05-5070-ag

To Be Argued By:
DOUGLAS P. MORABITO

==

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 05-5070-ag

IGOR YUHTER,

Petitioner,

-vs-

UNITED STATES DEPARTMENT OF JUSTICE,
ALBERTO GONZALES, ATTORNEY GENERAL,

Respondents.

ON PETITION FOR REVIEW FROM
THE BOARD OF IMMIGRATION APPEALS

==

BRIEF FOR ALBERTO GONZALES ATTORNEY GENERAL OF THE UNITED STATES

==

KEVIN J. O'CONNOR
United States Attorney
District of Connecticut

DOUGLAS P. MORABITO
Assistant United States Attorney
WILLIAM J. NARDINI
Assistant United States Attorney (of counsel)

TABLE OF CONTENTS

Table of Authorities iii

Statement of Jurisdiction vii

Statement of Issues Presented for Review viii

Preliminary Statement 1

Statement of the Case 2

Statement of Facts 3

A. Petitioner's Entry into the United States and Application for Adjustment of Status 3

B. INS Removal/Rescission Proceedings 4

C. The IJ's Decision 8

D. BIA's Decision 10

Summary of Argument 11

Argument 12

I. The BIA Properly Determined That Petitioner Failed To Establish Eligibility For Asylum and For Withholding of Removal 12

A. Relevant Facts 12

B. Governing Law and Standard of Review 13

C. Discussion 17

Conclusion 27

Addendum

TABLE OF AUTHORITIES

CASES

PURSUANT TO "BLUE BOOK" RULE 10.7, THE GOVERNMENT'S CITATION OF CASES DOES NOT INCLUDE "CERTIORARI DENIED" DISPOSITIONS THAT ARE MORE THAN TWO YEARS OLD.

Arkansas v. Oklahoma,
503 U.S. 91 (1992) 17

Cao He Lin v. United States Dep't of Justice,
428 F.3d 391 (2d Cir. 2005) 26

Chen v. Gonzales,
417 F.3d 268 (2d Cir. 2005) 21

Consolidated Edison Co. v. NLRB,
305 U.S. 197 (1938) 17

Consolo v. Federal Maritime Comm'n,
383 U.S. 607 (1966) 17

Diallo v. INS,
232 F.3d 279 (2d Cir. 2000) 16, 22

Drozd v. INS,
155 F.3d 81 (2d Cir. 1998) 25

INS v. Aguirre-Aguirre,
526 U.S. 415 (1999) 17

Kungys v. United States,
485 U.S. 759 (1988) 14, 15, 16, 23

Latifi v. Gonzales,
430 F.3d 103 (2d Cir. 2005) (per curiam) 24

Majidi v. Gonzales,
430 F.3d 77 (2d Cir. 2005) 22

Melgar de Torres v. Reno,
191 F.3d 307 (2d Cir. 1999) 17

Monter v. Gonzales,
430 F.3d 546 (2d Cir. 2005) 14, 15, 16

Qui v. Ashcroft,
329 F.3d 140 (2d Cir. 2003) 21

Ramsameachire v. Ashcroft,
357 F.3d 169 (2d Cir. 2004) 24

Richardson v. Perales,
402 U.S. 389 (1971) 17

Rojas-Reyes v. INS,
235 F.3d 115 (2d Cir. 2005) 25

Secaida-Rosales v. INS,
331 F.3d 297 (2d Cir. 2003) 16

Theodoropoulos v. INS,
358 F.3d 162 (2d Cir. 2004) 25

United States v. Tang,
214 F.3d 365 (2d Cir. 2000) 17

Wu Biao Chen v. INS,
344 F.3d 272 (2d Cir. 2003) 17

Xu Duan Dong v. Ashcroft,
406 F.3d 110 (2d Cir. 2005) (per curiam) . . . 17, 26

Zhou Yun Zhang v. Ashcroft,
386 F.3d 66 (2d Cir. 2004) 17, 23

STATUTES

8 U.S.C. § 1151 . . . . 13, 19

8 U.S.C. § 1153 . . . . 13, 19, 24

8 U.S.C. § 1182 . . . . 13, 16

8 U.S.C. § 1227 13

8 U.S.C. § 1252 . . . . vii, 25, 26

8 U.S.C. § 1256 . . . . 2, 6, 11, 12, 25

8 U.S.C. § 1451 . . . . 14, 16

OTHER AUTHORITIES

8 C.F.R. § 1003.1 26

Matter of S- and B-C-,
9 I & N Dec. 436 (BIA 1961) 13

Matter of Bosuego,
17 I & N Dec. 125 (BIA 1980) 13

STATEMENT OF JURISDICTION

This Court has appellate jurisdiction under § 242(b) of the Immigration and Nationality Act, 8 U.S.C. § 1252(b) (2006), to review petitioner's challenge to the BIA's September 1, 2005, final order dismissing petitioner's appeal from a February 24, 2004, order of an immigration judge finding that he was removable as charged in the notice to appear.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Whether the Immigration Judge and the Board of Immigration Appeals properly concluded that petitioner had obtained his visa through fraud and that it should be rescinded?

