05-0040-ag

To Be Argued By:
ERIC J. GLOVER

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 05-0040-ag

BALACHANDRAMOORTHY SHYAMALAN,
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

This Court has jurisdiction under § 242(b) of the Immigration and Nationality Act, 8 U.S.C. § 1252(b) (2006), to review the petitioner's challenge to the BIA's final order dated December 14, 2004, affirming, without opinion, the IJ's decision to find the petitioner to be inadmissible as an "alien smuggler" under 8 U.S.C. § 1182(a)(6)(E).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the Immigration Judge's determination that the petitioner was inadmissible as an "alien smuggler" under 8 U.S.C. § 1182(a)(6)(E)(i) was supported by substantial evidence where the determination involved a purely factual inquiry – whether the petitioner knowingly assisted another's attempt to enter the U.S. illegally – that turned on the Immigration Judge's adverse credibility findings.

2. Whether the Immigration Judge correctly denied the petitioner's motion to suppress the petitioner's sworn statement.

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

Preliminary Statement

Balachandramoorthy Shyamalan, a citizen of Sri Lanka and a resident of New Jersey, petitions this Court for

[1] Pursuant to Rule 43(c)(2) of the Federal Rules of Appellate Procedure, Attorney General Gonzales has been substituted as the Respondent in this matter.

review of a decision of the Board of Immigration Appeals ("BIA") dated December 14, 2004. Appendix (Certified Administrative Record) ("A") 2. The BIA summarily affirmed the decision of an Immigration Judge ("IJ") (A2), dated September 15, 2003, finding the petitioner to be inadmissible as an "alien smuggler" under the Immigration and Nationality Act of 1952 ("INA"), and ordering him removed from the United States. (A2 (BIA's decision), A60-78, 534-37 IJ's decision and order)).

On the evening of January 13, 2002, the petitioner, his wife, their child and a friend, Mathan Pathmanathan, attempted to enter the United States from Canada. The petitioner and Pathmanathan, a Canadian citizen, both initially claimed to INS officers that Pathmanathan was coming to the United States for a one-week vacation. However, later that evening, the petitioner admitted in a sworn statement that he was actually taking Pathmanathan to Pathmanathan's residence in New Jersey, and that he knew that Pathmanathan was living and working in the United States illegally. A554-56. Pathmanathan admitted in a sworn statement that he had lied to INS inspectors, that he was in fact attempting to enter the United States in order to live and work illegally in the United States (A558-62), and admitted in an addendum to his sworn statement that the petitioner knew that he was living and working in the United States A563.

The petitioner (and his wife) testified before the IJ. The petitioner claimed that although he gave a sworn statement admitting that he knew Pathmanathan was living and working in the United States illegally, he had lied.

The petitioner testified that he gave the sworn statement because he was told that if he did not do so he would not be allowed to return to home and would lose his immigration status. A481-83.

The IJ did not find the petitioner (or his wife) to be credible. The IJ stated that the petitioner was "not credible given his inconsistent statement to the officers and by saying that at one point he did not tell the truth to the officers acknowledging knowledge of the smuggling attempt when under oath, but that he is now telling the truth in court." A77. By contrast, the IJ found the testimony of the two INS officers who testified to be "credible and believable," and that the petitioner's admissions "directly to the inspectors and the giving of a sworn statement on January 13, 2002 demonstrates by clear, unequivocal, and convincing evidence that he in effect admitted to the smuggling and having knowledge of the illegal status of the smugglee." A76.

The petition should be denied because this case turns entirely on credibility findings made by the IJ. The IJ found that the petitioner was not credible based on his clear inconsistent statements, and that the two INS officers who testified were credible. Because "no reasonable adjudicator would be compelled to conclude to the contrary," 8 U.S.C. § 1252(b)(4)(B), the IJ's findings are "conclusive" and should be dispositive of this appeal. *See, e.g., Majidi v. Gonzales*, 430 F.3d 77, 79-80 (2d Cir. 2005) (discussing significance of adverse credibility findings). The petition for review should therefore be summarily denied.

