UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 17-73269
Agency File No. 073-436-746

IBRAHIM FARHAB BARE,
Petitioner

v.

JEFFREY A. ROSEN, ACTING U.S. ATTORNEY GENERAL,
Respondent

On Petition for Review of an Order of the Board of Immigration Appeals

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BRIEF OF *AMICI CURIAE* NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD AND THE IMMIGRANT DEFENSE PROJECT IN SUPPORT OF PETITIONER'S PETITION FOR PANEL REHEARING AND REHEARING EN BANC

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INTEREST OF *AMICI CURIAE*[1]

The National Immigration Project of the National Lawyers Guild ("NIPNLG") is a non-profit organization of immigration attorneys, legal workers, grassroots advocates, and others working to defend immigrants' rights and to secure a fair administration of the immigration and nationality laws, including noncitizens in immigration proceedings and persons who have been removed. NIPNLG has been promoting justice, transparency and government accountability in all areas of immigration law and social policies related to immigration for over forty years. Appearing as *amicus curiae*, NIPNLG litigates before the federal courts in cases challenging grounds of deportation and bars to withholding of removal.

The Immigrant Defense Project ("IDP") is a non-profit legal resource and training center that provides criminal defense attorneys, immigration attorneys, and immigrants with expert legal advice, publications, and training on issues involving the interplay between criminal and immigration law. IDP is dedicated to promoting fundamental fairness for immigrants accuse of crimes, and therefore has a keen interest in ensuring the correct interpretation of laws barring, based on past

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), neither party's counsel authored this brief in whole or in part, nor did either party's counsel or anyone else other than counsel for *amici* contribute money to fund the preparation or submission of this brief.

criminal charges, relief from removal to immigrants seeking refuge in this country from persecution abroad.

INTRODUCTION

The Court should grant the Petition for Panel Rehearing and Rehearing En Banc because the Board of Immigration Appeals ("BIA") and the panel failed to correctly conduct the applicable particularly serious crime ("PSC") test. That test requires an adjudicator to "examine the nature of the conviction, the type of sentence imposed, and the circumstances and underlying facts of the conviction" to determine whether the conviction at issue is a PSC such that it precludes asylum or withholding of removal eligibility.[2] *Matter of N-A-M-*, 24 I. & N. Dec. 336, 342 (BIA 2007).

That test was wrongly applied by the BIA and, subsequently, the panel for two reasons. First, the "nature of the conviction" factor—arguably the most important factor—was not analyzed. That factor requires a threshold inquiry to

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[2] The BIA's PSC analysis is deeply flawed because it is inconsistent with the United States' international treaty obligations. *See* Philip L. Torrey et al., *United States Failure to Comply with the Refugee Convention: Misapplication of the Particularly Serious Crime Bar to Deny Refugees Protection from Removal to Countries Where Their Life or Freedom is Threatened*, (2018) *available at* http://harvardimmigrationclinic.org/hirc/files/2018/09/IDP_Harvard_Report_FINAL.pdf. For purposes of this brief, *amici curiae* argue only that the BIA and the panel failed to apply the BIA's PSC analysis pursuant to *Matter of N-A-M-*, 24 I. & N. Dec. 336, 342 (BIA 2007), which the panel itself cited at the appropriate test, *Bare v. Barr*, 975 F.3d 952, 961–62 (9th Cir. 2020).

determine whether the elements of the offense could potentially be a PSC. According to the BIA, "the individual facts and circumstances of the offense are of no consequence" if the elements of the crime do not bring it "within the ambit" of a PSC. *Id.*

Second, the BIA and panel considered facts and circumstances wholly unrelated to the conviction at issue when determining that the Petitioner's conviction qualified as a PSC. Facts concerning alleged criminal activity that are not tethered to the conviction at issue are irrelevant to determining whether a conviction qualifies as a PSC. Furthermore, statutory withholding of removal is not a discretionary form of immigration protection. An adjudicator can only review the underlying facts of the conviction at issue—and only that conviction—when determining whether that conviction is a PSC.

