

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 August Term, 2006

4 (Submitted: April 25, 2007 Decided: July 13, 2007
5 Amended: July 17, 2007
6 Errata Filed: July 30, 2007)
7 Docket No. 06-0804-ag

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9 Michelle A. Chambers,

10 Petitioner,

11 - v -

12 Office of Chief Counsel, Department of Homeland Security, Alberto
13 R. Gonzales, United States Attorney General,

14 Respondents.

15 -----
16 Before: McLAUGHLIN, SACK, Circuit Judges, and POGUE, Judge.^{*}
17 Judge Pogue dissents in a separate opinion.

18 Petition for review of a decision by the Board of
19 Immigration Appeals ordering removal on the grounds that the
20 petitioner knowingly assisted the attempted entry of an illegal
21 alien.

22 Petition denied.

23 Victor Schurr, Pelham, NY, for
24 Petitioner.^{**}

* The Honorable Donald C. Pogue, of the United States Court of International Trade, sitting by designation.

**The Court was informed on the eve of the scheduled oral argument that Mr. Schurr was, for ample reason, unable to attend. At the time of the scheduled argument, the respondents presented

1 Ari Nazarov, Trial Attorney, Office of
2 Immigration Litigation, United States
3 Department of Justice (Peter D. Keisler,
4 Assistant Attorney General, and Alison
5 M. Igoe, Senior Litigation Counsel, on
6 the brief), Washington, DC, for
7 Respondents.

8 SACK, Circuit Judge:

9 Michelle Chambers, a Jamaican native, petitions for
10 review of a decision by the Board of Immigration Appeals ("BIA")
11 ordering her removal pursuant to 8 U.S.C. § 1182(a)(6)(E)(i). In
12 re Michelle A. Chambers, No. A 56 034 092 (B.I.A. Jan. 24, 2006),
13 aff'g No. A 56 034 092 (Immig. Ct. Buffalo Aug. 26, 2004). She
14 contends that the BIA erred in finding that she knowingly
15 assisted her former boyfriend's attempted illegal entry into the
16 United States and that irrespective of whether she knew he could
17 not legally enter the United States, her actions were
18 insufficient to constitute an affirmative act of assistance
19 within the meaning of the statute. We disagree and therefore
20 deny the petition.

21 **BACKGROUND**

22 Chambers was, at all relevant times, a lawful permanent
23 resident of the United States residing in Hempstead, Long Island,
24 New York. In February 2003, she traveled by automobile with her
25 brother, a United States citizen, to Ontario, Canada, to visit

no substantive argument. We then took this case under submission on the express understanding that if any one of the three members of the panel was of the view that oral argument would likely be helpful, the panel would reconvene to hear it. Upon further consideration, no member of the panel has asked for such oral argument.

1 relatives. In 1990, her former boyfriend, Christopher Woolcock,
2 a resident of Jamaica, had been deported by the United States
3 after being convicted of a drug-related felony. He was also in
4 Ontario at the time of Chambers's visit, allegedly to attend his
5 uncle's wedding. Prior to Chambers's and Woolcock's trips to
6 Ontario, they agreed during the course of a telephone
7 conversation to meet there and return together to the United
8 States.

9 On February 23, 2003, with Chambers's brother driving,
10 she, her brother, and Woolcock traveled from Ontario headed for
11 the United States in an automobile with Georgia license plates.
12 Chambers was in the front passenger seat and Woolcock was in the
13 back seat. At the border crossing, Chambers's brother handed
14 United States customs officials his passport, his sister's travel
15 documents, and a green card issued in Woolcock's name. Because
16 the customs database revealed that Woolcock had previously been
17 deported, the three were referred to immigration offices for
18 further examination.