Statement of the Case

On January 13, 2002, the petitioner attempted to enter the country from Canada at the Lewiston, New York, bridge. He was refused admission under Section 212(a)(6)(E)(i) of the Immigration and Nationality Act ("INA"), which provides that "any alien who at any time knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law is inadmissible." 8 U.S.C. § 1182(a)(6)(E)(i).

On April 30, 2002, and April 3, 2003, the IJ held hearings. On September 15, 2003, the IJ issued a 19-page oral decision. A60-78. The IJ found based on the totality of the evidence that the petitioner had violated Section 212(a)(6)(E)(i) of the INA and ordered him removed. A77-78.

On December 14, 2004, the BIA summarily affirmed the decision of the IJ, finding the petitioner to be inadmissible as an "alien smuggler" under the INA, and ordering him removed from the United States. A2.

Statement of Facts

A. Events of January 13, 2002

On the evening of January 13, 2002, INS Inspector Mary Everyingham was working primary inspection at the Lewiston, New York, bridge when the petitioner drove a car with three other passengers into her inspection lane.

A232. Inspector Everyingham asked all four for their citizenship. A232. The petitioner identified himself as Canadian, and stated that his wife was Canadian and that their child was American. The fourth passenger, Mathan Pathmanathan, who was in the passenger seat, identified himself as Canadian. *Id*. Inspector Everyingham then asked for citizenship documents, and received a Sri Lankan passport from the petitioner, a Canadian passport from his wife with parole documentation, a U.S. passport for the child, and Pathmanathan's Canadian citizenship card. A233-34.

When asked why they were in Canada, the petitioner stated that he and wife and child had gone to Canada to attend a funeral. A234. Inspector Everyingham then asked Pathmanathan why he was returning to the United States with them. Pathmanathan stated that he was a good friend of theirs and was coming to visit them at their home in New Jersey for a week. *Id*. He stated that he would be returning to Canada by train and produced a ticket. A234-35. Inspector Everyingham then referred them to secondary inspection in order to process their parole forms and to verify Pathmanathan's intent. A235.

At secondary inspection, Inspector Nick Truong became involved. A236; A277. The petitioner and Pathmanathan approached the counter where Inspector Truong was working, and Pathmanathan told Inspector Truong that he was coming to the United States to visit the petitioner for a week and that he would be returning to Canada by train. A277-78; A278-79. Inspector Truong then asked Pathmanathan if anyone could support his

story. A279. Pathmanathan stated that his wife could, and gave Inspector Truong her number. Id. Inspector Truong called Pathmanathan's wife. *Id.* She told him that Pathmanathan was going back to the United States to work and live, as they lived in New Jersey. She was in Canada because she did not have any health care coverage in the United States and was about to deliver a baby. *Id*. She stated that Pathmanathan had a job as a manager of a drug store in the United States, and that he alone had health care coverage. A279-80.

Inspector Truong then confronted Pathmanathan with this information. A280. Pathmanathan stuck to his original story. *Id*. Inspector Truong then asked the petitioner if he knew of anyone who could assist in his investigation. A280. The petitioner gave him the name and number for a "Mr. Robbie." *Id*. Inspector Truong spoke with Mr. Robbie, who knew both Pathmanathan and the petitioner. Mr. Robbie informed Inspector Truong that Pathmanathan was in fact going back to the United States because that is where Pathmanathan lives and works. A280-81.

Inspector Truong confronted the petitioner with this information (A308), who acknowledged to Truong that he too knew that Pathmanathan lived and worked in the United States. A308-09. Truong then asked the petitioner if he would agree to persuade Pathmanathan to admit the truth just as the petitioner had. A308-09. The petitioner went to see Pathmanathan with Truong, and Pathmanathan eventually admitted that his initial story was a lie and that he was attempting to illegally return to the United States

to live and work. A308-09; A515-16 (petitioner's testimony).

