioner's situation. JA 5. The BIA summarily affirmed the IJ's final order of removal. JA 2.

B. Governing Law and Standard of Review

The INA requires that all available administrative remedies be exhausted before an alien seeks judicial review of a final removal order. *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 a right . . . ."). In this regard, "[u]nder the doctrine of exhaustion of administrative remedies, a party may not seek federal judicial review of an adverse administrative determination until the party has first sought all possible relief within the agency itself." *Howell v. INS*, 72 F.3d 288, 291 (2d Cir. 1995) (quotation marks omitted). Further, if exhaustion is required, and the

party fails to do so, the court may dismiss the action for want of subject matter jurisdiction. *Id.*

It is well settled that arguments or claims not raised before the BIA are deemed waived for failure to exhaust administrative remedies. *Opere v. INS*, 267 F.3d 10, 14 (1st Cir. 2001); *see Chew v. Boyd*, 309 F.2d 857, 861 (9th Cir. 1962) ("failure to raise . . . a particular question concerning the validity of [a final] order constitutes a failure to exhaust administrative remedies with regard to that question, thereby depriving a court of appeals of jurisdiction to consider that question."). *See also Arango-Aradondo v. INS*, 13 F.3d 610, 614 (2d Cir. 1994) (declining to consider constitutional claim for ineffective assistance of counsel that was not raised before the BIA); *Correa v. Thornburgh*, 901 F.2d 1166, 1171 (2d Cir. 1990) (rejecting, in a habeas corpus proceeding, a claim that was "never raised . . . either before the Immigration Judge or on appeal to the BIA").

More recently, in *Gill v. INS*, 2005 WL 1983700, *2 (2d Cir. 2005), this Court addressed "the level of specificity at which a claim must have been made to have been 'exhausted' under § 1252(d)(1)." *Gill* noted that in *Beharry v. Ashcroft*, 329 F.3d 51 (2d Cir. 2003), the Court held that the exhaustion requirement would not permit a petitioner to raise "a whole new *category of relief*" on appeal, and in *Foster v. INS*, 376 F.3d 75, 78 (2d Cir. 2004) (quotation marks omitted), it held that "we require petitioner to raise *issues* to the BIA in order to preserve them for review." At the same time, *Gill* stated that the Court has "never held that a petitioner is limited to the exact contours of his argument below." 2005 WL 1983700, at *2. The *Gill* decision went on to hold that "

§ 1252(d)(1) bars the consideration of bases for relief that were not raised below, and of general issues that were not raised below, but not of specific, subsidiary legal arguments, or arguments by extension, that were not raised below." *Id*.

As relevant to the instant petition, it is of note that among the purposes served by the exhaustion requirement contained in § 1252(d) are "to [1] ensure that the INS, as the agency responsible for construing and applying the immigration laws and implementing regulations, has had a full opportunity to consider a petitioner's claims," *Theodoropoulos v. INS* [*Theodoropoulos II*], 358 F.3d 162, 171 (2d Cir. 2004), *cert. denied*, 125 S. Ct. 37 (2004); (2) to 'avoid premature interference with the agency's processes,' *Sun v. Ashcroft*, 370 F.3d 932, 940 (9th Cir. 2004); and (3) to 'allow the BIA to compile a record which is adequate for judicial review.' *Dokic* [*v. INS*], 899 F.2d [530] at 532 [(6th Cir. 1990)]." *Ramani v. Ashcroft*, 378 F.3d 554, 559 (6th Cir. 2004).

Further, the Supreme Court has held that when statutorily required, exhaustion of administrative remedies is jurisdictional and must be strictly enforced, without exception. *See McCarthy v. Madigan*, 503 U.S. 140, 144 (1992) ("Where Congress specifically mandates, exhaustion is required."); *Coit Independence Joint Venture v. Fed. Sav. & Loan Ins. Corp.*, 489 U.S. 561, 579 (1989) ("[E]xhaustion of administrative remedies is required where Congress imposes an exhaustion requirement by statute."). *Cf. Bastek v. Fed. Crop Ins. Corp.*, 145 F.3d 90, 94 (2d Cir. 1998) (common law exhaustion doctrine "recognizes judicial discretion to employ a broad array of

exceptions" for the failure to exhaust administrative remedies).

Again, this Court has squarely held that 8 U.S.C. § 1252(d) embraces the statutory, or mandatory, exhaustion doctrine. *Theodoropoulos II*, 358 F.3d at 172. "[Section] 1252(d)'s mandate that unless a petitioner 'has exhausted all administrative remedies available,' a 'court may [not] review a final order of removal,' 18 U.S.C. § 1252(d), applies to all forms of review . . . ." *Id.* at 171 (alteration in original). Thus, the failure to raise before the BIA specific claims, such as those concerning petitioner's § 212(c) eligibility and whether his offense constitutes an aggravated felony, will constitute a waiver of those claims and preclude their consideration by an appellate court for want of jurisdiction. *Cf. Vatulev v. Ashcroft*, 354 F.3d 1207, 1211 (10th Cir. 2003) (court without jurisdiction to consider IJ's "implicit rejection of . . . new evidence" when it was not appealed to BIA). *See also Ravindran v. INS*, 976 F.2d 754, 763 (1st Cir. 1992) (complaints involving defective translations, judicial conduct at hearing and evidentiary rulings should have been raised at the BIA for appellate court to have jurisdiction).

While this Court has recognized there are some circumstances in which a petitioner's failure to exhaust administrative remedies may not deprive an appellate court of jurisdiction to consider claims, those circumstances are very limited. For example, in *United States v. Gonzalez-Roque*, 301 F.3d 39, 47-48 (2d Cir. 2002), it was noted that the BIA does not have jurisdiction to adjudicate constitutional issues. It therefore follows that exhaustion would not be required for a petitioner to

seek judicial review of a constitutional claim, where the BIA could not have provided any relief. *See Ravindran*, 976 F.2d at 762-63 (noting that simply alleging that an error violated due process does not render that claim unreviewable by BIA, and hence exempt from administrative exhaustion requirement). Also, in *Theodoropoulos II*, this Court noted that in *Booth v. Churner*, 532 U.S. 731, 736 & n.4 (2001), the Supreme Court suggested a petitioner will not be required "to exhaust a procedure from which there is no possibility of receiving any type of relief." 358 F.3d at 173.

Recently, in *Marrero Pichardo v. Ashcroft*, 374 F.3d 46, 52-53 (2d Cir. 2004), the Court held that under the unusual facts in that case, it would invoke "the narrow leeway afforded by *Theodoropoulos II* . . . to prevent manifest injustice."[4] *Marrero Pichardo*, however, did not purport to overrule *Theodoropoulos II*, and should not be read to "support the proposition that a court can find jurisdiction to overrule an agency result whenever jurisdiction will assist a sympathetic petitioner[.]" *Gill v. INS*, 2005 WL 1983700, *13 (Jacobs, J., dissenting).

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[4] Pichardo had multiple DUI convictions. An IJ found that two of those convictions constituted aggravated felonies, and Pichardo, who appeared *pro se* before the IJ, was ordered removed to his home country of the Dominican Republic. Shortly thereafter, this Court held in *Dalton v. Ashcroft*, 257 F.3d 200, 208 (2d Cir. 2001), that a felony DUI conviction under the same statute involved in Pichardo's state convictions was not a "crime of violence" for purposes of defining an aggravated felony. *See* 374 F.3d at 49-50.