For these reasons, *amici* urge the Court to grant the Petition for Panel Rehearing and Rehearing En Banc.

ARGUMENT

I. THE BIA'S PSC ANALYSIS FIRST REQUIRES THE ADJUDICATOR TO DETERMINE WHETHER THE ELEMENTS OF THE OFFENSE BRING IT WITHIN THE AMBIT OF A PSC.

Before the specific circumstances of an offense may be considered in the PSC analysis, an adjudicator must examine the statutory elements of the offense to determine whether it could potentially be considered a PSC. *See Matter of N-A-M-*,

24 I. & N. Dec. at 342 ("If the elements of the offense do not potentially bring the crime into a category of particularly serious crimes, the individual facts and circumstances of the offense are of no consequence.").

The threshold elements inquiry serves an important "gatekeeping function." *Matter of N-A-M-*, 24 I. & N. Dec. at 342. Only if the elements of the offense potentially bring it within the ambit of a PSC can an adjudicator continue to apply the rest of the multi-factor PSC analysis. *Id.*; *see also Luziga v. Attorney General*, 937 F.3d 244, 253–54 (3d Cir. 2019) (deferring to the BIA's PSC analysis requiring a threshold elements inquiry of the conviction (citing *Matter of N-A-M-*, 24 I. & N. Dec. at 342)); *Matter of L-S-*, 22 I. & N. Dec. 645, 654–55 (BIA 1999) (reasoning that an "alien smuggling" offense under 8 U.S.C. § 1324(a)(2)(B)(iii) was not a per se PSC because, in part, the statutory elements of the respondent's specific conviction did not "require proof of any endangerment, harm, or intended harm").

In *Luziga*, the Third Circuit held that the BIA and immigration judge erred when they failed to apply the threshold elements inquiry as required by *Matter of N-A-M-*. 937 F.3d at 253–54. In that case, the immigration judge "failed to consider the elements of Luziga's offense" but instead focused on the specific loss amount from a fraud-related offense. *Id.* at 253. The BIA subsequently noted that it would consider the elements of the fraud offense, but then proceeded to analyze a

"hybrid of the elements and facts." *Id.* at 254 ("To the extent that the BIA decided that the IJ correctly applied the proper legal standard for the particularly serious crime determination, it erred."). On remand, the court directed the agency to "first determine whether the elements of [the] offense potentially fall within the ambit of a particularly serious crime. *Only then* may it proceed to consider the facts and circumstances particular to Luziga's case." *Id.* (emphasis added).

Failure to first analyze the elements of an offense to determine whether it may be considered a PSC not only violates the BIA's own precedent, but is also contrary to its practice. *See, e.g.*, *Matter of G-G-G-*, at *1–2 (BIA Feb. 27, 2020) (unpublished) (attached hereto at Add. A) ("This case presents a misdemeanor conviction . . . such that the elements of the offense do not bring it within the ambit of particularly serious crimes as to warrant further consideration."); *Matter of J-J-V-*, at *2–3 (BIA July 18, 2017) (unpublished) (attached hereto at Add. B) (reasoning that the "language of the statute 'provides the essential key' in assessing whether a crime is particularly serious" (internal citation omitted)) ("[W]e conclude that the elements of larceny from the person . . . do not fall within the ambit of a particularly serious crime, and, consequently, there is no need to consider the underlying facts of the offense.").