19 During subsequent questioning by an immigration
20 inspector, Chambers repeatedly said that Woolcock lived in Long
21 Island and that he had traveled to Canada with her and her
22 brother. She also denied having Woolcock's passport. Moments
23 later, however, she retrieved it from underneath a seat cushion
24 in the area where she had been waiting to be interviewed.
25 Following her interview, Chambers gave a sworn statement to the
26 inspector in which she admitted (1) lying about Woolcock's

1 residence; (2) having previously agreed with Woolcock to
2 accompany him at the Canadian border as he tried to enter the
3 United States; (3) that prior to that conversation, "[h]e was
4 going to come some other way through Kennedy airport"; (4) that
5 she thought Woolcock had last been in the United States seven
6 years before; (5) that she was aware he had been deported
7 previously; and (6) that Woolcock was planning to stay with her
8 at her home upon entering the United States.

9 Chambers was charged with knowingly aiding or assisting
10 the illegal entry of another alien under 8 U.S.C.
11 § 1182(a)(6)(E)(i), and given a notice to appear at removal
12 proceedings. That removal hearing was held before Immigration
13 Judge ("IJ") Philip J. Montante, Jr., on August 26, 2004.
14 Chambers testified that she thought Woolcock was permitted to
15 enter the United States because he had shown her a green card
16 (with his "much younger" picture on it) and had told her that an
17 immigration officer at the time of his deportation in 1990 had
18 informed him that he could return to the United States after ten
19 years.¹ She again admitted having lied to immigration officers
20 both when she told them that Woolcock was a Long Island resident
21 and when she said that she did not know the whereabouts of
22 Woolcock's passport. And she admitted that she had also lied
23 when she told the immigration inspector during her interview that

¹ Woolcock, as an alien deported for commission of an aggravated felony, is permanently ineligible to gain entry. See 8 U.S.C. § 1182(a)(9)(A)(i).

1 Woolcock was going to live with her when they returned to Long
2 Island. In fact, Chambers testified, he was to live with his
3 mother.

4 Chambers explained her misstatements by saying she was
5 frightened because she had been told she would be deported.
6 Asked on cross-examination why she had never decided to visit her
7 family in Canada until the weekend that Woolcock was also in
8 Canada, Chambers answered, "Well, we just decided."²

9 At the conclusion of the hearing, the IJ issued an oral
10 decision concluding that Chambers had knowingly aided the illegal
11 entry of another alien. The IJ noted Chambers's several
12 misstatements at the Canadian border and found that "she lied to
13 the Court today." In re Michelle A Chambers, A 56 034 092, at 9.
14 Relying on these misstatements and Chambers's sworn statement
15 that she and Woolcock had planned the trip across the border, the
16 IJ concluded that Chambers knew that Woolcock could not legally
17 enter the United States and that her actions "were an attempt to
18 induce and to encourage" Woolcock's illegal entry. Id. at 9-13.
19 The IJ also noted that he perceived Chambers's testimony that
20 Woolcock told her that he could reenter the United States ten
21 years after his deportation to be inconsistent with Chambers's
22 statement to the immigration inspector that Woolcock was last in
23 the United States seven years prior to the 2003 incident at the
24 border. Id. at 11 ("Well, if he had been in the United States

² There is no indication that Chambers received compensation for assisting Woolcock's attempted entry into the United States.

1 seven years ago, doesn't that fly in the face of her statement
2 that [Woolcock] told her allegedly that he could return after 10
3 years and here it was seven years ago that he was in the United
4 States.").

5 On January 24, 2006, the BIA affirmed in a short
6 opinion that closely followed the IJ's reasoning. First, the BIA
7 determined that "if [Chambers] believed that Mr. Woolcock could
8 only reenter the United States after having been absent for 10
9 years after his deportation, [Chambers] would have had knowledge
10 that Mr. Woolcock would not have been able to reenter the United
11 States after the passage of only 7 years." In re Michelle A.
12 Chambers, A 56 034 092, at 2. Second, it concluded that in light
13 of Chambers's numerous admitted and deliberate misrepresentations
14 to customs officials at the border, the IJ did not err in finding
15 Chambers's testimony at the hearing incredible or in "finding
16 that her deception at the border reflected guilty knowledge."
17 Id.