Although Pathmanathan provided a sworn statement to Truong admitting that he was returning to the United States to work illegally (A282-84; A558-562 (sworn statement)), Truong had not asked Pathmanathan in the statement about what the petitioner knew about Pathmanathan's true intentions in crossing the border into the United States A286. Inspector Truong's supervisor wrote out a series of questions for Truong to ask Pathmanathan concerning the petitioner. A287; A563 (list of questions). One question was: "Does Mr. Shyamalan know that you are working and living in the United States illegally?" Pathmanathan answered that the petitioner did know "that I live and work in the United States, but that he does not know that I did it illegally." A563. Although Pathmanathan's answers were written down by Inspector Truong, Pathmanathan was given an opportunity to review his answers and initialed and signed the page on which they appear. A287; A563.

The petitioner also provided a sworn statement to Inspector Everyingham in which he admitted that he was "bringing [Pathmanathan] back to his residence in the United States," and that he knew "that Mr. Pathmanathan was living and working in the United States illegally." A555-56; A245-46. The petitioner understood English, and Inspector Everyingham provided the petitioner with an opportunity to read the statement after it was completed. A244. She also asked the petitioner if he had any changes to make, and he had none. A244-45.

The petitioner was refused admission under Section 212(a)(6)(E)(i) of the Immigration and Nationality Act ("INA"), which provides that "any alien who at any time knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law is inadmissible." 8 U.S.C. § 1182(a)(6)(E)(i).

B. Administrative Hearing Before the Immigration Judge

On April 30, 2002, and April 3, 2003, the IJ held a hearing at which the INS called two witnesses, Inspector Everyingham and Inspector Truong, who testified essentially to the facts set forth above.

The petitioner called three witnesses: the petitioner, his wife, and Pathmanathan. The petitioner testified that on January 13, 2002, the date of the attempted border crossing, he was a citizen of Sri Lanka working and living in the United States with an application pending for a green card. A454. He testified that he ran into Pathmanathan at a funeral in Toronto and that Pathmanathan had asked the petitioner for a ride to New Jersey because Pathmanathan was planning to take a one-week vacation to the United States. A460. The petitioner testified that sometime after he had provided Inspector Truong with Mr. Robbie's telephone number (A474, 477), Inspector Everyingham told him they knew that where Pathmanathan was working and living, and that if the petitioner did not "tell the truth" he would not "be able to go to New Jersey" and that they would "revoke [his]

status." A478. The petitioner stated that Inspector Everyingham "banged on the counter and threatened him," and gave him time "to think about it." A478.

The petitioner then testified that he eventually decided to tell the INS "what they are looking for" in order to "save our status." A482. The petitioner therefore "just thought" he would "say this guy is working at a pharmacy with a company and lives in Elizabeth." A483; A512, 516. He testified that he provided a sworn statement admitting that he knew that Pathmanathan lived and worked in the United States illegally, and that he gave Inspector Everyingham the answers contained in it. A490-93; A518. He also testified that he signed the statement (A486; A518), although he stated that he did not read it (A487). He claimed that he signed the statement because Inspector Everyingham told him that it would not affect his status (A488-89), and because she said "[j]ust sign it and go," and thus "forced" him to sign it. A489-90. In essence, the petitioner testified that the answers in the sworn statement were lies because he was "forced to lie." A518; A492. The petitioner testified that he was telling the truth in court at the hearing, not when he gave the sworn statement to the INS. A493; A73 (IJ's summary of same).

The petitioner's wife also testified. She testified that Inspector Everyingham was "furious" when she found out that Pathmanathan lived and worked illegally in the United States, and that she "pounded the counter . . . and she threatened us." A404. The petitioner's wife testified that Inspector Everyingham told them that they could not go to New Jersey if they did not tell her that they knew that

Pathmanathan lived and worked in the United States A404-05. The petitioner's wife also claimed that Officer Truong stated that if they were to state where Pathmanathan was working and living, they could leave in fifteen minutes. A409. She testified that she and her husband then decided to tell the INS "he's living in Elizabeth, working for a pharmaceutical company. That's what they're looking for. . . . if we say that they'll let us go." A410, 414.