In this case, the panel correctly noted that the IJ and the BIA failed to conduct the threshold elements inquiry before holding that Mr. Bare's conviction

for being a felon in possession of a firearm was a PSC.[3] *Bare v. Barr*, 975 F.3d 952, 962 (9th Cir. 2020); Pet. for Reh'g at 6. As the Court has repeatedly done in similar cases, the panel should have then remanded the case back to the agency to conduct the proper elements inquiry in the first instance. *See, e.g.*, *Delgado v. Holder*, 648 F.3d 1095, 1107–1108 (9th Cir. 2010) (directing the BIA on remand to clarify its "scant" and "ambiguous" PSC analysis); *Gomez-Sanchez v. Sessions*, 892 F.3d 985, 996–97 (9th Cir. 2018) (remanding to the BIA to consider the petitioner's mental health when conducting the proper PSC analysis); *Zuniga Johnson v. Barr*, 830 Fed. App'x 558, 558 (Dec. 4, 2020) (remanding to the BIA to correctly apply the proper factors of PSC analysis in the first instance).

II. THE PSC ANALYSIS PRECLUDES CONSIDERATION OF CRIMNAL CONDUCT UNRELATED TO THE OFFENSE AT ISSUE.

The PSC bar precludes withholding of removal eligibility if the applicant has been "convicted by a final judgment of *a* particularly serious crime." 8 U.S.C. § 1231(b)(3)(B)(ii) (emphasis added). Using the indefinite article "a," the PSC bar's text clearly directs the review of a single conviction to determine whether the

[3] Citing *Guerrero v. Whitaker*, 908 F.3d 541 (9th Cir. 2018) and *Alphonsus v. Holder*, 705 F3d 1031 (9th Cir. 2013), the panel mistakenly inferred that a felon in possession of a firearm conviction is the type of offense likely to be a PSC simply because it also qualifies as an aggravated felony. *Bare v. Barr*, 975 F.3d 952, 964 (9th Cir. 2020). But the PSC test is different than the aggravated felony test and the latter does not justify truncating the former. In short, the elements inquiry must still be conducted even if the conviction at issue qualifies as an aggravated felony.

circumstances of that conviction render it a PSC. *Delgado*, 648 F.3d at 1111–12 (Reinhardt, J., concurring); *see also Yousefi v. INS*, 260 F.3d 318, 329 (4th Cir. 2001) ("The *Frentescu* standard focuses on the crime that the Service claims is particularly serious, and the standard does not call for consideration of conduct that is unrelated to that crime.").

This Court's decision in *Delgado* is illustrative. In that case, the petitioner was convicted of driving under the influence of alcohol on three separate occasions. 648 F.3d at 1098. Both the immigration judge and the BIA concluded that the petitioner's three separate convictions, when considered cumulatively, established that he had been convicted of a PSC. *Id.* at 1099. This Court reversed and remanded because it was unclear how the BIA determined that the three separate offenses constituted a single PSC. *Id.* at 1107–08.

Judge Reinhardt authored a concurring opinion in *Delgado* in which he reasoned that the BIA cannot combine the circumstances of multiple offenses when making a PSC determination. *Delgado*, 648 F.3d at 1111–12 (Reinhardt, J., concurring). According to Judge Reinhardt:

> The bar to relief applies if the Attorney General determines that "the [noncitizen], having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States." The statutes do not mention "a particularly long rap sheet," "a particularly egregious repeat offender," or "a particularly serious series of offenses." The singular article "a" could not make any clearer the singular nature

> of "a particularly serious crime": the agency must identify one offense of conviction that constitutes "a particularly serious crime" in order to relieve the Attorney General of the opportunity to exercise his discretion and to bar the [noncitizen]'s application for relief. . . . The agency can consider the "circumstances" of that conviction, but the phrase imposes its own limit: the relevant circumstances are those relating to the conviction, not to the [noncitizen]'s life history, his moral character, or his criminal record.

Id. at 1111–13 (emphasis in original) (internal citations omitted).