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 05-5070-ag

IGOR YUHTER,

Petitioner,

-vs-

UNITED STATES DEPARTMENT OF JUSTICE,
ALBERTO GONZALES, ATTORNEY GENERAL,

Respondents.

ON PETITION FOR REVIEW FROM
THE BOARD OF IMMIGRATION APPEALS

BRIEF FOR ALBERTO GONZALES
Attorney General of the United States

Preliminary Statement

Igor Yuhter, a native of the former Soviet Union and a citizen of Israel, petitions this Court for review of an September 1, 2005, decision of the Board of Immigration Appeals ("BIA") (Joint Appendix ("JA") 1-3). The BIA affirmed the February 24, 2004, decision and order of an Immigration Judge ("IJ"), which rescinded petitioner's lawful permanent resident status and which ordered him

removed from the United States. (JA 14–58 (IJ's decision and order)).

Substantial evidence supports the IJ's conclusion that, for multiple reasons, petitioner obtained his lawful permanent resident status through fraud. First, the IJ correctly found that the government had proven by clear and convincing evidence that the defendant was not a high school graduate, which was a requirement for petitioner's eligibility in the Diversity Visa program. Second, the IJ properly concluded that petitioner's credibility was undermined by his failure to disclose on his application for adjustment of status that he had been arrested and convicted of shoplifting. As such, substantial evidence supports the IJ's conclusion that petitioner was removable as charged in the notice to appear, and that his status was rescinded under 8 U.S.C. § 1256(a).

Statement of the Case

On or about November 3, 1997, petitioner submitted a Form I-485 Application to Register Permanent Residence or Adjust Status. (JA 301-04). That application was approved on August 26, 1998. (JA 312).

On August 26, 1998, petitioner entered the United States at New York, New York as a diversity immigrant. (JA 458).

On June 8, 1999, petitioner was served with notice of intent to rescind lawful permanent resident status based on

the fact that he had procured his visa based on fraud. (JA 357-59).

On June 8, 1999, petitioner was also served a Notice to Appear ("NTA") charging him with removability. (JA 458-59).

After several continued hearings, on February 24, 2004, petitioner appeared at a removal hearing in New York, New York. On that same date, Immigration Judge Joanna Miller Bukszpan issued an oral ruling rescinding petitioner's application for adjustment of status, finding petitioner removable, and denying his request for voluntary departure to Israel. (JA 149-58).

On March 15, 2004, petitioner filed a timely notice of appeal to the BIA (JA 139-42), and on September 1, 2005, the BIA issued a written decision affirming the IJ's decision and dismissing the appeal. (JA 1-3).

On September 19, 2005, petitioner filed a timely petition for review of the BIA's decision.

Statement of Facts

A. Petitioner's Entry into the United States and Application for Adjustment of Status

Petitioner Igor Yuhter is a native of the Soviet Union and a citizen of Israel. (JA 458). Petitioner was admitted to the United States at New York, New York on or about August 26, 1998, as a diversity immigrant. (JA 458).

On July 27, 1997, petitioner was notified of his selection in the Diversity Immigrant program. (JA 357). To establish his eligibility in the Diversity Immigrant program, petitioner claimed that he was a high school graduate and submitted transcripts as evidence. (JA 358, 427-30). In October 1997, petitioner submitted a written application for permanent residence with the Immigration and Naturalization Service ("INS").[1] (JA 80-83; 358). In that application, petitioner certified under penalty of perjury that he had never been arrested. (JA 82-83).

B. INS Removal/Rescission Proceedings

On June 8, 1999, the INS served petitioner with a Notice to Appear for a removal hearing. (JA 458-61). The alleged bases for removal asserted in the Notice to Appear were that petitioner: (1) was neither a citizen nor a national of the United States; (2) was a native of the U.S.S.R. and a citizen of Israel; (3) was admitted to the United States at New York, New York on or about August 26, 1998, as a Diversity Immigrant; and (4) that petitioner procured his admission, visa, other documentation or benefit by fraud or by willfully misrepresenting a material fact, namely, that he had submitted a fraudulent school

[1] The INS was abolished effective March 1, 2003, and its functions transferred to three bureaus within the Department of Homeland Security pursuant to the Homeland Security Act of 2002. *See* Pub. L. No. 107-296, 116 Stat. 2135, 2178. The enforcement functions of the INS were transferred to the Bureau of Immigration and Customs Enforcement ("ICE"). *Id.* For convenience, this brief will refer throughout to the INS.

transcript to establish eligibility in the Diversity Visa program. (JA 458). The Notice to Appear concluded, therefore, that petitioner was subject to removal as an alien who had procured a visa by fraud or willfully misrepresenting a material fact under Section 212(a)(6)(C)(i) of the Immigration and Nationality Act. (JA 458). On September 16, 2003, the INS submitted an additional allegation to support the original charge of removability that petitioner procured his admission, visa, other documentation or benefit by fraud or by willfully misrepresenting a material fact, to wit: on his I-485 Application for Adjustment of Status filed on October 28, 1997, petitioner failed to disclose his shoplifting conviction in the State of New Jersey. (JA 233, 456-57).