Pathmanathan also testified on behalf of the petitioner. Pathmanathan testified that the initial story he provided to the INS about his one-week vacation and a return to Canada by train was a lie, and that the reason he sought entry into the United States was because he had been living and working illegally in the United States, which he admitted in a sworn statement. A120-22; 126; 141-42, 144; 170-71; 558-62. However, Pathmanathan testified that the petitioner did not know that he lived and worked in the United States illegally. A162. Pathmanathan admitted that he did in fact sign the addendum to his sworn statement, which states that the petitioner knew "that I [Pathmanathan] live and work in the United States, but that he does not know that I did it illegally." A158-59; 189-90; 563. But Pathmanathan claimed that Inspector Truong did not write the answers that Pathmanathan actually gave (A154-58, 192), and that he (Pathmanathan) knew as much while the statement was being prepared because Truong was "reading out what he was writing down." A157; A189 ("he would read it out"). When asked why he signed it if it was not true, Pathmanathan claimed Inspector Truong "insisted that I sign it. He said

it was nothing. Don't worry about it. Just sign it and you'll be on your way." A158-59; A190.

C. The Immigration Judge's Decision

The IJ gave a 19-page oral decision. A60-78. The IJ summarized the testimony of the INS's two witnesses, Inspector Everyingham and Inspector Truong (A60-66), as well as the testimony of the petitioner and his wife (A66-74).

The IJ stated that "the Court has carefully weighed and considered the totality of the testimonial and documentary evidence of record in the aggregate, and the Court finds that the [petitioner] knowingly, intelligently, and voluntarily gave a sworn statement to inspectors of the [INS]." A74-75. The IJ further stated that "the testimony of the officers was credible and believable, and that the action of the officers was entirely appropriate, and nothing of an 'egregious' nature occurred in violation of any rights the [petitioner] may have been entitled to." A75. The IJ found that the fact that the parties were detained was "reasonable and appropriate, and that the length of time to do so was both reasonable (given the manpower and traffic at the time) and appropriate." The IJ also found that "no unreasonable measures were used to obtain the sworn statements of either the smugglee [Pathmanathan] or the alleged smuggler [petitioner]," and "that the Government agents never threatened or coerced any individuals." A75.

The IJ further found that "the admissions of the [petitioner] directly to the inspectors and the giving of a

sworn statement on January 13, 2002 demonstrates by clear, unequivocal, and convincing evidence that he in effect admitted to smuggling and having knowledge of the illegal status of the smugglee." A75-76. The IJ found neither the petitioner nor his wife to be credible. A76-77. As to the petitioner, the IJ found that he was "not credible given his inconsistent statement to the officers and by saying that at one point he did not tell the truth to the officers acknowledging knowledge of the smuggling attempt when under oath, but that he is now telling the truth in court." A77. As to the petitioner's wife, the IJ found that "she simply is not credible as a result of what the Court has observed," including the fact that she "appeared to become overly animated in describing the alleged demeanor of the inspectors and appeared to exaggerate her testimony which detracted considerably from her credibility." A76-77.

The IJ found based on the totality of the evidence that the petitioner had violated Section 212(a)(6)(E)(i) of the INA and ordered him removed. A77-78.

D. The BIA's Decision

On December 14, 2004, the BIA summarily affirmed the IJ's decision and adopted it as the "final agency determination" under 8 C.F.R. § 1003.1(e)(4). A2. This petition for review followed.