The BIA has similarly held that the PSC analysis does not include consideration of facts unrelated to the conviction at issue. *See, e.g.*, *Matter of H-H-S-M-*, at *3 (BIA Dec. 12, 2019) (unpublished) (attached hereto at Add. C) ("It therefore appears that the Immigration Judge erred by combining the underlying facts and circumstances of the 2007 and 2016 DWIs to find that both convictions together established that the respondent had committed a particularly serious crime."); *Matter of S-D-S-C-*, at *2 (BIA May 3, 2019) (unpublished) (attached hereto at Add. D) ("[W]e disagree with the Immigration Judge's finding that it is significant that the respondent committed other criminal offenses are jumping bail, as factors which are subsequent and unrelated to the bailing jumping offenses are not germane to whether bail jumping itself is a particularly serious crime." (emphasis in original)); *Matter of L-G-M-*, at *3 (BIA Sept. 24, 2018) (unpublished) (attached hereto at Add. E) ("[T]he Immigration Judge's apparent reliance on the respondent's complete history of contacts with the criminal justice

system . . . to assess whether an individual crime is particularly serious, is erroneous."). Extraneous facts cannot be considered even if they are included as part of the sentencing information. *Cf. Dickson v. Ashcroft*, 346 F.3d 44, 55 (2d Cir. 2003) (holding that the factual allegations in a pre-sentencing report cannot be used to determine the specific offense for which an individual has been convicted).

Here, the BIA and the panel considered facts and circumstances wholly unrelated to Mr. Bare's conviction pursuant to 18 U.S.C. § 922(g)(1). For example, the panel reasoned that it was appropriate to consider the impact of Mr. Bare's business on the community, how he obtained the firearm he was convicted of possessing, and "other acts which go to his mental state."[4] *Bare*, 975 F.3d at 965–66. Prior criminal conduct and allegations concerning Mr. Bare's character and business are irrelevant to the PSC analysis. The PSC analysis requires review of *a* conviction. It does not allow for review of discretionary facts that are untethered to the conviction at issue.

CONCLUSION

For the foregoing reasons *amici curiae* respectfully request that this Court grant the Petitioner for Panel Rehearing and Rehearing En Banc.

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[4] The panel condones the review of these extraneous allegations as part of a "dangerousness" inquiry, which the panel simultaneously notes is no longer a distinct inquiry yet remains an "essential key" to the PSC test. *Bare*, 975 F.3d at 965 (citing *Gomez-Sanchez*, 892 F.3d at 991, 993–94).

Dated: December 28, 2020

Respectfully submitted,

/s/ Philip L. Torrey

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(4)–(6), (7)(C), and Fed. R. App. P. 32(d), as well as Circuit Rule 29-2(a), (c)(2), and (e)(1), the attached brief is proportionally spaced, has a typeface of 14 points or more, and contains approximately 2,157 words, exclusive of the table of contents, table of authorities, and certificates of counsel, which does not exceed the 4,200 word-limit for an amicus brief in support of a petition for panel rehearing or rehearing en banc.

Dated: December 28, 2020

/s/ Philip L. Torrey
Philip L. Torrey

ADDENDUM A

Matter of G-G-G-, (BIA Feb. 27, 2020) (unpublished)

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Falls Church, Virginia 22041

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DHS/ICE Office of Chief Counsel - NYD
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New York, NY 10014

Name: G[redacted] G[redacted], G[redacted] **A[redacted]-185**

Date of this notice: 2/27/2020

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:
O'Connor, Blair
Wendtland, Linda S.
Greer, Anne J.

Userteam: Docket

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A[redacted]-185 – New York, NY

Date: FEB 27 2020

In re: G[redacted] G[redacted]-G[redacted] a.k.a. [redacted]

IN ASYLUM AND/OR WITHHOLDING PROCEEDINGS

APPEAL

ON BEHALF OF APPLICANT: Perry McAninch, Esquire

APPLICATION: Withholding of removal; Convention Against Torture

The applicant, a native and citizen of Honduras who is in withholding-only proceedings, timely appeals an Immigration Judge's June 28, 2019, decision denying his applications for withholding of removal pursuant to sections 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1231(b)(3) (2012) and protection under the Convention Against Torture pursuant to 8 C.F.R. § 1208.16(c)(2) (2018). The appeal will be sustained, and the record will be remanded to the Immigration Judge for further adjudication and the entry of a new decision.