On June 8, 1999, the INS also notified petitioner of its intent to rescind his lawful permanent resident status based on the allegation that the school transcript he submitted to establish his eligibility for a Diversity Immigrant visa was a fraudulent document. (JA 358, 319). That notice advised petitioner that he could submit an answer in writing under oath setting forth the reasons why his lawful permanent resident status should not be rescinded within thirty days. (JA 359). It further advised petitioner that within that thirty-day period, he could request a hearing before an immigration judge. (JA 359). Petitioner never responded to the rescission notice.

A combined removal and rescission hearing was held over the course of five years before an immigration judge, with an oral decision being issued on February 24, 2004

(hereinafter "Removal/Rescission Hearing").[2] As part of that Removal/Rescission Hearing, the parties submitted various documents in support of their competing claims. The INS submitted a number of documents establishing that petitioner did not have a high school diploma or its equivalent.

Specifically, the Main Management of Public Education of the Executive Apparatus of Hokim of the city of Tashkent, sent a letter to the United States Embassy advising consular officials that petitioner never received a high school diploma and that his name was not found in the school book listing students. (JA 401-02). That letter was signed by "X. Uldashev." (JA 401-02). On October 2, 1998, the United States Embassy in Moscow advised R. Wing of the INS in Moscow that no school transcript had been issued to petitioner and that his name was not listed in the school registration book. (JA 320). On January 28, 1999, Rodney Wing of INS Moscow sent a memorandum to the INS in the United States advising that the

---

[2] In 1996, Congress amended 8 U.S.C. § 1256(a) by adding the following language:

> Nothing in this subsection shall require the Attorney General to rescind the alien's status prior to commencement of procedures to remove the alien under section 1229a of this title, and an order of removal issued by an immigration judge shall be sufficient to rescind the alien's status.

Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. 104-208, 110 Stat. 3009 (Sept. 30, 1996), § 378.

Department of Education in Tashkent had verified that petitioner had not received a high school diploma, that no transcript had been issued on his behalf, that the name of the city listed on the transcripts submitted by petitioner was wrong, and that he was not found in the school record book. (JA 319). That memorandum was received by the INS on April 16, 1999. (JA 319).

Petitioner submitted a document purporting to be from the Main Management of Public Education of the Executive Apparatus of Hokim of the city of Tashkent, dated November 15, 2000, also from "X. Uldashev." (JA 431). That letter claims that its previous response dated August 28, 1998 (JA 401), was erroneous and that petitioner in fact had received a high school diploma from the school in question. (JA 431, 350-52). On January 7, 2002, the Forensic Document Laboratory ("FDL") of the INS concluded that the original name and phone number on the mailer had been removed and replaced by the present name and phone number. (JA 339-42; 350-52; 199-203, 249). Moreover, on July 19, 2002, the United States Embassy in Tashkent, Uzbekistan confirmed that it stood by its original finding that petitioner did not have a high school diploma. (JA 317).

The INS also introduced records showing that petitioner had been convicted of shoplifting in violation of N.J.S.2C:20-11 on June 24, 1996 in the Totowa Boro Court in Passaic County New Jersey. (JA 2992-95). Petitioner never disclosed his criminal record on his application to adjust status which he filed with the INS. (JA 233, 456-57).

C. The IJ's Decision

The IJ issued an oral ruling on February 24, 2004, rescinding petitioner's application for adjustment of status, finding petitioner removable, and denying his request for voluntary departure to Israel. (JA 149-58).

The IJ began his ruling by noting that petitioner denied that he had committed fraud in connection with his application for adjustment of status. (JA 150). The IJ then explained that the issue presented was "whether the Government can prove by clear and convincing evidence that [petitioner] was not entitled to the relief granted to him; namely, adjustment of status as a visa lottery winner." (JA 150).

After summarizing the documents in evidence, the IJ found that the documentation supplied by the Government was very strong. (JA 152-53). The IJ went on to explain that several factors supported the Government's fraud charge. (JA 153). Specifically, the IJ noted that there was a consular report that petitioner did not have a high school diploma, that the INS's Forensic Document Lab concluded that a document submitted by petitioner at the Removal/Rescission Hearing purporting to explain that the original consular report stating that petitioner did not have a high school diploma was issued in error had been altered, and that petitioner gave a false statement by failing to disclose his prior arrest in his application to adjust status. (JA 153). The IJ noted that viewing this evidence together created a serious hurdle for petitioner to surmount. (JA 153).

The IJ further explained that although petitioner submitted rebuttal documents to overcome the Government's position, he failed to produce certain evidence requested by the IJ. (JA 153). Specifically, the IJ had requested that petitioner submit his immigration dossier from when he emigrated from Uzbekistan to Israel because it could show that he held himself out there as having a high school diploma. (JA 153-54). Second, the IJ had suggested to petitioner's counsel that he put on evidence to show that there was a universal education requirement in the former Soviet Union to infer that petitioner had in fact received such secondary education. (JA 154). The IJ explained that petitioner submitted information from a website which was not reliable and did not answer the specific question regarding whether secondary education was the norm in the former Soviet Union. (JA 154).