18 Chambers petitions for review.

19 **DISCUSSION**

20 I. Standard of Review

21 "Since the BIA affirmed the IJ's order in a 'brief
22 opinion [that] closely tracks the IJ's reasoning,' and since our
23 conclusion is the same regardless of which decision we review,
24 'we will consider both the IJ's and the BIA's opinions.'" Lewis
25 v. Gonzales, 481 F.3d 125, 129 (2d Cir. 2007) (quoting Wangchuck

1 v. Dep't of Homeland Security, 448 F.3d 524, 528 (2d Cir. 2006))
2 (brackets in original).

3 We review the IJ's and BIA's factual findings for
4 substantial evidence, and we consider questions of law and
5 applications of law to fact de novo. Secaida-Rosales v. INS, 331
6 F.3d 297, 306-07 (2d Cir. 2003). The BIA's findings of fact "are
7 conclusive unless any reasonable adjudicator would be compelled
8 to conclude to the contrary." 8 U.S.C. § 1252(b)(4)(B). The
9 petitioner's knowledge at the time in question is a question of
10 fact. See, e.g., Farmer v. Brennan, 511 U.S. 825, 842 (1994);
11 Weyant v. Okst, 101 F.3d 845, 856 (2d Cir. 1996); see
12 also Locurto v. Guliani, 447 F.3d 159, 177 n.6 (2d Cir. 2006)
13 ("[T]he defendants' intent is a factual question . . .").

14 II. Chambers Acted Knowingly

15 Section 212(a)(6)(E)(i) of the Immigration and
16 Naturalization Act provides that an alien is not admissible into
17 the United States if he or she "at any time knowingly has
18 encouraged, induced, assisted, abetted, or aided any other alien
19 to enter or try to enter the United States in violation of the
20 law." 8 U.S.C. § 1182(a)(6)(E)(i).³ Chambers argues that the

³ Aliens such as Chambers who have achieved lawful permanent resident status in the United States are regarded as seeking admission to the United States if they have "engaged in illegal activity after having departed the United States." 8 U.S.C.

1 circumstances surrounding her stop at the border compel the
2 conclusion that she did not act "knowingly." Specifically, she
3 contends that her behavior was consistent with the acts of
4 someone who thought she was participating in a legal act: her
5 brother readily handed over Woolcock's green card to the customs
6 officer; no subterfuge in the form of fraudulent documents or
7 hidden compartments was used; and Chambers complied with all of
8 the various officers' requests. She argues further that her
9 misstatements were not only immaterial to the charge of aiding
10 illegal alien entry, but also were later recanted.

11 But Chambers does not contest that she lied at the
12 border regarding Woolcock's residency and the whereabouts of his
13 passport. The nature of these misstatements plainly supports the
14 inference drawn by the IJ and the BIA that Chambers knew Woolcock
15 could not legally enter the United States. For example, her
16 statements that Woolcock lived in Long Island and drove with her
17 and her brother to Canada could reasonably be construed as an
18 attempt by Chambers to convince officials that Woolcock then
19 resided in the United States lawfully. Such an inference would
20 in turn support the corollary inference that Chambers wanted

§ 1101(a)(13)(C)(iii) ("An alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission into the United States for purposes of the immigration laws unless the alien . . . (iii) has engaged in illegal activity after having departed the United States.").

1 border officials to think Woolcock was a legal resident of the
2 United States because she knew he would otherwise not be
3 permitted to enter in light of his immigration status. These
4 inferences, taken together with Chambers's admissions that she
5 and Woolcock planned the means and method of his return to the
6 United States and that she knew that he had been deported
7 previously, constitute substantial evidence to support the IJ's
8 and BIA's findings that Chambers acted knowingly to assist
9 Woolcock's attempted illegal entry. See Siewe v. Gonzales, 480
10 F.3d 160, 168 (2d Cir. 2007) ("So long as there is a basis in the
11 evidence for a challenged inference, we do not question whether a
12 different inference was available or more likely."); see also id.
13 ("[W]e will reject a deduction made by an IJ only when there is a
14 complete absence of probative facts to support it").