SUMMARY OF ARGUMENT

1. The IJ's decision finding the petitioner to be inadmissible as an alien smuggler is supported by substantial evidence. The IJ's decision turned on a factual finding that the petitioner knowingly assisted another to attempt to enter the United States illegally. Such a finding of fact is "conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. § 1252(b)(4)(B). Moreover, where a factual challenge relates to a credibility finding made by the IJ, this Court affords particular deference in applying the substantial evidence standard. Here, the IJ did not find the petitioner's testimony to be credible, and the IJ based that finding on specific examples in the record of the petitioner's inconsistent statements and the contradictory evidence. The IJ's decision was therefore clearly supported by substantial evidence.

2. The IJ correctly denied the petitioner's motion to suppress. The defendant claims that his due process rights were violated when a sworn statement was taken from him without being advised pursuant to the regulations that, among other things, any statement might be used against him in a subsequent proceeding. However, there was no requirement in the regulations to give the petitioner such an advisement, as no formal proceedings had been initiated against the petitioner. The petitioner also claims that his sworn statement was the product of threatening and coercive behavior in violation of the regulations. But the facts as found by the IJ do not support the petitioner's claim of threatening, coercive or abusive conduct by the

INS inspectors. The IJ therefore correctly denied the petitioner's motion to suppress.

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTED THE IJ'S DETERMINATION THAT PETITIONER KNOWINGLY ASSISTED ANOTHER PERSON'S ATTEMPT TO ENTER THE UNITED STATES ILLEGALLY

A. Governing Law and Standard of Review

The IJ determined that the petitioner was inadmissible because he knowingly assisted another to enter the United States unlawfully in violation of 8 U.S.C. § 1182(a)(6)(E) (Section 212(a)(6)(E) of the INA). A077-78. The BIA affirmed the IJ's decision by summary order pursuant to 8 C.F.R. § 1003.1(e)(4). A001-002. Where, as here, the BIA summarily affirms the IJ's decision, this Court reviews the IJ's decision rather than the BIA's order. *See Chen v. DOJ*, 434 F.3d 144, 150 (2d Cir. 2006).

In this Court, as the petitioner agrees (Pet.'s Br. at 16), the IJ's "administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. § 1252(b)(4)(B). Under "this strict standard of review," this Court "'defer[s] to the factual findings of the . . . IJ if they are supported by substantial evidence.'" *Chen*, 434 F.3d at 156-57 (quoting *Zhou Yun Zhang v. INS*, 386 F.3d 66, 73 (2d Cir. 2004)). Where, as here, "a factual challenge pertains to a

credibility finding made by an IJ," this Court "afford[s] 'particular deference' in applying the substantial evidence standard." *Zhou Yun Zhang*, 386 F.3d at 73 (quoting *Montero v. INS*, 124 F.3d 381, 386 (2d Cir. 1997)); *see also Guan v. Gonzales*, 432 F.3d 391, 396 (2d Cir. 2005) ("Reviewing a factfinder's determination of credibility is ill-suited to attempts to fashion rigid rules of law."). In a case in which "'the IJ's adverse credibility finding is based on specific examples in the record of inconsistent statements . . . or on contradictory evidence . . . a reviewing court will generally not be able to conclude that a reasonable adjudicator was compelled to find otherwise.'" *Chen*, 434 F.3d at 157 (quoting *Zhou Yun Zhang*, 386 F.3d at 74 (internal quotation marks omitted)).

B. Discussion

This Court should deny the petition. This case involves a purely factual inquiry – whether the petitioner knowingly assisted Pathmanathan's attempt to enter the United States illegally – and the IJ's credibility findings with respect to the petitioner's testimony are based on specific examples in the record of inconsistent statements and on contradictory evidence. As petitioner's counsel made clear in his closing argument to the IJ, the case before the IJ boiled down to whether the petitioner was telling the truth at the hearing before the IJ when he denied having knowingly assisted Pathmanathan to enter the United States illegally, notwithstanding the fact that he previously admitted as much in a sworn statement. See A527. But, as the petitioner acknowledges (Pet.'s Br. at 14), the IJ did not find the petitioner's testimony to be

credible, and the IJ based that finding on the petitioner's inconsistent statements and the contradictory evidence in the record. Specifically, the IJ stated that he had

> carefully weighed and considered the totality of the testimonial and documentary evidence of record in the aggregate, and the Court finds that the [petitioner] knowingly, intelligently, and voluntarily gave a sworn statement to inspectors of the [INS], and that the testimony of the officers was credible and believable . . . .