The IJ also explained that an evaluation report explaining that a diploma in the former Soviet Union is the equivalent of a high school diploma in the United States did not support petitioner's case. (JA 155). That is, the IJ explained that, because the Government claimed that petitioner never in fact received a high school diploma, the documents he submitted in support of his eligibility to the Diversity Visa program were fraudulent. (JA 154). Thus, in the IJ's view the report submitted by petitioner was not relevant to the issue at hand. (JA 155). The IJ further concluded that a letter allegedly submitted by petitioner's parents abroad could not be given serious weight because it was not signed before the United States consul. (JA 155).

As to an expungement order submitted by petitioner regarding his conviction, the IJ noted that the issue was not whether he was subject to removal based on that conviction but rather whether he divulged this information at the time of his interview regarding his application to adjust status. (JA 155). The IJ also explained that this nondisclosure undermined petitioner's credibility. (JA 155-56). The IJ specifically noted that whether or not petitioner had ever been arrested was easily verifiable and it had been shown to be untrue. (JA 156).

In sum, the IJ concluded that, because there were two consular reports stating that petitioner did not have a high school diploma and a forensic document report casting considerable doubt on a document submitted by petitioner regarding his diploma, the INS had met its burden of proving by clear and convincing evidence that petitioner was removable as charged in the NTA. (JA 156-57). As such, the IJ denied petitioner's motion to terminate the proceedings, rescinded petitioner's lawful permanent resident status under INA § 246, denied petitioner's application for voluntary departure, and ordered that petitioner be removed to Israel based on the charge in the NTA. (JA 157).

D. BIA's Decision

On September 1, 2005, the BIA, in a written opinion, adopted and affirmed the IJ's decision and dismissed petitioner's appeal. (JA 1-3). The BIA began its ruling by concluding that the factual findings of the IJ were not clearly erroneous. (JA 2). The BIA explained that there

was no error in the IJ's conclusion that the INS's evidence was credible while that presented by petitioner was not. (JA 2-3). The BIA explained that petitioner acknowledged that he failed to disclose in his application to adjust status the fact that he had been arrested and convicted of shoplifting. (JA 3). The BIA also noted that the fact that he submitted a "false shipper waybill, reflecting a false sender, in connection with the evidence he offered in support of his claim that he in fact graduated from high school . . . fatally undermine [petitioner's] credibility." (JA 3). As such, the BIA affirmed the IJ's finding that the INS has satisfied its burden of disproving petitioner's claim that he had received a high school diploma. (JA 3).

The BIA also concluded that petitioner's claim that the IJ failed to consider the fact that former citizens of the Soviet Union were required to have ten years of education was without merit because the IJ addressed that issue. (JA 3). Finally, the BIA rejected petitioner's claim that rescission, not removal, proceedings were required because petitioner had withdrawn that claim at the hearing and because 8 U.S.C. § 1256(a) specifically allows for removal proceedings in lieu of rescission. (JA 3). This petition for review followed.

SUMMARY OF ARGUMENT

Substantial evidence supports the IJ's conclusion that petitioner obtained his lawful permanent resident status through fraud. First, the IJ correctly concluded that the INS proved by clear and convincing evidence that petitioner was not a high school graduate, which was a

requirement for petitioner's eligibility for the Diversity Visa program. Specifically, substantial evidence supports the IJ's decision because there were two reports from consular offices stating that there was no record showing petitioner had graduated from high school or its equivalent. Second, substantial evidence supports the IJ's finding that petitioner's credibility was undermined by his failure to disclose on his application for adjustment of status that he had been arrested and convicted of shoplifting. Moreover, the fact that petitioner submitted a false shipper waybill, reflecting a false sender, in connection with the evidence he offered in support of his claim that he in fact graduated from high school further undermined his credibility, and permitted the IJ to disregard that rebuttal evidence. As such, substantial evidence supports the IJ's conclusion that petitioner was removable as charged in the NTA. His lawful permanent resident status was properly rescinded under 8 U.S.C. § 1256(a), and the petition for review of the removal order should be denied.

ARGUMENT

I. THE BIA PROPERLY DETERMINED THAT PETITIONER FAILED TO ESTABLISH ELIGIBILITY FOR ASYLUM AND FOR WITHHOLDING OF REMOVAL.

A. Relevant Facts

The relevant facts are set forth in the Statement of the Facts above.

B. Governing Law and Standard of Review

Pursuant to 8 U.S.C. §§ 1151 and 1153(c), qualifying aliens can be admitted to the United States as diversity immigrants. One such requirement is that an alien have a high school diploma or its equivalent. 8 U.S.C. § 1153(c)(2)(A). However, 8 U.S.C. § 1182(a)(6)(C)(i) includes in the category of persons who are ineligible to receive visas or to be admitted to the United States "[a]ny alien who, *by fraud or willfully misrepresenting a material fact*, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this chapter." (Emphasis added). Further, 8 U.S.C. § 1227(a)(1)(A) states that "[a]ny alien who at the time of entry or adjustment of status was within one or more of the classes of aliens inadmissible by the law existing at such time is deportable."

