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Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (“AEDPA”) and the Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009-546 (“IIRIRA”). Additionally, because the BIA affirmed the IJ’s removal order, Brito-DeLeon has exhausted his administrative remedies and a district court may review the order. See 8 U.S.C. § 1252(d).

B. Merits





2. Ineffective Assistance of Counsel

Although Brito-DeLeon characterizes his claim solely as one asserting the right to counsel, the cases he cites concern ineffective assistance of counsel. See Petitioner Angel Brito-DeLeon’s Memorandum of Law in Support of His Petition for Writ of Habeas Corpus (“Pet. Mem.”) at ¶ 1 (citing Iavorski v. INS, 232 F.3d 124 (2d Cir. 2000) and Esposito v. INS, 987 F.2d 108 (2d Cir. 1993)). Ineffective assistance of counsel in a deportation or removal case “occurs when ‘counsel’s performance impinged upon the fundamental fairness of the hearing in violation of the fifth amendment due 1.0000 TD92u.’” Iavorski, 232 F.3d at 128 (quoting Rabiu v. INS, 41 F.3d 879, 882 (2d Cir. 1993)). The fundamental fairness of the hearing is impinged when competent counsel would have acted otherwise and the alien was prejudiced by counsel’s

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<sup>3</sup>(...continued)

Brito-DeLeon also argues, Petition at 8, that the hearing was improper because the INS did not have its file available to prove that he had committed fraud or misrepresentation, under 8 U.S.C. § 1182(a)(6)(C)(i), by failing to disclose his 1991 drug conviction on his LPR application. The IJ did not sustain this charge, however, precisely because the file was not available and thus the file’s absence has no relevance to the order of removal.

States. See 8 U.S.C. § 1182(a)(2)(A)(i)(II). This provision may only be waived by the Attorney General if the conviction relates to simple possession of 30 grams or less of marijuana, not the attempted sale of a controlled substance for which Brito-DeLeon was convicted. See 8 U.S.C.

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<sup>4</sup>Respondents urge dismissal of any ineffective assistance of counsel claim on the ground that Brito-DeLeon failed to exhaust administrative remedies. See Respondents' Memorandum of Law in Opposition to Petition for Writ of Habeas Corpus at 12-13. Specifically, the respondents contend that Brito-DeLeon was required to argue his ineffective assistance of counsel claim before the BIA by moving to reopen his case as required by regulation and BIA precedent. See 8 C.F.R. § 3.2 and In re Lozada, 19 I & N Dec. 637 (BIA 1988). The Court

reasons that the respondents' claim is not ripe for review.

## CONCLUSION

For the foregoing reasons, Brito-DeLeon's petition for a writ of habeas corpus should be denied. In addition, because the petition should be denied, the accompanying request should be denied and the May 8, 2001 Order staying the removal and deportation of Brito-DeLeon should be vacated.

## **Notice of Procedure for Filing of Objections to this Report and Recommendation**

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