**U.S. Department of Justice**

Executive Office for Immigration Review

*Board of Immigration Appeals*
*Office of the Clerk*

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**Name: SHCHUPAK, MYKOLA**

**A 076-577-376**

**Date of this notice: 11/7/2012**

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:
Grant, Edward R.

schwarzA
Userteam: Docket

File: A076 577 376 - Atlanta, GA Date: NOV -7 2012

In re: MYKOLA SHCHUPAK

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Socheat Chea, Esquire

ON BEHALF OF DHS: Renae M. Hansell
Senior Attorney

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony

Lodged: Sec. 237(a)(2)(A)(i), I&N Act [8 U.S.C. § 1227(a)(2)(A)(i)] - Convicted of crime involving moral turpitude

APPLICATION: Termination; remand

The Department of Homeland Security (DHS) appeals from the Immigration Judge's decision dated April 22, 2011, terminating these proceedings. The DHS has also filed a motion to remand. The respondent opposes both the appeal and the motion. The motion will be granted.

We review for clear error the findings of fact, including the determination of credibility, made by the Immigration Judge. 8 C.F.R. § 1003.1(d)(3)(i). We review de novo all other issues, including whether the parties have met the relevant burden of proof, and issues of discretion. 8 C.F.R. § 1003.1(d)(3)(ii).

In his most recent decision, the Immigration Judge terminated proceedings on the basis that the DHS did not meet its burden of establishing by clear and convincing evidence that the respondent is removable pursuant to section 237(a)(2)(A)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(i), for having committed a crime involving moral turpitude within 5 years after the date of his August 1996 admission (I.J. at 4-5, Apr. 22, 2011). The respondent was convicted of conspiracy to produce counterfeit documents in violation of 18 U.S.C. § 371 (I.J. at 1-2, Apr. 22, 2011). A conviction under 18 U.S.C. § 371 requires (1) a conspiracy between two or more persons to commit any offense against the United States or the defraud the United States, and (2) an overt act by at least one person to effect the object of the conspiracy. *See Whitfield v. United States*, 543 U.S. 209, 212-14 (2005). The record reflects that the respondent's offense took place between 2000 and 2003 (I.J. at 4-5; DHS filing of Apr. 6, 2011, Tab C). Although the respondent's offense commenced in 2000, there is no evidence that an overt act in furtherance of the conspiracy was

carried out–and therefore that the crime of conspiracy was committed–within 5 years of his admission to the United States. Accordingly, we agree with the Immigration Judge that the DHS has not met its burden of demonstrating the respondent's removability pursuant to section 237(a)(2)(A)(i) of the Act.

While the appeal was pending, the DHS filed a motion to remand for further proceedings (DHS Motion to Remand, Sept. 27, 2011). The motion requests a remand for consideration of the Form 1-261, Additional Charges of Inadmissibility/Deportability, dated May 9, 2011, that was filed with the Immigration Judge subsequent to his decision (DHS Motion to Reconsider, May 10, 2011). The DHS is authorized by regulation to lodge additional charges at any time during proceedings. *See* 8 C.F.R. § 1240.10(e). The DHS charges that the respondent is removable pursuant to section 237(a)(3)(B)(iii) of the Act, as an alien who, at any time after admission has been convicted of a violation of, or any attempt or conspiracy to violate, 18 U.S.C. § 1546. We conclude that further fact finding is required to address the revised allegations and charge. *See* 8 C.F.R. § 1003.1(d)(3)(iv). Accordingly, the motion to remand will be granted. The following orders shall be entered.

ORDER: The DHS's Motion to Remand is granted.

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

FOR THE BOARD