A material misrepresentation is one which tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in a proper determination that he be excluded. *Matter of S- and B-C-,* 9 I & N Dec. 436, 447 (BIA 1961). The government bears the burden of proving by clear and convincing evidence "that facts possibly justifying denial of a visa or admission to the United States would have likely been uncovered and considered but for the misrepresentation." *Matter of Bosuego,* 17 I & N Dec. 125, 131, 1979 WL 44373 (BIA 1980). The burden then shifts to the alien to demonstrate that "no proper" determination of inadmissibility could have been made." *Id.*

The general rule is that a concealment or misrepresentation is material if it "has a natural tendency to influence or was capable of influencing, the decision of the decisionmaking body to which it was addressed." *Kungys v. United States*, 485 U.S. 759, 770 (1988) (internal quotation marks and citation omitted). In *Kungys*, the Supreme Court analyzed a materiality requirement in the context of judicial denaturalization proceedings brought under 8 U.S.C. § 1451(a). The Supreme Court settled on the same uniform definition of "material" that is typically used in interpreting criminal statutes. *Monter v. Gonzales*, 430 F.3d 546, 554 (2d Cir. 2005).

Finding that a false statement was "material," however, does not end the court's inquiry. The *Kungys* Court observed that 8 U.S.C. § 1451(a) "plainly contains four independent requirements: the naturalized citizen must have misrepresented or concealed some fact, the misrepresentation or concealment must have been willful, the fact must have been material, and the naturalized citizen must have procured citizenship as a result of the misrepresentation or concealment." *Kungys,* 485 U.S. at 767. If a court concludes that the misrepresented or concealed fact is "material," then it must determine whether the fourth requirement of § 1451(a) is met namely, whether the applicant "procured" his or her citizenship by means of those misrepresentations or concealments. *Id.* at 776.

In order to satisfy this fourth part of the test, the government need not establish that "but for" the

misrepresentation, the petitioner would not have achieved naturalization. *Id*. Instead, the *Kungys* Court concluded that the government's showing of "materiality" creates a presumption that the petitioner was disqualified from naturalization: "Though the 'procured by' language of the present statute cannot be read to *require* proof of disqualification, we think it can be read to express the notion that one who obtained his citizenship in a proceeding where he made material misrepresentations was *presumably* disqualified." *Id.* at 777 (emphases in original). The *Kungys* Court continued, however:

> The importance of the rights at issue leads us to conclude that the naturalized citizen should be able to refute that presumption, and avoid the consequence of denaturalization, by showing, through a preponderance of the evidence, that the statutory requirement as to which the misrepresentation *had a natural tendency* to produce a favorable decision was in fact met.

Id. (emphasis in original). Thus, for the fourth *Kungys* requirement, once the government establishes "materiality," a presumption arises against and the burden of persuasion shifts to the subject of the denaturalization proceeding regarding whether he or she is statutorily "disqualified." *Id.* That person may refute the presumption by establishing that he or she did in fact meet the statutory qualification that the misrepresentation had a tendency to influence. *Monter*, 430 F.3d at 554-55.

As this Court explained in *Monter*, *Kungys* analyzed the word "procure" for purposes of 8 U.S.C. § 1451(a), which involves denaturalization court proceedings, but the alien's claim in *Monter* concerned 8 U.S.C. § 1182(a)(6)(C)(i), which involves aliens' administrative applications. *Monter*, 430 F.3d at 555. This Court further explained that both provisions are used in the same title of the United States Code in the immigration context (Title 8: "Aliens and Nationality"), are used for similar purposes and contain strikingly similar wording. *Id. Compare* 8 U.S.C. § 1451(a) (providing for "revoking and setting aside the order admitting [a] person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were *illegally procured or were procured by concealment of a material fact or by willful misrepresentation*") (emphasis added), *with* 8 U.S.C. § 1182(a)(6)(C)(i) ("Any alien who, *by fraud or willfully misrepresenting a material fact, seeks to procure* (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this chapter is inadmissible.") (emphasis added).

This Court reviews the IJ's and BIA's factual findings under the substantial evidence standard, and as such, "a finding will stand if it is supported by 'reasonable, substantial, and probative' evidence in the record when considered as a whole." *Secaida-Rosales v. INS*, 331 F.3d 297, 307 (2d Cir. 2003) (quoting *Diallo v. INS*, 232 F.3d 279, 287 (2d Cir. 2000)). This Court also uses the substantial evidence standard to review credibility determinations, and its review of an adverse credibility

determination is "highly deferential." *Xu Duan Dong v. Ashcroft*, 406 F.3d 110, 111 (2d Cir. 2005) (per curiam). This Court reviews questions of law and constitutional questions *de novo*, but accords deference to the Board's interpretation of the INA. *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424-25 (1999). The proper construction of a statute is a question of law, subject to de novo review. *See United States v. Tang*, 214 F.3d 365, 370 (2d Cir. 2000).