C. Discussion

Petitioner waived any claims concerning his eligibility for § 212(c) relief and a review of whether his State of New York conviction for Criminal Sale of a Prescription for a Controlled Substance (six counts) constitutes an aggravated felony under § 101(a)(43)(B) of the INA, 8 U.S.C. § 1101(a)(43)(B).[5] A simple review of the record below clearly establishes that neither of these claims was ever raised by petitioner in his appeal of the IJ's removal order to the BIA. Rather, petitioner's appeal brief only sought a general review of the IJ's removal order based on what can best be characterized as purported equitable grounds for overturning that order.

In his two-page Brief in Support of Appeal filed with the BIA, JA 5-6, petitioner summarized both his personal background and the proceedings before the IJ. JA 5. He then argued to the BIA that he was married to a citizen of the United States, that he had children who were U.S. citizens, had not been to Pakistan in a number of years, and that his removal would be "a severe emotional and economic hardship" on himself and his family. *Id*.[6]

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[5] As noted above, petitioner concedes the validity of the IJ's finding that his conviction also constituted a controlled substance offense under § 237(a)(2)(B)(1) of the INA, 8 U.S.C. § 1227(a)(2)(B)(i). Petitioner's Brief at 4.

[6] The United States notes that petitioner was charged by the grand jury with felony offenses in February 1991, JA 128, convicted and sentenced to 3 to 9 years in June 1992, JA 120-27, and released on parole in June 1995, JA 112. The Notice (continued...)

Petitioner then asserted that he had learned a great lesson from his conviction and had become a good citizen who worked full time and paid his taxes. *Id.*

Without citing a single case or other authority to support his request, petitioner asked the BIA to act favorably on his appeal of the IJ's decision. *Id.* at 6. On

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[6] (...continued)
to Appear for removal proceedings was served on November 26, 1997.

It was not until after the removal proceedings had been initiated, and specifically on April 10, 1998, that petitioner married a Russian emigre who was naturalized on August 26, 2000, more than two years after the marriage and more than two and a half years after the removal process had started. JA 109, 110.

Further, according to the record below, throughout these proceedings petitioner was residing at 2418 Brigham Street, Brooklyn, New York. *See, e.g.*, documents relating to INS Notice to Appear, JA 157, Family Court proceedings in Delaware, JA 107, Marriage Certificate, JA 110. His wife's residence prior to the marriage was 501 B Surf Avenue, Brooklyn, New York, JA 110, and she maintained that address, at least for mailing purposes, after the marriage as reflected in the Certificate of Birth for her daughter, Saher, an event which occurred less than four months after her August 1998 marriage to petitioner. JA 111.

Finally, in his April 16, 2002, application for § 212(c) relief, INS Form I-191, petitioner lists neither a spouse nor any children as members of his "immediate family." JA 87.

October 16, 2003, the BIA properly denied the appeal and affirmed the IJ's decision without opinion. *Id*. at 1-2.

Petitioner's general argument that he had learned a great deal from his ordeal and that his removal would constitute a hardship on him and his family hardly served to alert the BIA to the specific issues which he raises in his petition for review. *See Foster*, 376 F.3d at 78 (petitioner's "generalized protestations that his removal was improper did not suffice to alert adequately the IJ to the discrete issue" being pressed). Indeed, a petitioner's failure to exhaust his administrative remedies before the BIA leaves this Court without jurisdiction to consider his claims.

It is well established that an alien is statutorily required to exhaust all administrative remedies available to him before he can seek judicial review of a removal order, *see* § 242(d)(1) of the INA (8 U.S.C. § 1252(d)(1)), and this requirement is jurisdictional. *Theodoropoulos II*, 358 F.3d at 168 (alien's "failure to exhaust his administrative remedies deprive[s] the district court of subject matter jurisdiction to entertain his habeas petition"); *see also Gonzalez-Roque*, 301 F.3d at 49 (petitioner forfeited his due process claim by failing to raise it before the BIA). As the Supreme Court and this Circuit have made clear, when statutorily required, exhaustion of administrative remedies must be strictly enforced, without exception. *See McCarthy*, 503 U.S. at 144; *Booth,* 532 U.S. at 741 n.6 (holding "we will not read futility or other exceptions into statutory exhaustion requirements where Congress has provided otherwise"); *Bastek*, 145 F.3d at 94 ("Statutory

exhaustion requirements are mandatory, and courts are not free to dispense with them.").

The instant petition raises no constitutional issue for review, *Booth*, *supra*, nor does it involve questions which could not have been ably addressed by the BIA had they been properly presented by petitioner, *Gonzalez-Roque, supra*. This matter, then, does not involve the type of unusual facts on which the Court in *Marrero Pichardo* "invoke[d] the narrow leeway afforded by *Theodoropoulos II*" to prevent a manifest injustice. 374 F.3d at 53.

Finally, the record makes it clear that not only did petitioner fail to exhaust his administrative remedies,[7] but he offers no factual or legal grounds in his petition for review which might excuse the failure to exhaust. *See Theodoropoulos II*, 358 F.3d at 172-73. Accordingly, the Court is without jurisdiction to act on the subject matters raised in this petition for review, and, therefore, the petition should be dismissed.

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[7] Pursuant to 8 U.S.C. § 1252(b)(4)(A), courts of appeals must conduct their review of a removal order "only on the administrative record on which the order of removal is based."

II. The BIA Did Not Err in Upholding the IJ's Decision That a Conviction for Criminal Sale of a Prescription for a Controlled Substance Is an Aggravated Felony Under the Immigration and Nationality Act

A. Statement of Facts

On February 4, 1991, petitioner was indicted by a New York state grand jury on six counts of Criminal Sale of a Prescription of a Controlled Substance, in violation of N.Y. Penal Law § 220.65. The New York indictment specifically alleged that he had aided his co-defendant/co-conspirator (Dr. P. Kitshen Dias) in the knowing and unlawful sale of prescriptions for "Valium, the brand name of Diazepam, a controlled substance," to individuals for other than good faith professional purposes. JA 128-35. Following a full jury trial, petitioner was convicted on all six counts of the indictment. JA 120. His conviction was upheld on appeal by the Supreme Court of New York, Appellate Division, First Department. JA 114-17.

B. Governing Law and Standard of Review

Pursuant to § 1227(a)(2)(A)(iii) of Title 8, United States Code, any alien who has been convicted of an "aggravated felony" at any time after he has been admitted into the United States is removable. The term "aggravated felony" is defined in 8 U.S.C. § 1101(a)(43), and includes, among numerous other offenses, "illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in

§ 924(c) of Title 18)." *See* § 1101(a)(43)(B). Further, the term "aggravated felony" is defined to include all offenses described in 8 U.S.C. § 1101(a)(43) "whether in violation of Federal or State law." *See also United States v. Ramirez*, 344 F.3d 247 (2d Cir. 2003) (interpreting § 1101(a)(43)(B) in context of sentencing enhancement for illegal re-entry conviction)*;* 21 U.S.C. § 802(13) (defining "felony" to include "any Federal or State offense classified by applicable Federal or State law as a felony").