A074-75. Indeed, the IJ found that

> the admissions of the respondent directly to the inspectors and the giving of a sworn statement on January 13, 2002 demonstrates by clear, unequivocal, and convincing evidence that he in effect admitted to smuggling and having knowledge of the illegal status of the smugglee.

A075-76. The IJ squarely rejected as not credible the petitioner's testimony that he had lied to the INS officers when he admitted in his sworn statement that he knew that Pathmanathan was attempting to enter the United States illegally, and that the real truth was what he had initially told the INS inspectors before changing his story – that is, that all he knew was that Pathmanathan was going to the United States for a one-week vacation:

> [T]he respondent is not credible given his inconsistent statement to the officers and by saying

> that at one point he did not tell the truth to the officers acknowledging knowledge of the smuggling attempt when under oath, but that he is now telling the truth in court.

A077. *See Kanacevic v. INS*, No. 04-3878-ag, slip op. at 12-14, 2006 WL 1195925, at *5 (2d Cir. May 5, 2006) (concluding that substantial evidence supported "the IJ's choice to believe [petitioner's initial] story rather than the story she told at the hearing"). The IJ also noted in his ruling that the petitioner acknowledged during cross-examination the truthfulness of a statement in Inspector Truong's memorandum that stated that the petitioner admitted to Inspector Truong (in addition to his sworn statement to Inspector Everyingham) that he knew Pathmanathan was living in New Jersey and working at a pharmaceutical company in New York. A74.[2] The petitioner's acknowledgment was clearly inconsistent with his claim that all he knew was that Pathmanathan was coming to the United States for a one-week vacation. These inconsistent statements clearly "bear a legitimate nexus" to the IJ's adverse credibility finding. *Zhou Yun Zhang*, 386 F.3d at 74; *see also Guan*, 432 F.3d at 395

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[2] *See also* A552 (memorandum which states that the petitioner "admitted that he knew that Mr. Pathmanathan is working in a pharmaceutical company in New York and living in New Jersey"); A516 (petitioner's testimony that "[w]hat I told [Inspector Truong] is that he is working in a pharmaceutical company in either New York or New Jersey and he lives in Elizabeth").

("Inconsistent testimony often bears a legitimate nexus to an adverse credibility finding").

The petitioner claims that the IJ should have believed the petitioner because his testimony was corroborated by his wife's (Pet.'s Br. at 23), but the IJ did not find the petitioner's wife to be credible either:

> *In many respects the wife appeared to become overly animated in describing the alleged demeanor of the inspectors and appeared to exaggerate her testimony which detracted considerably from her credibility*. It also appeared that she . . . would change the tone and inflection in her voice when trying to convince the Court of the officer's demeanor and then would sharply look over at the Court with her eyes as if to see if her testimony was having any effect and inferred that she was deprived of bathroom privileges when the truth of the fact that was not true. In fact, she herself stated that she was directed to where the rest room was by one of the officers. Not to mention that the wife appeared to want to answer questions "not asked of her" or wanted to volunteer answers or was not responsive to questions asked of her as if to make sure to get out what she wanted to say or to have the Court hear. She also appeared to have rehearsed her testimony in court and was arguing with the officers on the day of the incident, and she also appears to have mischaracterized the statements of the officers, and *she simply is not credible as a result of what the Court has observed*.

A76-77 (emphasis added); *see Borovikova v. DOJ*, 435 F.3d 151, 161 (2d Cir. 2006) (declining "to set aside the IJ's adverse credibility finding" where the IJ "had the opportunity to question petitioner in person" and "to evaluated her demeanor"); *Chen v. BIA*, 435 F.3d 141, 146 (2d Cir. 2006) (finding it reasonable for the IJ to rely on the petitioner's "demeanor and inconsistencies in her testimony, in making the ultimate finding that she was not a credible witness").

