

JAN 24 2008

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

PAVEL ELIAS VIZCAINO-CARDONA,

Petitioner,

v.

MICHAEL B. MUKASEY, Attorney  
General,

Respondent.

No. 06-72242

Agency No. A77-114-381

MEMORANDUM\*

On Petition for Review of an Order of the  
Board of Immigration Appeals

Argued and Submitted January 14, 2008  
San Francisco, California

Before: NOONAN, W. FLETCHER, and IKUTA, Circuit Judges.

We do not have jurisdiction to review Vizcaino-Cardona's due process claim because it was not exhausted before the BIA. 8 U.S.C. § 1252(d)(1); *see Barron v. Ashcroft*, 358 F.3d 674, 678 (9th Cir. 2004). Although we are mindful of the relevant presumptions in favor of pro se pleadings, *see Agyeman v. INS*, 296 F.3d

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\* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

871, 877 (9th Cir. 2002), Vizcaino-Cardona did not put the BIA on notice of his due process claim. *See Kaganovich v. Gonzales*, 470 F.3d 894, 897 (9th Cir. 2006). Vizcaino-Cardona's citation to *Agyeman* was inadequate to raise the issue that the IJ had violated his constitutional due process rights by depriving him of a full and fair hearing. Accordingly, the BIA did not have "a full opportunity to resolve [the] controversy or correct its own errors before judicial intervention." *Ladha v. INS*, 215 F.3d 889, 903 (9th Cir. 2000) (internal quotation marks omitted).

We do, however, have jurisdiction to review the BIA's determination that Vizcaino-Cardona was statutorily ineligible for asylum because that determination was not based on his conviction of an enumerated criminal offense. The relevant statutory provision, 8 U.S.C. § 1252(a)(2)(C), does not divest this court of jurisdiction to review the denial of an asylum application unless it is based on a petitioner's qualifying enumerated criminal convictions. *See Morales v. Gonzales*, 478 F.3d 972, 977–78 (9th Cir. 2007); *Arteaga v. Mukasey*, — F.3d —, 2007 WL 4531961, at \*1 & n.1 (9th Cir. Dec 27, 2007).

The IJ's and BIA's determination that Vizcaino-Cardona was statutorily ineligible for asylum because he did not establish a "well-founded fear of persecution" was supported by substantial evidence. 8 U.S.C. §§ 1101(a)(42)(A), 1158(b)(1). The State Department Report does not specify that dark-skinned

Mexicans (or those with poor Spanish language skills) are more likely to be targeted for abuse and arbitrary arrest than other groups. Additionally, the threats Vizcaino-Cardona received in American prison are not sufficient to show that he will be singled out for persecution in Mexico. In short, the IJ's determination that Vizcaino-Cardona did not succeed in demonstrating that his fear of persecution was "objectively reasonable" was supported by substantial evidence. *Gu v. Gonzales*, 454 F.3d 1014, 1019 (9th Cir. 2006).

The BIA also did not abuse its discretion in refusing to consider the argument that Vizcaino-Cardona had a well-founded fear of persecution based on his homosexuality. The argument was raised for the first time on appeal to the BIA. Vizcaino-Cardona argues that he attempted to raise the issue in his hearing before the IJ when he referred to the fact that he walked and talked differently, but in context it is clear that those statements were made in reference to Vizcaino-Cardona's earlier comments that he felt estranged from the Mexican community because he was dark-skinned and because he had adopted African-American mannerisms.

Because we conclude that Vizcaino-Cardona did not establish a well-founded fear of persecution for purposes of his asylum application, which has a lower standard of proof, we need not address his withholding of removal claim. *See Pedro-Mateo v. INS*, 224 F.3d 1147, 1150 (9th Cir. 2000). Because Vizcaino-

Cardona was statutorily ineligible for asylum, we also need not reach his claim that the IJ erred in its discretionary asylum determination.

**PETITION DENIED**