A "drug trafficking crime," in turn, is defined under 18 U.S.C. § 924(c) to mean "any felony punishable under the Controlled Substances Act (21 U.S.C. § 801 et seq.) . . . ." *See* 18 U.S.C. § 924(c)(1)(D)(2). Under the Controlled Substances Act, and specifically 21 U.S.C. § 841(a)(1), it is unlawful for an individual "knowingly and intentionally - to manufacture, distribute, or *dispense* . . . a controlled substance." (Emphasis added.) To "dispense" a controlled substance simply means "to deliver a controlled substance to an ultimate user . . . pursuant to a lawful order of [ ] a practitioner, *including the prescribing and administering of a controlled substance* . . . ." 21 U.S.C. § 802(10) (emphasis added).

A controlled substance is defined as "a drug or substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of [ ] subchapter [1 of Chapter 13- (Drug Abuse Prevention and Control) of Title 21.] As relevant here, Valium, the commercial name for diazepam,

is a schedule IV controlled substance. *See* 21 U.S.C. § 812(b)(4); 21 C.F.R. § 1308.14(c)(14).[8]

Diazepam (Valium) also is characterized as a schedule IV controlled substance under N.Y.Pub.Health Law § 3306 (Schedule IV (c)(14)) (McKinney 1997). Further, under New York Penal Laws, Article 220 (involving "Controlled Substance Offenses"), and specifically New York Penal Law § 220.65, it is unlawful for "a practitioner . . . to knowingly and unlawfully sell[ ] a prescription for a controlled substance. For purposes of [New York Penal Law § 220.65], a person sells a prescription for a controlled substance unlawfully when he does so other than in good faith in the course of his professional practice." A person who engages in the offense of Criminal Sale of a Prescription for a Controlled Substance is guilty of a class C felony under New York law.

Finally, this Court has repeatedly noted that it has no jurisdiction to adjudicate a petition for review challenging a final order of removal against an alien who is subject to removal because he or she committed an aggravated felony or controlled substance offense. See 8 U.S.C. § 1252(a)(2)(C); *Durant v. INS,* 393 F.3d 113, 115 (2d Cir. 2004); *Brissett v. Ashcroft*, 363 F.3d 130, 133 (2d Cir. 2004). The Court does, however, retain its jurisdiction to review whether a petitioner's conviction -- in this case Aziz's New York state conviction -- constitutes an aggravated felony under § 101(a)(43)(B) of the INA, 8 U.S.C. § 1101(a)(43)(B). In this regard, the Court gives "substantial deference to the BIA's interpretations of the

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[8] Classifications are made pursuant to 21 U.S.C. § 811.

statutes and regulations that it administers." *Brissett*, 363 F.3d at 133. The Court reviews *de novo* the BIA's interpretation of federal or state criminal laws, and its determination that a petitioner's crime of conviction falls within the INA's definition of an aggravated felony. *Richards v. Ashcroft*, 400 F.3d 125, 127 (2d Cir. 2005); *Kamagate v. Ashcroft*, 385 F.3d 144, 151 (2d Cir. 2004); *Ming Lam Sui v. INS*, 250 F.3d 105, 112-13 (2d Cir. 2001); *see also Gill*, 2005 WL 1983700 at *5 ("[W]e review *de novo* the BIA's finding that a petitioner's crime of conviction *contains* those elements which have been properly found to constitute a [Crime Involving Moral Turpitude]") (emphasis in original).

C. Discussion

Applying the "categorical approach" employed by the Court to determine whether a conviction constitutes an aggravated felony, *see Jobson v. Ashcroft*, 326 F.3d 367, 371-72 (2d Cir. 2003) ("crime of violence" under 18 U.S.C. § 16); *Ming Lam Sui*, 250 F.3d at 109 (fraud offense in which the victim suffered a loss of more than $10,000), leads to the conclusion that petitioner was convicted of an aggravated felony. As this Court explained in *Gousse v. Ashcroft*, in using the categorical approach, the question is "whether the statutory definition of the offense of conviction is broader than an offense defined as an 'aggravated felony' under federal law." 339 F.3d 91, 95 (2d Cir. 2003). "Unless the offense of conviction is broader, the petitioner has committed an 'aggravated felony' irrespective of the particular circumstances of his crime." *Id*. at 96 (citing *Ming Lam Sui*, 250 F.3d at 116).

Analyzing petitioner Aziz's conviction under these standards leads to the conclusion that the definition of the aggravated felony of "illicit trafficking in a controlled substance . . . including a drug trafficking crime (as defined in section 924(c) of Title 18)," 8 U.S.C. § 1101(a)(43)(B) is broader than the New York state drug felony of Criminal Sale of a Prescription for a Controlled Substance. First, the New York statute N.Y. Penal Law § 220.65 makes it a crime for a physician -- and for anyone who aids and abets a physician -- to sell prescriptions for controlled substances other than in good faith in the course of his professional practice. This is a much narrower statute than the broad federal statute which makes it a crime for anyone to unlawfully ". . . distribute, or dispense . . ." a controlled substance. 21 U.S.C. § 841(a)(1).

In addition, in making the required assessment, this Court is permitted to look not only to the language of the statute itself, but also to the charging document and the judgment of conviction. When the statutory definition of the offense of conviction "encompasses some classes of criminal acts that fall within the federal definition of aggravated felony and some classes that do not fall within the definition, . . . a court may then look 'to the record of conviction for the limited purpose of determining whether the alien's conviction was under the branch of the statute that permits removal.'" *Abimbola v. Ashcroft*, 378 F.3d 173, 177 (2d Cir. 2004) (quoting *Dickson v. Ashcroft*, 346 F.3d 44, 48-49 (2d Cir. 2003)). Under the INA, "the record of conviction includes the charging document, plea agreement, a verdict or judgment of conviction, and a record of the sentence or plea trancript." *Id*. (citing 8

U.S.C. § 1229a(c)(3)(B)). *See also Dickson*, 346 F.3d at 53; 8 U.S.C. § 1229a(c)(3)(B); 8 C.F.R. § 1003.41(a); *Sui*, 250 F.3d at 118 ("[C]ourts undertaking a categorical approach look beyond the language of the statute to examine the charging document and the judgment of conviction when the relevant statute includes both conduct that would constitute an aggravated felony and conduct that would not."). Indeed, this Court has noted that "[o]rdinarily, the record of conviction in a drug case supplies ample evidence of the act committed (e.g., 'selling' or 'possessing') and of the substance involved" for a determination to be made as to whether the offense constitutes an "aggravated felony." *Gousse*, 339 F.3d at 95. Here, the New York indictment specifically alleged in six counts that petitioner had engaged in the unlawful sale of prescriptions for "Valium, the brand name of Diazepam, a controlled substance," for other than good faith professional purposes, JA 128-35, and the Judgments of Conviction reflect convictions on all six felony drug counts, JA 122-27.

Moreover, the same criminal conduct for which petitioner was convicted has been prosecuted in the federal courts under 21 U.S.C. § 841(a)(1). *See United States v. Singh*, 390 F.3d 168, 178 (2d Cir. 2004) (conviction of a physician charged with, *inter alia*, twenty-four counts of causing and aiding and abetting the illegal distribution and dispensing of controlled substances, in violation of 21 U.S.C. § 841(a)(1)); *United States v. Vamos*, 797 F.2d 1146, 1148-51 (2d Cir. 1986) (physician's office manager convicted after trial on thirteen counts of aiding and abetting the distribution of controlled substances outside the scope of professional medical practice, in violation of

21 U.S.C. §§ 812 and 841); *United States v. Rogers*, 609 F.2d 834, 835 (5th Cir. 1980) (per curiam) (physician charged with and convicted of dispensing Valium "not in the usual course of professional conduct and not for a legitimate medical purpose."). In short, the physicians and office manager in *Singh, Vamos,* and *Rogers* were convicted of criminal conduct involving the dispensing of controlled substances via unlawful prescriptions under the provisions of 21 U.S.C. § 841(a)(1) -- provisions which are significantly broader than the drug felony provisions of which petitioner Aziz was convicted.