The petitioner also argues that the IJ did not comment on Pathmanathan's testimony.[3] But while the IJ did not summarize Pathmanathan's testimony or explicitly make a credibility finding with respect to his testimony, the IJ did refer to Pathmanathan's sworn statement in finding that "no unreasonable measures were used to obtain" it.[4]

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[3] *See* Pet.'s Br. at 2 ("no consideration was given of the purported 'smugglee's' exculpating testimony"); *id*. at 16 (arguing that the IJ's failure to refer to Pathmanathan's testimony is cause for finding that the IJ's determination is not supported by substantial evidence); *id*. at 25 (yet again referring to the IJ's failure to refer to Pathmanathan).

[4] The petitioner claims that "nothing in the handwritten addendum to Pathmanathan's sworn statement implicated the Petitioner as a knowing participant in any attempt by Pathmanathan to unlawfully enter the United States." Pet.'s Br. at 8; *see also id.* at 23. This is simply not true. Pathmanathan admitted in the addendum that the petitioner knew that he lived and worked in the United States (A563), which obviously undercuts the petitioner's claim to the border officials that (continued...)

And in any event, this Court has made clear that "it is not enough for petitioner to point to some deficiencies in the IJ's factual analysis" where, as here, "the IJ's denial of petitioner's claim was supported by substantial evidence" and this Court is "confident that the IJ would reach the same decision in the absence of the noted deficiencies." *Chen*, 434 F.3d at 159. Here, given the IJ's adverse credibility determination with respect to the petitioner himself (and his wife), the IJ would rule no differently if the case were to be remanded to him to make explicit findings about Pathmanathan's testimony.

Finally, the petitioner fruitlessly points to typographical and other minor clerical errors in the inspectors' reports as apparently undermining their credibility. Pet.'s Br. at 24. But these immaterial errors were brought out by the petitioner's counsel at the hearing before the IJ, who made note of them in his oral ruling (A62), and they did not adversely affect the IJ's determination of the inspectors' credibility, nor would any reasonable person expect them to.

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[4] (...continued)
Pathmanathan was coming to the United States for a one-week vacation.

II. THE IJ CORRECTLY DENIED THE MOTION TO SUPPRESS THE PETITIONER'S SWORN STATEMENT AT THE BORDER BECAUSE FEDERAL REGULATIONS DID NOT REQUIRE THAT HE BE ADVISED OF HIS RIGHTS, AND BECAUSE THE BORDER AGENTS DID NOT COERCE OR THREATEN THE PETITIONER

The petitioner also argues that his sworn statement should have been suppressed. Pet. Br. at 27-30. His argument has two prongs, both of which should be rejected.

First, he argues that the sworn statement was taken in violation of 8 C.F.R. § 287.3(c), which provides that "an alien arrested without warrant and placed in formal proceedings under . . . the Act will be advised . . . of the reasons for his . . . arrest and the right to be represented at no expense to the Government," and that the "officer will also advise the alien that any statement made may be used against him or her in a subsequent proceeding." He claims that his due process rights were violated as a result. This claim is easily dismissed, as no formal proceedings had been initiated against the petitioner. There was thus no requirement under § 287.3(c) to advise the petitioner that anything he said could be used against him in a subsequent proceeding, and no requirement to provide Miranda warnings. *See Avila-Gallegos v. INS*, 525 F.2d 666, 667 (2d Cir. 1975) ("[s]ince deportation proceedings are not criminal in nature . . . there was no necessity for Miranda warnings"); *see also INS v. Lopez-Mendoza*, 468 U.S.

1032, 1038-39 (1984) (exclusionary rule not applicable to civil deportation proceedings).