The scope of this Court's review under the substantial evidence test is "exceedingly narrow." *Zhang v. INS*, 386 F.3d at 71; *Wu Biao Chen*, 344 F.3d at 275; *Melgar de Torres*, 191 F.3d at 313. Substantial evidence entails only "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197 (1938)). The mere "possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966); *Arkansas v. Oklahoma*, 503 U.S. 91, 113 (1992).

C. Discussion

Substantial evidence supports the IJ's finding that the INS established by clear and convincing evidence that the INS established that petitioner procured his visa by making two material misrepresentations or frauds, and was therefore removable as charged in the NTA. That is, substantial evidence supported the IJ's conclusion that but

for petitioner's claim that he possessed a high school diploma, he would not have received a visa because eligibility in the Diversity Immigrant program required a high school diploma or its equivalent. Moreover, substantial evidence supports the IJ's conclusion that petitioner's failure to disclose on his application to adjust status that he had been arrested and convicted of shoplifting cut off an appropriate line of inquiry by the INS in determining his eligibility for a visa and might well have resulted in a proper determination that he be excluded from adjusting his status.

The evidence in the record supports the IJ's conclusion that petitioner submitted fraudulent transcripts showing that he graduated from high school when in fact he did not possess such qualifications. The INS offered a letter from the Main Management of Public Education of the Executive Apparatus of Hokim of the city of Tashkent, sent a letter to the United States Embassy advising consular officials that petitioner never received a high school diploma and that his name was not found in the school book listing such students. (JA 401-02). That letter was signed by a X. Uldashev. (JA 401-02). That letter was transmitted to the INS in the United States. (JA 319-20).

This evidence alone is sufficient to establish by clear and convincing evidence that petitioner submitted fraudulent transcripts as part of his eligibility in the Diversity Immigrant program when in fact he did not have a high school diploma or the equivalent thereof. (JA 427-30). This fraudulent submission of transcripts had a

natural tendency to affect the INS's official decision on whether he could adjust his status because a high school diploma is a prerequisite for eligibility in the Diversity Immigrant program. 8 U.S.C. §§ 1151, 1153(c)(2)(A). Indeed, petitioner does not dispute the fact that he would be ineligible for the Diversity Immigrant program without a high school diploma

Although petitioner submitted rebuttal evidence in an attempt to establish that he did have a high school diploma, the IJ permissibly declined to credit those materials in light of forensic evidence that the rebuttal evidence had been altered. Specifically, petitioner submitted a document purporting to be from the Main Management of Public Education of the Executive Apparatus of Hokim of the city of Tashkent, dated November 15, 2000 from X. Uldashev. (JA 431). That letter claims that its previous response dated August 28, 1998, (JA 401), was erroneous and that petitioner in fact had received a high school diploma from the school in question. (JA 431, 350-52). However, on January 7, 2002, the Forensic Document Laboratory ("FDL") of the INS concluded that the original name and phone number on the mailer had been removed and replaced by the present name and phone number. (JA 339-42; 350-52; 199-203, 249).[3] Moreover, on July 19, 2002, the United

---

[3] The Government notes that, although never raised by the INS below, it appears that the date of shipment listed on the UPS Waybill is February 26, 2000. (JA 352). However, the document purporting to be from X. Uldashev clarifying that his (continued...)

States Embassy in Tashkent, Uzbekistan confirmed by way of a letter that it stood by its original finding that petitioner did not have a high school diploma. (JA 317).

Petitioner also submitted an affidavit dated August 16, 1999, claiming to be a high school graduate and also explaining the steps taken by him and others to obtain proof of his high school diploma. (JA 443-44). Petitioner further submitted a document dated August 3, 2001, purporting to establish that he in fact had a high school diploma and that he thus obtained his visa properly. (JA 329). That document, allegedly signed by the principal of his high school, was notarized by several different government officials from Uzbekistan. (JA 330-32). Thereafter, the United States Consul completed an authentication certificate dated October 22, 2001, which certified that the document had been executed by a P. Muminov in his official capacity of the Ministry of Foreign Affairs of Uzbekistan. (JA 344). The United States Consul, however, conveyed no judgment as to the validity or the truth of the content of the authenticated document, namely, that petitioner had a valid high school diploma. (JA 317). Instead, the United States Embassy explained that it stood by its original finding that petitioner did not have a high school diploma. (JA 317).

---

[3] (...continued)
previous communication to the United States Consul that petitioner did not graduate was in error is dated November 15, 2000, almost nine months later. (JA 350).

Moreover, the IJ properly faulted petitioner for failing to produce specific, identifiable, and available corroborating evidence for his claim that he had a high school diploma. (JA 153). First, petitioner never followed up on the IJ's request that petitioner submit his immigration dossier from when he emigrated from Uzbekistan to Israel because it could show that he held himself out there as having a high school diploma. (JA 153-54). Second, the IJ suggested to petitioner's counsel that he put on evidence to show that there was a universal education requirement in the former Soviet Union to infer that petitioner had in fact received such secondary education. (JA 154). Substantial evidence supports the IJ's determination that the evidence submitted by petitioner from a website was not reliable and did not answer the specific question regarding whether secondary education was the norm in the former Soviet Union. (JA 154). The record is devoid of any such evidence and there is no claim by petitioner that he was not given ample opportunity to present such evidence. *Chen v. Gonzales*, 417 F.3d 268, 275 (2d Cir. 2005) (explaining that where the immigration court fails to consider all evidence supporting a claim, the court cannot adequately review such claim); *Qui v. Ashcroft*, 329 F.3d 140 (2d Cir. 2003) (same).