Accordingly, the IJ correctly concluded that Aziz's conviction of criminal sales of prescriptions for a controlled substance under N.Y. Penal Law § 220.65 comes within the definition of "illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in § 924(c) of Title 18)" under 8 U.S.C. § 1101(a)(43)(B) and thus subjects him to removal from the United Sates as an aggravated felon.

III. If the Court Decides to Consider Petitioner's Claim of Eligibility for § 212(c) Relief, It Should Remand the Matter to the BIA for an Individualized Showing of Actual Reliance on the Availability of Such Relief

A. Statement of Facts

Petitioner was indicted by a New York grand jury on February 4, 1991, convicted by a trial jury on June 4, 1992, and sentenced on June 30, 1992. JA 120, 122-27,128-35. The convictions were affirmed by the New York appellate court on October 7, 1993. JA 117.

In 1996, Congress enacted legislation limiting the availability of § 212(c) relief, Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), Pub.L. No. 104-132, § 440(d), 110 Stat. 1214, 1277 (1996), and later in that year eliminating § 212(c) relief completely, Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), Pub.L. No. 104-208, 110 Stat. 3009-546, 597 (1996).

On November 21, 1997, the INS issued a Notice to Appear to petitioner which alleged he was removable from the United States based on his conviction for a controlled substance offense. JA 153-55. On April 17, 2001, an additional charge of removability was filed which alleged that petitioner's conviction constituted an aggravated felony. JA 150-52.

On April 16, 2002 -- more than 4 ½ years after the initiation of the removal proceedings -- petitioner filed a written application for § 212(c) relief. JA 87-111.[9]

On May 16, 2002, an Immigration Judge ordered petitioner removed from the United States based upon his prior conviction in the Supreme Court of the State of New York on six counts of Criminal Sale of a Prescription for a Controlled Substance in violation of § 220.65 of the New York State Penal Laws. JA 23-24 (written order); 25-28 (oral decision and order).

B. Governing Law and Standard of Review

This Court's decision in *Rankine v. Reno*, 319 F.3d 93 (2d Cir. 2003), succinctly sets forth the background of former INA § 212(c) (8 U.S.C. §1182(c)), which provided for discretionary relief from removal, as follows:

> [T]he deportation of resident aliens who commit aggravated felonies is controlled by the [INA]. *See* 8 U.S.C. § 1227(a)(2)(A) (iii)(2001). Prior to 1997, aliens deportable under the INA could apply to the Attorney General for a discretionary waiver of deportation pursuant to § 212(c) of the INA. To qualify for such relief, an alien was required to show that he (1) was a lawful permanent resident of the United States, (2) had an unrelinquished domicile of seven consecutive years, and (3) had

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[9] Petitioner did not file an affirmative application for 212(c) relief under 8 C.F.R. §§ 212.3(a)(1), (2) prior to initiation of removal proceedings.

> not committed an aggravated felony for which he had served a term of at least five years. *See* 8 U.S.C. § 1182(c) (1994). If the alien met these requirements, the Attorney General had the discretion to waive deportation. *See id.*; [*St. Cyr v. INS*, 229 F.3d 406, 410 (2d Cir. 2000), *aff'd*, 533 U.S. 289 (2001)] In 1996,Congress enacted first the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), which limited eligibility for relief under § 212(c), *see* AEDPA, Pub.L. No. 104-132 § 440(d), 110 Stat. 1214, 1277 (1996), and then the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), which repealed INA § 212(c) completely, effective April 1, 1997. *See* IIRIRA, Pub.L. No. 104-208 § 304(b), 110 Stat. 3009-546, 597 (1996). Section 212(c) relief was, in effect, replaced by a new form of relief called "cancellation of removal," 8 U.S.C. § 1229b, which allows the Attorney General to cancel removal proceedings for a class of resident aliens that does not include those convicted of an aggravated felony. In removal proceedings commenced after April 1, 1997, therefore, resident aliens convicted of an aggravated felony are no longer eligible for any form of discretionary relief from deportation.

319 F.3d at 95-96.

The decisions of the Supreme Court in *INS v. St. Cyr*, 533 U.S. 289 (2001) (holding that § 212(c) relief remained available to waive pre-IIRIRA guilty plea convictions), and this Court in *Rankine v. Reno*, *supra*, and *Restrepo v.*

McElroy, *supra*, are particularly relevant to petitioner's claim here that he is eligible for § 212(c) relief. Accordingly, these decisions are discussed in detail below.[10]

1. *St. Cyr*

As noted, prior to the enactment of IIRIRA, certain aliens otherwise determined to be deportable or inadmissible had been entitled to apply for discretionary waivers of deportation or exclusion under § 212(c). Before 1996, § 212(c) gave the Attorney General broad discretion to award such waivers to qualifying lawful permanent residents ("LPRs"). Beginning in 1990, Congress passed several amendments to the INA limiting the availability of this discretionary waiver and in 1996 passed IIRIRA, which repealed § 212(c) in its entirety, *see* IIRIRA, § 304(b), 110 Stat. at 3009-597.

In *St. Cyr*, the Supreme Court limited the scope of IIRIRA's repeal of § 212(c), holding that § 212(c) relief remained available to aliens in removal proceedings who had entered guilty pleas prior to IIRIRA's enactment. *See St. Cyr*, 533 U.S. at 326. Specifically, the Supreme Court

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[10] Respondent's brief concerning this legal tableau draws heavily on the brief filed by the United States in the matter of *Wilson v. Reno, et al*, Docket Nos. 04-5869-pr(L), 04-5973(XAP), which is presently pending before this Court and which argues, *inter alia*, that remands to the BIA for individualized showings of reliance on the availability of 212(c) relief is the appropriate treatment for petitions claiming such subjective reliance.

found that: (1) Congress had not clearly indicated its intent in IIRIRA that the repeal of § 212(c) be applied retroactively; and (2) an impermissible retroactive effect would result from applying the repeal to aliens who, before IIRIRA's enactment, had pleaded guilty to a deportable offense with the expectation of qualifying for § 212(c) relief. *Id.* at 317-26.

In finding that a retroactive application of IIRIRA § 304(b) would be contrary to "familiar considerations of fair notice, reasonable reliance, and settled expectations," *id.* at 323, the Supreme Court relied heavily on the fact that "plea agreements involve a *quid quo pro* between a criminal defendant and the government," *id.* at 321. The Court found that by entering into these agreements aliens surrendered important constitutional rights in anticipation of, *inter alia*, receiving a sentence that would preserve their eligibility for § 212(c) relief, while the government received the benefit of "promptly imposed punishment without the expenditure of prosecutorial resources." *Id.* at 321-23 (citations omitted).