Second, the petitioner argues that his sworn statement was the product of threatening and coercive behavior by the INS inspectors in violation of 8 C.F.R. § 287.8(c)(2)(vii), which provides that the "use of threats, coercion, or physical abuse by the designated immigration officer to induce a suspect to waive his or her rights or to make a statement is prohibited." The facts as found by the IJ simply do not support the petitioner's claim of threatening, coercive or abusive conduct by the INS inspectors. The IJ found the following with respect to the petitioner's claims of threats and coercion:

> [T]he Court has carefully weighed and considered the totality of the testimonial and documentary evidence of record in the aggregate, and the Court finds that the [petitioner] knowingly, intelligently, and voluntarily gave a sworn statement to inspectors of the [INS], and that the testimony of the officers was credible and believable, and that *the action of the officers was entirely appropriate, and nothing of an 'egregious' nature occurred in violation of any rights the [petitioner] may have been entitled to.*
>
> The fact that the parties were "detained" in order to conduct their investigation was reasonable and appropriate, and that the length of time to do so was both reasonable (given the manpower and the traffic at the time) and appropriate, and that the use

> of a holding cell [for Pathmanathan only] was appropriate. In fact, the [petitioner] was allowed to use the rest room and that no unreasonable measures were used to obtain the sworn statements of either the smugglee or the alleged smuggler (the [petitioner]), and that *the Government agents never threatened or coerced any individuals.* The Court simply does not believe that and their actions are not tantamount to that.

A74-75 (emphasis added).

The IJ's findings in this regard are amply supported by the record. Inspector Everyingham testified that she did not threaten the petitioner or anybody else involved, and that she understood that abusive behavior was prohibited at ports of entry. A235; *see also* A677-78, at ¶¶ 12-15 (Affidavit of Inspector Everyingham). She testified that she advised the petitioner of the consequences of not being truthful, and advised him that he could be charged with alien smuggling if it were found that he was assisting Pathmanathan to enter the United States unlawfully. A238, 254. Inspector Everyingham did not deny the petitioner, his wife, or their child access to the restroom facilities. A264.

Moreover, in response to questions from the IJ, Inspector Everyingham testified that the petitioner did not resist her efforts to take a sworn statement; did not tell her that he felt that she was forcing him to make a statement; and answered affirmatively her first question concerning whether he was willing to answer her questions. A272;

A554. Moreover, after she took his sworn statement, the petitioner did not recant anything in it. A272-73.

Inspector Truong testified that he did not threaten or coerce anyone. A348. Truong also testified that he never denied either the petitioner or Pathmanathan an opportunity to get a drink of water or to go to the restroom. A349. The petitioner was never confined in a holding cell; he sat with his wife and child in an open area where there were vending machines and a restroom. A349.

In short, the facts as found by the IJ show that there was no threatening, coercive or abusive conduct on the part of the INS inspectors; that the petitioner's sworn statement was given voluntarily and knowingly; and that the IJ therefore correctly denied the petitioner's motion to suppress it. A75-76, 77.

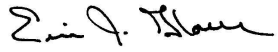
CONCLUSION

For the foregoing reasons, the government respectfully requests that this Court issue an order denying the petition for the review of the BIA's final order.

Dated: May 15, 2006

Respectfully submitted,

KEVIN J. O'CONNOR
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT



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Addendum

8 U.S.C. § 1182. Inadmissible aliens.

(a) Classes of aliens ineligible for visas or admission

Except as otherwise provided in this chapter, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

(6) Illegal entrants and immigration violators

(E) Smugglers
(i) In general

Any alien who at any time knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law is inadmissible.

8 U.S.C. § 1252(b)(4) (as amended by RIDA § 101(e) with effective date May 11, 2005). Judicial 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 208(b)(1)(B), 240(c)(4)(B), or 241(b)(3)(C), unless the court finds, pursuant to section 242(b)(4)(B), that a reasonable trier of fact is compelled to conclude that such corroborating evidence is unavailable.