U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
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1901 S. Bell Street, Suite 900
Arlington, VA 22202

Name: CUNDALL, SYLVIA

A 075-776-185

Date of this notice: 12/29/2015

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Cole, Patricia A.
Greer, Anne J.
Pauley, Roger

Userteam: Docket

File: A075 776 185 – Arlington, VA

Date: DEC 29 2015

In re: SYLVIA CUNDALL

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Ivan Yacub, Esquire

ON BEHALF OF DHS: Jill J. Parikh
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(6), I&N Act [8 U.S.C. § 1227(a)(6)] -
Voted unlawfully

APPLICATION: Termination

The respondent, a native and citizen of Peru and a lawful permanent resident of the United States, appeals from an Immigration Judge's November 20, 2014, decision ordering her removed under section 237(a)(6) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(6). The Department of Homeland Security opposes the appeal. The record will be remanded.

The issue on appeal is whether the DHS has proven by clear and convincing evidence that the respondent "has voted in violation of any Federal, State, or local constitutional provision, statute, ordinance, or regulation," as required to establish that she is removable as charged. Whether the respondent is removable under section 237(a)(6) of the Act is an ultimate question of law that we review de novo, but the underlying findings of fact are reviewed for clear error. 8 C.F.R. § 1003.1(d)(3)(i), (ii).

In his decision, the Immigration Judge sustained factual allegation 5 of the Notice to Appear, which alleges that the respondent "voted in a Virginia state election in violation of 237(a)(6)" (I.J. at 2; Exh. 1). In sustaining this allegation, the Immigration Judge relied solely on one court document prepared in connection with the respondent's 2010 Virginia conviction for voter registration fraud: namely, a "Commonwealth's Proffer of Facts" which represents that if the respondent proceeded to trial the prosecution would have presented evidence that she "voted in two elections since submitting her [fraudulent voter registration] application in 2001." (I.J. at 2; Exh. 2).

On the present record, we are unable to affirm the Immigration Judge's decision. Specifically, the "Commonwealth's Proffer of Facts" upon which the Immigration Judge relied does not appear to specify that the respondent "voted in a Virginia state election," as allegation 5 alleges; it merely states that she "voted in two elections," without identifying the elections in question. Moreover, in sustaining the charge, the Immigration Judge did not identify which

federal, state, or local law the respondent allegedly violated by voting. In this regard, we note that a conviction for voter registration fraud under Virginia law does not depend upon proof that the defendant voted.[1] Further, the prosecution elected not to prosecute the respondent for unlawful voting in violation of Va. Code § 24.2-1004. Accordingly, the Immigration Judge's decision does not contain sufficient findings of fact to permit us to conduct a meaningful appellate review. *See Matter of S-H-*, 23 I&N Dec. 462, 465 (BIA 2002) (emphasizing the need for Immigration Judges to include in their decisions clear and complete findings and analysis that are in compliance with controlling law, in view of this Board's inability to conduct fact-finding on appeal); *see also Matter of J-H-J-*, 26 I&N Dec. 563, 565 (BIA 2015).

While a conviction for unlawful voting is not required to find an alien removable under section 237(a)(6) of the Act, a meaningful analysis of this ground of removability should include a factual determination that the respondent violated a specific law by voting. *See Matter of Fitzpatrick*, 26 I&N Dec. 559, 560-61 (BIA 2015) (analyzing removability under section 237(a)(6) by finding that the respondent voted in a federal election, finding that the respondent violated 18 U.S.C. § 611, and concluding that this statute was one of general intent); *McDonald v. Gonzales*, 400 F.3d 684 (9th Cir. 2005) (concluding that while the alien did vote, she did not violate the law willfully or knowingly and thus did not have the requisite mental state to have violated section 19.3-5(2) of Hawaii's revised statute, and consequently was not removable under section 237(a)(6) for having violated a state statute).