The Court further found that such reliance on the continued availability of § 212(c) was reasonable because, "as a general matter, alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions." *Id.* at 322 (citing *Magana-Pizano v. INS*, 200 F.3d 603, 612 (9th Cir. 1999)). The Court based this conclusion on: numerous state laws requiring trial judges to advise defendants that immigration consequences may result from their plea, *id.* at 322 n.48; the fact that "numerous practice guides" advise defense counsel of the importance of

preserving § 212(c) relief prior to entering into a plea agreement, *id.* at 323 & n.50; *see also id.* at 323 (citing 3 Bender, Criminal Defense Techniques §§ 60A.01, 60A.02[2] (1999)) ("Preserving the client's right to remain in the United States may be more important to the client than any potential jail sentence")); and an "instructive" parallel litigation in which the record expressly reflected that the alien-defendant's "sole purpose" for entering into a plea agreement was to ensure that "'he got less than five years to avoid what would have been a statutory bar on § 212(c) relief,'" *id.* at 323 (quoting *Jideonwo v. INS*, 224 F.3d 692, 699 (7th Cir. 2000)).[11] Accordingly, the Court reasoned that because aliens who pleaded guilty to deportable offenses "almost certainly relied" upon the likelihood of receiving § 212(c) relief in deciding to forgo their right to trial, it would be unfair to apply the repeal of § 212(c) retroactively to this class of aliens. 533 U.S. at 325-26; *see also id.* at 323 (noting reliance upon "settled

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[11] Similarly, the existence of objective evidence of an alien's reliance on § 212(c) relief in the context of a plea agreement was a critical factor in this Court's decision to employ a categorical presumption of reliance in *St. Cyr v. INS*, 229 F.3d at 419 (2d Cir. 2000). Specifically, this Court relied on: (1) the "common requirement that defense counsel and the court advise a criminal defendant of the immigration consequences of a guilty plea," *id.*; (2) an attorney's independent "professional duty" to do the same, *id.* (citing ABA Standards for Criminal Justice, Pleas of Guilty, Standard 14-3.2, commentary at 75 (2d ed. 1982)); and (3) criminal defense law treatises emphasizing the importance of immigration relief to an alien considering whether to accept a plea bargain, *id.*

practice, the advice of counsel, and perhaps even assurances in open court").

2. *Rankine*

In *Rankine*, this Court addressed whether IIRIRA's repeal of § 212(c) could be applied to an alien who was convicted after trial of a deportable offense prior to IIRIRA's effective date. *See Rankine*, 319 F.3d at 95. This Court rejected petitioners' argument that IIRIRA's repeal of § 212(c) would be impermissibly retroactive as applied to them, finding that the decision to stand trial distinguished those petitioners from the petitioner in *St. Cyr* in "two crucial" respects:

> First, none of these petitioners detrimentally changed his position in reliance on continued eligibility for § 212(c) relief. Unlike aliens who entered pleas, the petitioners made no decision to abandon any rights and admit guilt -- thereby immediately rendering themselves deportable -- in reliance on the availability of the relief offered prior to IIRIRA. The petitioners decided instead to go to trial, a decision that, standing alone, had no impact on their immigration status . . . .
>
> Second, the petitioners have pointed to no conduct on their part that reflects an intention to preserve their eligibility for relief under § 212(c) . . . . If they had pled guilty, petitioners would have participated in the *quid quo pro* relationship, in which a greater expectation of relief is provided in exchange for forgoing a trial, that gave rise to the reliance

> interest emphasized by the Supreme Court in *St. Cyr*. As the Court made clear, it was that reliance, and the consequent change in immigration status, that produced the impermissible retroactive effect of IIRIRA.

Id. at 99-100.

Accordingly, this Court held that "[b]ecause those aliens who went to trial prior to the elimination of § 212(c) relief cannot show that they altered their conduct in reliance on the availability of such relief," IIRIRA's repeal of § 212(c) was not impermissibly retroactive as applied to petitioners. *Id.* at 100.[12]

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[12] Petitioner urges the Court to follow the rationale of the Third Circuit in *Ponnapula v. Ashcroft*, 373 F.3d 480, 496 (3d Cir. 2004), which held that IIRIRA's repeal of § 212(c) discretionary relief was impermissibly retroactive as applied to *some* aliens who were convicted after trial, but prior to the effective date of IIRIRA. Petitioner's Brief at 3, 7. The *Ponnapula* panel, however, acknowledged that its holding conflicted with this Court's decision in *Rankine*, as well as decisions in other circuits which had considered the issue raised by the petitioner in *Ponnapula*. 373 F.3d at 488-89, 496-500. *See Chambers v. Reno*, 307 F.3d 284, 290-91 (4th Cir. 2002); *Montenegro v. Ashcroft*, 355 F.3d 1035 (7th Cir. 2004); *Armendariz-Montoya v. Gonchik* 291 F.3d 1116 (9th Cir. 2002); *Brooker v. Ashcroft*, 283 F.3d 1268 (11th Cir. 2002).

3. *Restrepo*

In *Restrepo*, this Court held that a criminal alien who was convicted of a deportable offense after trial could assert a cognizable reliance interest in the continued availability of § 212(c) relief based, not on his decision to stand trial, but on his purported decision not to file an affirmative application for such relief -- i.e., an application made to an INS district director prior to the commencement of immigration proceedings -- after his conviction and prior to AEDPA's enactment. *See* 369 F.3d at 632-33. Specifically, the petitioner in *Restrepo* claimed that he chose not to file an affirmative application immediately after his conviction "in reliance on his ability to apply for 212(c) relief at a later time, when, presumably, his 212(c) case would be stronger due to the longer record of rehabilitation and community ties, and that AEDPA's elimination of that relief would disrupt his reasonable reliance and settled expectations." *Id.* at 633.

The Court observed that because an alien's "proof of rehabilitation," the "nature, recency and seriousness" of his criminal record, and his "community ties," *inter alia*, were relevant factors in determining whether he was deserving of § 212(c) relief, it was "conceivable" that an alien "convicted of a deportable crime *might* choose to wait to apply for 212(c) relief, but would only do so if [he] believed that 212(c) relief would remain available later." *Id.* at 634 (emphasis added). Accordingly, the Court found that it was reasonable that "an alien such as [p]etitioner *might* well decide to forgo the immediate filing of a 212(c) application based on the considered and reasonable expectation that he would be permitted to file a stronger

application for 212(c) relief at a later time." *Id.* at 634 (emphasis added).

In so holding, this Court rejected the Government's argument that *Rankine* foreclosed the petitioner's claim of reliance because he had been convicted at trial. *Id.* at 636. The Court distinguished *Rankine*, noting, *inter alia*, that the petitioners in that case "'pointed to no conduct on their part that reflects an intention to preserve their eligibility for relief under § 212(c) by going to trial.'" *Restrepo*, 369 F.3d at 636-37 (quoting *Rankine*, 319 F.3d at 100). Conversely, the Court found that "aliens like [p]etitioner incurred a heightened expectation of prospective relief flowing from their choice to forgo filing an affirmative application in the hope of building a stronger record and filing at a later date." *Id.* at 637. Consequently, the Court stated that "*[t]o the extent* aliens like [p]etitioner detrimentally adapted their positions in reliance of their expectation of continued eligibility for 212(c) relief," AEDPA's bar could not be applied retroactively to such aliens. *Id.* at 637 (emphasis added). The Court, however, did not rule that the petitioner was automatically entitled to benefit from his claimed reliance interest. Rather, the Court remanded the matter to the district court to determine whether:

> an alien such as [p]etitioner must make an *individualized* showing that he decided to forgo an opportunity to file for 212(c) relief in reliance on his ability to file at a later date (and, if he must, whether [p]etitioner can do so), or whether, instead, a *categorical* presumption of reliance by any alien who might have applied for 212(c) relief when it

was available, but did not do so, is more appropriate.