Substantial evidence also supports the IJ's factual conclusion that an evaluation report explaining that a diploma in the former Soviet Union is the equivalent of a high school diploma in the United States did not support petitioner's case and did not rebut the INS's evidence. (JA 155). That is, because the INS claimed that petitioner

never in fact received a high school diploma, the report submitted by petitioner was not relevant to the issue at hand. (JA 155). Substantial evidence further supports the IJ's determination that a letter allegedly submitted by petitioner's parents abroad claiming petitioner had a high school diploma could not be given serious weight because it was not signed before the United States consul. (JA 155, 353). That is, because petitioner had previously submitted tampered documents, it was improper for the IJ to discount the reliability of that evidence. The IJ's request for such additional evidence was reasonable and linked to the ultimate issue in this case–petitioner's eligibility in the Diversity Immigrant program. *Diallo v. INS*, 232 F.3d 279, 287 (2d Cir. 2000) (vacating decision because BIA failed to explain why its demand for corroborative evidence was reasonable). Based on the foregoing, substantial evidence supports the IJ's conclusion that petitioner failed to rebut the presumption that he would not have received the visa in question and further would not have been removable had the true facts been known by the INS.

When faced with contradictory documents, the IJ acted rationally in crediting those documents which had been transmitted through official channels, and discrediting the document which bore indicia of tampering and therefore entailed doubts regarding authenticity. The IJ's reasons for her finding were specific and cogent in that she found the evidence submitted by petitioner did not overcome the evidence submitted by the INS showing he did not have a high school diploma. (JA 149-58); *See Majidi v. Gonzales*, 430 F.3d 77, 81 (2d Cir. 2005) (explaining that

credibility findings must be "specific" and "cogent."). Moreover, because there was contradictory evidence in the record and the IJ found the INS's evidence to be more credible and compelling, this Court's review is especially deferential. *Zhou Yun Zhang v. Ashcroft*, 386 F.3d 66, 74 (2d Cir. 2004). As such, based on the present record this Court certainly cannot conclude that a reasonable adjudicator would be compelled to reach a contrary conclusion. *Id.*

The IJ's decision not to credit petitioner's assertions regarding his high school diploma was properly reinforced by the fact that petitioner failed to disclose a material fact on his visa application namely, that he had a prior criminal conviction for shoplifting. It is undisputed that petitioner failed to disclose his prior criminal record. (JA 80-83, 213-19). The fact that petitioner submitted an expungement order regarding his conviction does not alter the preceding analysis. As the IJ found, the issue was not whether petitioner was subject to removal based on that conviction, but rather whether petitioner divulged this information on his application to adjust status and at the time of his interview regarding his application. (JA 155). The disclosure of truthful information to the INS is material to whether petitioner was entitled to the visa in question and would have played a part in the decision on whether or not to grant adjustment of status. *Kungys*, 486 U.S. at 770 (explaining that misrepresentation is material if it "has a natural tendency to influence or was capable of influencing" the decision in question). Petitioner's failure to disclose his criminal record cut off a line of inquiry regarding whether petitioner should have received his visa

and was capable of influencing whether the INS would favorably exercise its discretion in adjusting his status. Indeed, as noted by the IJ, whether or not petitioner had ever been arrested was easily verifiable and it had been shown to be untrue. (JA 156).

Based on the evidence contained in the record, substantial evidence supports the IJ's determination that petitioner made material misrepresentations as to his prior criminal record and in regards to his claim that he was a high school graduate. Such evidence is sufficient to support the IJ's decision in this matter. The knowledge of petitioner's criminal record and the fact that he did not possess a high school diploma would likely have led the INS to more closely scrutinize his eligibility for the visa in question. As noted above, it is undisputed that petitioner is ineligible for the Diversity Immigrant program absent a high school diploma, or its equivalent. 8 U.S.C. § 1153(c)(2)(A). The fact that two inconsistent conclusions could arguably be drawn based on the evidence below does not mean that the IJ's conclusion was in error and not supported by substantial evidence. *Latifi v. Gonzales*, 430 F.3d 103, 105 (2d Cir. 2005) (per curiam). The IJ's explicit determination that it was relying on the two consular reports, the FDL report and the fact that petitioner failed to divulge his prior criminal record in rescinding petitioner's status and finding him removable as charged in the NTA is fairly supported by the record and not based on speculation. *Ramsameachire v. Ashcroft*, 357 F.3d 169, 178 (2d Cir. 2004).