Therefore, the record will be remanded for further proceedings and for entry of a new decision which includes all necessary factual determinations and analysis.

Accordingly, the following order will be entered.

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[1] The respondent was convicted under section 24.2-1016 of the Code of Virginia which provides:

> Any willfully false material statement or entry made by any person in any statement, form, or report required by this title shall constitute the crime of election fraud and be punishable as a Class 5 felony. Any preprinted statement, form, or report shall include a statement of such unlawful conduct and the penalty provided in this section.

As this statute does not include the element of casting a vote and can penalize conduct even when an individual did not cast a vote, the respondent's conviction cannot be independently used to sustain a factual allegation that she voted or that she is removable under section 237(a)(6)(A) of the Act. *See Williams v. Commonwealth of Va.*, 43 Va. App. 1, 5 (Va. 2004) (noting that the first sentence of Va. Code § 24.2-1016 "expressly and unambiguously sets out the elements of the offense of election fraud."); *Wilson v. Commonwealth of Va.*, No. 2061-98-4, 2000 WL 527681 (Va. Ct. App. 2000) (affirming a conviction under Va. Code § 24.2-1016 for an individual who falsified her living address on a voter registration form) (unpublished).

ORDER: The record is remanded to the Immigration Judge for further proceedings and for the entry of a new decision consistent with the foregoing opinion.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
ARLINGTON, VIRGINIA

File: A075-776-185 November 20, 2014

In the Matter of

SYLVIA CUNDALL	)	IN REMOVAL PROCEEDINGS
RESPONDENT	)	

CHARGES: Section 237(a)(6), I&N Act, as amended - alien who voted in violation of state, Federal or local constitutional provision, statute, ordinance, or regulation.

APPLICATIONS: Termination of proceedings.

ON BEHALF OF RESPONDENT: RYAN A. MILLETT, Esquire
12761 Darby Brook Court
Suite 102
Woodbridge, Virginia 22191

ON BEHALF OF DHS: JILL PARIKH, Esquire
Assistant Chief Counsel

ORDER OF THE IMMIGRATION JUDGE

The respondent is a female who is a native and citizen of Peru. Through counsel, the respondent admits allegations 1, 2 and 3 in the Notice to Appear dated

June 21, 2012. The respondent denies allegations 4 and 5 and the charge of removability. I note that at a previous hearing, DHS Assistant Chief Counsel withdrew the charge under Section 237(a)(3)(D) of the Act relating to false representation as a U.S. citizen.

In support of the charges of removability, the DHS submits group Exhibit 2, the records of conviction in the Circuit Court of Loudoun County, Virginia. According to those records, the respondent was convicted on November 6, 2001 for felony voter registration fraud under Virginia law. Attached to the record of conviction is the Commonwealth's proffer of facts signed by the respondent's criminal attorney. According to that record of facts, voter records show that the defendant voted in two elections since submitting her application in 2001.

The respondent argues in a brief filed April 21, 2014 that the evidence submitted by the DHS is insufficient to establish the charge of unlawful voting by clear and convincing evidence. However, I find that the evidence submitted by the Government in group Exhibit 2 is sufficient to sustain that charge by clear and convincing evidence. I therefore find the respondent removable on the charge under Section 237(a)(6) of the Act. I also find that factual allegation nnumber 5 in the Notice to Appear is sustained by clear and convincing evidence.

Respondent declined to file any additional relief for removal today. Through counsel, the respondent also declined an offer of post-hearing voluntary departure, which I was willing to grant.

Consequently, I have no choice but to enter the following order:

ORDER

THE RESPONDENT SHALL BE REMOVED TO PERU ON THE SECTION 237(a)(6) CHARGE CONTAINED IN THE NOTICE TO APPEAR.

Please see the next page for electronic signature

PAUL WICKHAM SCHMIDT
United States Immigration Judge

//s//

Immigration Judge PAUL W. SCHMIDT

schmidtp on February 24, 2015 at 5:14 PM GMT