Id. at 639 (emphasis in original).[13]

C. Discussion

1. Aziz Should Be Required to Make an Individualized Showing of Reliance Prior to Being Deemed Eligible for § 212(c) Relief

In remanding *Restrepo* to the district court to determine whether to adopt an individualized or categorical approach to reliance, this Court observed that, in *St. Cyr*, the Supreme Court applied a categorical presumption of reliance to the class of aliens who pleaded guilty to a deportable offense prior to April 24, 1996. *Restrepo*, 369 F.3d at 640. Rather than support the application of a categorical presumption of reliance to a *Restrepo*-based claim, however, the factors underlying the Supreme Court's decision in *St. Cyr* strongly indicate that an individualized showing is appropriate. Specifically, the

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[13] On remand, the district court in *Restrepo* did not address this open question, but instead dismissed the habeas petition on the ground that at the time of the IJ's decision, Restrepo had served more than five years for an aggravated felony conviction and therefore was statutorily ineligible for § 212(c) relief pursuant to § 511 of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, 5052 (Nov. 29, 1990). *See Restrepo v. McElroy*, 354 F. Supp. 2d 254, 255 (E.D.N.Y. 2005).

Supreme Court applied a categorical presumption of reliance in *St. Cyr* because it found that: (1) an alien's plea of guilty to a deportable offense, in and of itself, provides powerful objective evidence of an alien's reliance on the continued availability of § 212(c) relief; and (2) such reliance was supported by substantial empirical evidence, thereby rendering an individualized showing unnecessary. There is no such objective evidence of reliance here. Indeed, petitioner Aziz did not even make such a claim before either the IJ or the BIA. Rather, he simply makes the bold assertion before this Court that "[he] did not [file an affirmative application for relief under 8 C.F.R. § 212.3(a)(1)] because he was trying to bolster his case for the granting of such relief by waiting until more time had elapsed from the date of his conviction," Petitioner's Brief at 3, without pointing to a single piece of objective evidence in the record which supports his assertion.

As noted above, Aziz, like the alien in *Restrepo*, doe*s not* claim that he took any affirmative action in reliance on the continued availability of § 212(c), such as by filing an affirmative application for such relief prior to that provision's repeal. Arguably, such conduct might provide objective evidence of an alien's reliance on pre-IIRIRA law, like an alien's entry into a guilty plea in *St. Cyr*. Rather, like Restrepo, Aziz's purported reliance derives from his alleged decision *not* to file an affirmative § 212(c) application. Thus, the reliance interests at issue in *St. Cyr* and *Restrepo* are fundamentally different: While the former is based on an alien's affirmative conduct -- his waiver of his constitutional right to a trial by jury and his entry into a plea agreement -- and is therefore objectively demonstrable, the latter is based solely on the

absence of affirmative conduct (the purported decision not to apply affirmatively for a § 212(c) waiver), and is therefore entirely dependent on the self-serving statements of the alien.[1] This distinction is critical, because the objective reasonableness of an alien's alleged reliance interest was central to the Supreme Court's use of a categorical approach in *St. Cyr*. Indeed, as the Supreme Court noted, plea agreements, by their nature, provide powerful evidence of reliance because they "involve a *quid pro quo* between a criminal defendant and the government," pursuant to which the defendant waives certain constitutional rights "[i]n exchange for some perceived benefit." *St. Cyr*, 533 U.S. at 322.

Further, it is reasonable to presume that prior to accepting a plea agreement an alien defendant would have considered his continued eligibility for relief from deportation, including § 212(c) relief, because pleading guilty to a deportable offense "result[s] in *an immediate and detrimental change of position with respect to [an alien's] immigration status*." *Chambers*, 307 F.3d at 290 (emphasis in original); *see also Rankine*, 319 F.3d at 100

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[1] *Cf. United States v. Swaby*, 357 F.3d 156, 162 (2d Cir. 2004) ("We therefore conclude that the holding in *Rankine* is not an invitation to aliens, like petitioner, to offer individualized proof of their motivation in choosing to go to trial. *We hold that the decision to go to trial, as a matter of law, forecloses any argument of detrimental reliance on the availability of § 212(c) relief, and that IIRIRA's repeal of § 212(c) is not impermissibly retroactive in its application to petitioner."*) (emphasis added).

(distinguishing *St Cyr*. on the ground that the petitioners did not similarly "abandon any rights and admit guilt -- thereby *immediately rendering themselves deportable*") (emphasis added).

Petitioner argues that actual reliance should not be required since "reasonable reliance should be inferred for this class of aliens," citing to the Third Circuit's decision in *Ponnapula*, *supra*. Petitioner's Brief at 3. The controlling authority in this Circuit, however, is *Rankine* which was rejected in *Ponnapula*. 373 F.3d at 489. Further, even in *Ponnapula*, the court recognized that for a certain class of aliens, specifically those who went to trial and were convicted prior to IIRIRA's effective date but who were not offered a plea agreement, it would be unreasonable to infer reliance on the availability of § 212(c) relief. *Id*. at 494. Here, the record is completely silent as to whether Aziz was ever offered a plea agreement, if so what its terms were, and why any such offer was rejected. Thus, he does not stand on the same footing as the petitioner in *Ponnapula*, a decision which in any event is not controlling authority in this Circuit.

Moreover, in concluding as a categorical matter that "preserving the possibility of [§ 212(c)] relief would have been one of the principal benefits sought by [alien] defendants deciding whether to accept a plea offer," *St. Cyr*, 533 U.S. at 323, the Supreme Court relied heavily on overwhelming empirical evidence, such as state laws requiring trial judges to inform criminal aliens of the immigration consequences that might result from a guilty plea, *see id*. at 322 n.48, and "numerous practice guides" that inform defense counsel to advise their clients of

§ 212(c)'s importance prior to entering into a plea bargain, *see id.* at 322 n.50 & 322, (citing 3 Bender, Criminal Defense Techniques §§ 60A.01, 60A.02[2] (1999)). *See also St. Cyr v. INS*, 229 F.3d at 420 (adopting categorical presumption "[b]ecause there is *sufficient evidence*" of reliance) (emphasis added). In contrast, an alien's purported unilateral decision not to apply affirmatively for § 212(c) relief -- which does not change his immigration status -- does not, by itself, present any basis for presuming an alien's reliance on his ability to file such an application at a later date.

More critically, unlike in *St. Cyr*, there is absolutely no empirical evidence here to indicate that Aziz was even aware of the existence of the affirmative application process for § 212(c) relief (as compared to the normal course in which an alien seeks a § 212(c) waiver of removal after having been placed in proceedings) or, if he was cognizant of this procedure, that he intended to avail himself of it prior to being placed in removal proceedings. *See Thompson v. Ridge*, No. 04 Civ. 0429 (RMB)(AJP), 2005 WL 433277, at **9-10 (S.D.N.Y. Feb. 24, 2005) (report and recommendation concluding that individualized showing of reliance was required under *Restrepo* because unlike in *St. Cyr* where there was "overwhelming empirical evidence" of reliance, there is "no empirical evidence . . . to demonstrate that aliens in the *Restrepo* situation generally knew of the availability of an affirmative application for § 212(c) relief or generally delayed applications in the hopes of bolstering a future application").