15 To be sure, the IJ and BIA appear to have ascribed
16 misplaced significance to the fact that Chambers professed to
17 believe both that Woolcock had been in the United States within
18 the past seven years and that an immigration officer had told
19 Woolcock he could reenter after ten years. These two assertions
20 are not inherently contradictory. Assuming that Chambers had
21 believed Woolcock's assertion that he could reenter the United
22 States ten years after his deportation in 1990, nothing about the
23 statement would compel Chambers to think that the ten-year clock

1 restarted each time Woolcock entered the United States, as the IJ
2 and BIA seemed to believe. Nevertheless, neither the IJ nor the
3 BIA relied solely -- or, in the case of the IJ, substantially --
4 on this reasoning in finding that Chambers knowingly assisted
5 Woolcock's attempted illegal entry. Instead, each expressly and
6 additionally relied on Chambers's repeated misstatements and the
7 reasonable inferences drawn therefrom. We therefore conclude
8 that the record contains substantial evidence in support of the
9 agency's finding that Chambers acted with the requisite knowledge
10 and that, were we to remand, the agency would reach the same
11 result even absent the likely error that we have identified. See
12 Cao He Lin v. U.S. Dep't of Justice, 428 F.3d 391, 401 (2d Cir.
13 2005) ("Certainly if the IJ explicitly adopts an alternative and
14 sufficient basis for her determination, no remand is required.");
15 see also Siewe, 480 F.3d at 166-67; Li Zu Guan v. INS, 453 F.3d
16 129, 137-38 (2d Cir. 2006).

17 III. Chambers's Actions Are Sufficient to Constitute
18 Assistance Under Section 212(a)(6)(E)(i)

19
20 As an alternative basis for granting her petition,
21 Chambers argues that her actions do not as a matter of law rise
22 to the requisite affirmative assistance that § 212(a)(6)(E)(i)
23 requires. In support, she cites cases in which divided panels of
24 the Sixth and Ninth Circuits have held that the anti-smuggling

1 statute requires an affirmative act of assistance or
2 encouragement beyond either "openly presenting an alien to border
3 officials with accurate identification and citizenship papers,"
4 Tapucu v. Gonzales, 399 F.3d 736, 737 (6th Cir. 2005), or "mere
5 presence in [a] vehicle with knowledge of [a] plan" to smuggle an
6 alien into the United States, Altamirano v. Gonzales, 427 F.3d
7 586, 596 (9th Cir. 2005).

8 Our Circuit has yet to set forth anything approaching a
9 bright-line test as to the nature of the actions that will or
10 will not suffice to support a finding that an alien has
11 "encouraged, induced, assisted, abetted, or aided" another in
12 illegally entering the United States. 8 U.S.C.

13 § 1182(a)(6)(E)(i). We need not do so here. Chambers did not
14 present agents at the border with accurate information, as did
15 the petitioner in Tapucu, and she was not "mere[ly] presen[t] in
16 the vehicle" in which her brother drove Woolcock across the
17 border like the petitioner in Altamirano. She does not qualify
18 as an innocent bystander on any reading of the facts. The fact
19 that no fraudulent documents were used and no payments by
20 Woolcock were made does not overcome the ample evidence to
21 support the IJ's and BIA's findings that Chambers personally
22 arranged to provide transportation for Woolcock into the United
23 States and purposefully deceived customs officials at the time of

1 his attempted entry. Chambers traveled to Canada with the pre-
2 planned intent to bring Woolcock across the border in her car
3 upon her return, and she actively sought to mislead customs
4 officials about Woolcock's residency status in a way that, if
5 believed, would have made it easier for him to enter the United
6 States. There is thus sufficient evidence from which the IJ and
7 the BIA could conclude that she assisted, abetted, or aided
8 Woolcock in his attempt illegally to enter the United States.
9 Section 212(a)(6)(E)(i) requires no more.

10 **CONCLUSION**

11 For the foregoing reasons, Chambers's petition for
12 review is denied.