Finally, petitioner raises a number of other claims, all of which are without merit. First, petitioner claims that the record does not exclude the possibility that his transcripts were submitted mistakenly and thus he could not have engaged in any fraudulent conduct. Petitioner's Brief ("Pet. Br.") at 28-29. Despite the fact that petitioner never raised this issue before the IJ or the BIA, *see Drozd v. INS*, 155 F.3d 81, 91 (2d Cir. 1998 (finding argument waived because never raised before the IJ or the BIA), the record nonetheless does not support such a conclusion. Petitioner submitted the transcripts as part of his eligibility in the Diversity Immigrant program and has contended throughout that he is a high school graduate of the school where the transcripts purportedly came from. Second, petitioner claims that he was improperly denied a separate rescission hearing and apparently he should have been provided such a hearing before removal proceedings were commenced against him. Pet. Br. at 32-40. However, petitioner withdrew that claim before the IJ (JA 197-98), so it is jurisdictionally barred for failure to exhaust administrative remedies. 8 U.S.C. § 1252(d); *Theodoropoulos v. INS*, 358 F.3d 162 (2d Cir. 2004). In any event, 8 U.S.C. § 1256(a) permits the INS to initiate removal proceedings, stating that "an order of removal issued by an immigration judge shall be sufficient to rescind the alien's status." As such, and because there is no evidence the INS engaged in misconduct, let alone affirmative misconduct, petitioner's estoppel claim likewise fails. *Rojas-Reyes v. INS*, 235 F.3d 115, 126 (2d Cir. 2005) (explaining that equitable estoppel cannot be used against the government unless there has been a showing of affirmative misconduct by the government).

Lastly, petitioner's claim that the BIA erred as a matter of law when it failed to review the IJ's decision under the substantial evidence standard is misplaced. Pet. Br. at 43-48. Petitioner cited 8 U.S.C. § 1252 as support for his claim that the BIA was required to review the IJ's decision under the substantial evidence standard. However, that standard only applies to reviews of the administrative record by this Court on petitions for review. 8 U.S.C. § 1252(b)(4); 8 C.F.R. § 1003.1(d) (2004).

In sum, substantial evidence supports the IJ's conclusion that, because there were two consular reports stating petitioner did not have a high school diploma, a forensic document report casting considerable doubt on a document submitted by petitioner regarding his diploma; and because petitioner had failed to disclose his criminal record, the INS had met its burden of proving by clear and convincing evidence that petitioner procured his visa by way of fraud or a material misrepresentation, *Cao He Lin v. United States Dep't of Justice*, 428 F.3d 391, 403 (2d Cir. 2005), and that he was therefore removable as charged in the NTA. (JA 156-57). Based on the record before this Court, it cannot be said that "a reasonable adjudicator [would be] compelled to find otherwise" on the grounds listed by the IJ and affirmed by the BIA. *Dong v. Ashcroft*, 406 F.3d 110, 111 (2d Cir. 2005).

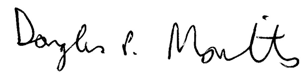
CONCLUSION

For each of the foregoing reasons, the petition for review should be denied.

Dated: May 17, 2006

Respectfully submitted,

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



DOUGLAS P. MORABITO
ASSISTANT U.S. ATTORNEY

WILLIAM J. NARDINI
Assistant United States Attorney (of counsel)

Addendum

8 U.S.C. § 1252(b)(4) (2004). 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.

8 U.S.C.A. § 1252. Judicial review of order of removal

(d) Review of final orders

A court may review a final order of removal only if--

(1) the alien has exhausted all administrative remedies available to the alien as of right, and

(2) another court has not decided the validity of the order, unless the reviewing court finds that the petition presents grounds that could not have been presented in the prior judicial proceeding or that the remedy provided by the prior proceeding was inadequate or ineffective to test the validity of the order.

8 U.S.C.A. § 1252. Allocation of immigrant visas

(c) Diversity immigrants

(2) Requirement of education or work experience

An alien is not eligible for a visa under this subsection unless the alien--

(A) has at least a high school education or its equivalent, or

(B) has, within 5 years of the date of application for a visa under this subsection, at least 2 years of work experience in an occupation which requires at least 2 years of training or experience.

8 C.F.R. § 1003.1(d) Organization, jurisdiction, and powers of the Board of Immigration Appeals.

(d) Powers of the Board–

(3) Scope of review.

(i) The Board will not engage in de novo review of findings of fact determined by an immigration judge. Facts determined by the immigration judge, including findings as to the credibility of testimony, shall be reviewed only to determine whether the findings of the immigration judge are clearly erroneous.

(ii) The Board may review questions of law, discretion, and judgment and all other issues in appeals from decisions of immigration judges de novo.

(iii) The Board may review all questions arising in appeals from decisions issued by Service officers de novo.

(iv) Except for taking administrative notice of commonly known facts such as current events or the contents of official documents, the Board will not engage in factfinding in the course of deciding appeals. A party asserting that the Board

cannot properly resolve an appeal without further factfinding must file a motion for remand. If further factfinding is needed in a particular case, the Board may remand the proceeding to the immigration judge or, as appropriate, to the Service.