The dearth of objective support for Aziz's claim, which, again, is raised for the first time before this Court, is not surprising, considering that an alien who is not in removal proceedings would ordinarily not be concerned with applying for relief therefrom, nor would the removable alien want to voluntarily alert the immigration authorities to his continued presence in this country and prompt them into commencing removal proceedings sooner than they otherwise might have. *See* 1 Immigration Law and Defense § 8:41 n.1 (2004) (stating that it was common practice for immigration practitioners not to file affirmative § 212(c) applications so as to avoid detection by the INS).

Thus, far from the well-documented, "settled practice" considered in *St. Cyr*, there is no support for the proposition that criminal aliens, like petitioner Aziz, would have considered filing affirmative § 212(c) applications in a "vacuum," rather than first contemplating such relief once he had been placed in proceedings. *See Thompson*, 2005 WL 433277, at *10 ("Without any evidence that generally aliens relied in the past on the continued availability of § 212(c) relief as their reason for not immediately applying for that relief [affirmatively], this Court cannot presume that such reliance is sufficiently prevalent or reasonable . . . to apply a categorical presumption of reliance."); *cf. St. Cyr*, 533 U.S. at 323 ("Relying upon settled practice, the advice of counsel, and perhaps even assurances in open court that the entry of the plea would not foreclose § 212(c) relief, a great number of defendants in . . . St. Cyr's position agreed to plead guilty.").

Accordingly, because Aziz's claim does not bear the same objective hallmarks of reliance discussed in *St. Cyr*, he should be required to make an individualized showing that he decided to forgo his opportunity to file an affirmative § 212(c) application in reliance on his belief that he would be able to make a stronger application at some indeterminate future date.

2. A Categorical Presumption of Reliance Would Effectively Overturn This Court's Decision in *Rankine*

An individualized approach is also preferable here for the additional reason that "[a]dopting a blanket rule that the AEDPA/IIRIRA have an impermissible retroactive effect when applied to aliens, like [Aziz] and Restrepo, who were convicted at trial but could have filed affirmative § 212(c) applications before that section's repeal in 1996, would effectively overrule *Rankine*." *Thompson*, 2005 WL 433277, at *10.

While this Court recently reaffirmed the vitality of its decision in *Rankine, see Restrepo*, 369 F.3d at 636 ("[w]e have no argument with *Rankine's* reasoning or conclusion"); *Thom v. Ashcroft*, 369 F.3d 158, 163 (2d Cir. 2004) (post-*Restrepo* decision rejecting, pursuant to *Rankine*, alien's claim of reliance based solely on his decision to stand trial), its holding that *St. Cyr* does not extend to criminal aliens convicted after trial would be eviscerated if a categorical presumption of reliance is applied under *Restrepo*. Specifically, a categorical presumption of reliance would extend *Restrepo*'s holding to any alien "who might have applied [affirmatively] for

212(c) relief when it was available [to him], but [who] did not do so" prior to being rendered ineligible for such relief by AEDPA or IIRIRA. 369 F.3d at 639. This class of aliens would therefore be defined by a simple chronological calculus, and would essentially include any alien who was: (1) convicted after trial prior to AEDPA's or IIRIRA's enactment; and (2) was placed in post-enactment immigration proceedings.

Because *Rankine* operates according to the same chronology -- it forecloses a claim of reliance based on an alien's decision to stand trial prior to AEDPA's or IIRIRA's enactment where the alien is in post-enactment removal proceedings -- any alien who has been or would be denied § 212(c) relief under *Rankine*, would nonetheless be eligible for § 212(c) relief under *Restrepo,* because they too "might have" applied affirmatively for such relief in the interim between their conviction and AEDPA's or IIRIRA's enactment. *See Thompson,* 2005 WL 433277, at *10 ("Every alien who falls within the *Restrepo* category also falls within the *Rankine* category."); *see generally Rankine*, 319 F.3d at 96-97 (factual backgrounds indicating that each petitioner was convicted after trial prior to IIRIRA's enactment and applied for § 212(c) relief after being placed in post-IIRIRA removal proceedings). Thus, "if a categorical approach were adopted, the *Restrepo* holding would swallow the *Rankine* holding." *Thompson*, 2005 WL 433277, at *10.

Conversely, an individualized approach to reliance would:

> maintain a distinction between *Rankine* and *Restrepo* by requiring those aliens who were convicted at trial before 1996 ("*Rankine* aliens") who were later brought into removal proceedings after 1996 to show that applying [] AEDPA/IIRIRA to them would have an impermissible retroactive effect because they relied on the continued existence of § 212(c) relief in not affirmatively filing a § 212(c) application. This showing of detrimental reliance would separate a *Rankine* alien who gave no consideration to applying for § 212(c) relief from a *Restrepo* alien who can show he actually was waiting for his § 212(c) claim to ripen.

2005 WL 433277, at *10.

Finally, this Court's recent post-*Restrepo* decision in *Thom v. Ashcroft*, *supra*, discussed a hypothetical case of reliance on the continued availability of § 212(c), in which it strongly indicated that an individualized showing of reliance would be required. 369 F.3d at 166. There, the Court theorized that the repeal of § 212(c) might have an impermissible retroactive effect on an alien whose immigration proceedings were not commenced while such relief was still available to him due to the INS's delay. *Id.* The Court noted that "[u]nder these circumstances -- and where Congress's intent as to the retroactivity of the elimination of 212(c) is unclear -- an alien *might* argue with some force that he has demonstrated . . . reasonable reliance," *id.* at 166 (emphasis added), "especially . . . if the alien could show that part of his reliance was based on the fact that -- during the relevant period -- the BIA

regularly granted 212(c) relief to aliens whose 212(c) applications were considerably *weaker than his own," id.* at 166 n.14 (emphasis added). This showing, of course, would be inherently individualized because it would require an alien to demonstrate the relative strength of his claim as compared to those of other aliens. Likewise, the Court hypothesized that an incarcerated alien would be hard pressed to claim "that he made life-shaping decisions relying on the INS's disinclination to institute proceedings against him" and accordingly decided to postpone filing a § 212(c) application. *Id*. at 166 n.15. Again, this suggests that an individualized examination of an alien's situation can disclose whether the alien in fact reasonably relied on § 212(c)'s continued availability.

Accordingly**,** this Court should hold that an alien, like Aziz, who asserts that he is eligible for § 212(c) relief under this Court's decision in *Restrepo* should be required to make an individualized showing of reliance, and the matter should be remanded to the BIA to determine in the first instance whether Aziz can make such a showing, and if so, whether he merits such relief as matter of discretion.

CONCLUSION

For the foregoing reasons, the instant petition for review should be dismissed based on petitioner's failure to exhaust his administrative remedies. To the extent the Court elects to review the claims set forth in the instant petition, the Court should affirm the agency's finding that petitioner's state conviction for the felony drug offense of Criminal Sale of a Prescription for a Controlled Substance is an "aggravated felony" under 8 U.S.C.

§ 1101(a)(43)(B). Further, if the Court considers petitioner's § 212(c) claim, it should then remand the matter to the BIA for petitioner to make an individualized showing that he delayed applying for § 212(c) relief in reliance on the continued availability of such relief.

Dated: September 1, 2005

Respectfully submitted,

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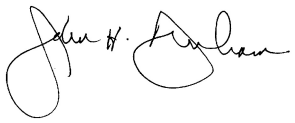
CERTIFICATION PER FED. R. APP. P.32(a)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 11,214 words, exclusive of the Table of Contents, Table of Authorities, Addendum of Statutes and Rules, and this Certification.



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ADDENDUM

8 U.S.C. § 1101. Definitions

(a) As used in this chapter –

....

(43) The term "aggravated felony" means –

....

(B) illicit trafficking in any controlled substance (as defined in section 802 of Title 21), including any drug trafficking crime as defined in section 924(c)(2) of Title 18

8 U.S.C. § 1182. Inadmissible aliens

(c) Repealed. INA § 212(C) (repealed 1996)

Aliens lawfully admitted for permanent resident 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 without regard to the provisions of subsection (a) of this section (other than paragraphs (3) and (9)(c)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 1181(b) of this title. The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years.

8 U.S.C. § 1227. Deportable aliens

(a) Classes of deportable aliens

Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

. . . .

(2) Criminal offenses

(A) General crimes

. . . .

(iii) Aggravated felony

Any alien who is convicted of an aggravated felony at any time after admission is deportable.

. . . .

(B) Controlled substances

(i) Conviction

Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

8 U.S.C. § 1252. Judicial review of orders of removal

(a) Applicable provisions

(1) General orders of removal

Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of Title 28, except as provided in subsection (b) of this section and except that the court may not order the taking of additional evidence under section 2347(c) of Title 28.

(2) Matters not subject to judicial review

. . . .

(C) Orders against criminal aliens

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by

section 1227(a)(2)(A)(i) of this title.

. . . .

(b) Requirements for review of orders of removal

. . . .

(4) Scope and standard for review

Except as provided in paragraph (5)(B)--

(A) the court of appeals shall decide the petition only on the administrative record on which the order of removal is based,

(B) the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary,

(C) a decision that an alien is not eligible for admission to the United States is conclusive unless manifestly contrary to law, and

(D) the Attorney General's discretionary judgment whether to grant relief under section 1158(a) of this title shall be conclusive unless manifestly contrary to the law and an abuse of discretion.

No court shall reverse a determination made by a trier of fact with respect to the availability of corroborating evidence, as described in section 1158(b)(1)(B), 1229a(c)(4)(B), or 1231(b)(3)(C) of this title, unless the court finds, pursuant to section 1252(b)(4)(B) of this title, that a reasonable trier of fact is compelled to conclude that such corroborating evidence is unavailable.

18 U.S.C. § 16. Crime of violence defined

The term "crime of violence" means--

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 924(c)(2)

(c)(2**)** For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act 21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act 21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.).

21 U.S.C. § 802. Definitions

(6) The term "controlled substance" means a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter. The term does not include distilled spirits, wine, malt beverages, or tobacco, as those terms are defined or used in subtitle E of the Internal Revenue Code of 1986.

. . . .

(10) The term "dispense" means to deliver a controlled substance to an ultimate user or research subject by, or pursuant to the lawful order of, a practitioner, including the prescribing and administering of a controlled substance and the packaging, labeling or compounding necessary to prepare the substance for such delivery. The term "dispenser" means a practitioner who so delivers a controlled substance to an ultimate user or research subject.

. . . .

(13) The term "felony" means any Federal or State offense classified by applicable Federal or State law as a felony.

21 U.S.C. § 811. Authority and criteria for classification or substances

(a) Rules and regulations of Attorney General; hearing

The Attorney General shall apply the provisions of this subchapter to the controlled substances listed in the schedules established by section 812 of this title and to any other drug or other substance added to such schedules under this subchapter. Except as provided in subsections (d) and (e) of this section, the Attorney General may by rule--

(1) add to such a schedule or transfer between such schedules any drug or other substance if he--

(A) finds that such drug or other substance has a potential for abuse, and

(B) makes with respect to such drug or other substance the findings prescribed by subsection (b) of section 812 of this title for the schedule in which such drug is to be placed; or

(2) remove any drug or other substance from the schedules if he finds that the drug or other substance does not meet the requirements for inclusion in any schedule.

Rules of the Attorney General under this subsection shall be made on the record after opportunity for a hearing pursuant to the rulemaking procedures prescribed by subchapter II of chapter 5 of Title 5. Proceedings for the issuance, amendment, or repeal of such rules may be initiated by the Attorney General (1) on his own motion, (2) at the request of the Secretary, or (3) on the petition of any interested party.

§ 812. Schedules of controlled substances

(a) Establishment

There are established five schedules of controlled substances, to be known as schedules I, II, III, IV, and V. Such schedules shall initially consist of the substances listed in this section. The schedules established by this section shall be updated and republished on a semiannual basis during the two-year period beginning one year after October 27, 1970, and shall be updated and republished on an annual basis thereafter.

(b) Placement on schedules; findings required

Except where control is required by United States obligations under an international treaty, convention, or protocol, in effect on October 27, 1970, and except in the case of an immediate precursor, a drug or other substance may not be placed in any schedule unless the findings required for such schedule are made with respect to such drug or other substance. The findings required for each of the schedules are as follows:

. . . .

(4) Schedule IV.--

(A) The drug or other substance has a low potential for abuse relative to the drugs or other substances in schedule III.

(B) The drug or other substance has a currently accepted medical use in treatment in the United States.

(C) Abuse of the drug or other substance may lead to limited physical dependence or psychological dependence relative to the drugs or other substances in schedule III.

21 U.S.C. § 841. Prohibited acts A

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally--

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

8 C.F.R. § 212.3 Application for the exercise of discretion under section 212(c)

(a) Jurisdiction. An application for the exercise of discretion under section 212(c) of the Act shall be submitted on Form I-191, Application for Advance Permission to Return to Unrelinquished Domicile, to:

(1) The district director having jurisdiction over the area in which the applicant's intended or actual place of residence in the United States is located; or

(2) The Immigration Court if the application is made in the course of proceedings under sections 235, 236, or 242 of the Act.

21 C.F.R. § 1308.14 Schedule IV.

(c) Depressants. Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances, including its salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

. . . .

(14) Diazepam

New York Penal Law § 220.65 Criminal sale of a prescription for a controlled substance

A person is guilty of criminal sale of a prescription for a controlled substance when, being a practitioner, as that term is defined in section thirty-three hundred two of the public health law, he knowingly and unlawfully sells a prescription for a controlled substance. For the purposes of this section, a person sells a prescription for a controlled substance unlawfully when he does so other than in good faith in the course of his professional practice.

Criminal sale of a prescription is a class C felony.

New York Public Health Law § 3306.

Schedules of controlled substances

There are hereby established five schedules of controlled substances, to be known as schedules I, II, III, IV and V respectively. Such schedules shall consist of the following substances by whatever name or chemical designation known:

. . . .

Schedule IV. (a) Schedule IV shall consist of the drugs and other substances, by whatever official name, common or usual name, chemical name, or brand name designated, listed in this section.

. . . .

(c) Depressants. Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances, including its salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

. . . .

(14) Diazepam.