The Board reviews an Immigration Judge's findings of fact, including credibility determinations and the likelihood of future events, under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i); *Matter of Z-Z-O-*, 26 I&N Dec. 586 (BIA 2015). We review all other issues, including questions of law, judgment, or discretion, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

The applicant bases his claims on past persecution suffered, and future persecution feared, by members of the MS-13 gang. There is no dispute that on May 31, 2018, the applicant pled guilty in the Criminal Court of the City of New York, County of Bronx, for the offense of assault in the third degree, in violation of New York Penal Law § 120.00(01), for which he was sentenced to 5 months' imprisonment, with a 5-year order of protection for the victim (IJ at 9; Exh. 12, Exh. 14 at 494; Exh. 18 at 461). The Immigration Judge found that this offense constitutes a particularly serious crime, thus rendering the applicant ineligible for withholding of removal under section 241(b)(3) of the Act (pursuant to section 241(b)(3)(B)(ii) of the Act), and withholding of removal under the Convention Against Torture (pursuant to 8 C.F.R. § 1208.16(d)(2)) (IJ at 10-11). We disagree, and will reverse this determination.

There is no dispute that this conviction is not a felony, but is a misdemeanor. In *Matter of Juarez*, 19 I&N Dec. 664 (BIA 1988), we held that, except possibly under unusual circumstances, a single conviction for a misdemeanor offense is not a particularly serious crime within the scope of former section 243(h)(2)(B) of the Act, 8 U.S.C. § 1253(h)(2)(B)(1982). We agree with the applicant that such unusual circumstances are not present in this case. In this regard, we observe that in *Matter of Juarez*, we determined that the respondent's misdemeanor conviction for assault upon another with a deadly weapon did not constitute the type of "unusual circumstances" required to support a finding that the misdemeanor conviction was for a particularly serious crime. *Matter of Juarez*, 19 I&N Dec. at 664-65. This case presents a misdemeanor conviction for a less serious crime, assault ***without*** the use of a deadly weapon, such that the elements of the offense do

not bring it within the ambit of particularly serious crimes so as to warrant further consideration. *See Matter of N-A-M-*, 24 I&N Dec. 336, 342 (BIA 2007) (observing that "[i]f the elements of the offense do not potentially bring the crime into a category of particularly serious crimes, the individual facts and circumstances of the offense are of no consequence, and the alien would not be barred from a grant of withholding of removal"). Accordingly, we will reverse the Immigration Judge's particularly serious crime finding.

We acknowledge that the Immigration Judge found alternatively that, even if the applicant's offense were not for a particularly serious crime, the applicant was not credible, and had not sufficiently corroborated his claims (IJ at 5-9). We find the The Immigration Judge's adverse credibility finding to be clearly erroneous, and will reverse it. *See* 8 C.F.R. § 1003.1(d)(3)(i); *see also Matter of J-Y-C-*, 24 I&N Dec. 260 (BIA 2007).

The Immigration Judge largely based his adverse credibility finding on inconsistencies regarding the timing and number of past persecutory events. For example, the Immigration Judge observed that in his credible fear interview, the applicant stated that the last time he was threatened was in October 2011, when MS-13 members told him that he needed to leave Honduras to save his life (IJ at 6; Exh. 3 at 5). By contrast, at his hearing the applicant stated that he was never approached by MS-13 members following his return to El Salvador in 2011, and neither his declaration or application specifically allege that he was threatened by gang members at that time (Tr. at 74-75; Exhs. 7, 7A). When asked to explain this inconsistency, the applicant stated that the credible fear interview was in error, and that in October 2011 he decided to return to the United States because he *felt* threatened because he knew that the gang was looking for him, not that they actually said anything to him verbally (Tr. at 100-02). We determine that this sufficiently resolves this apparent inconsistency. In any case, we observe that the applicant's asylum application, his very detailed declaration, and his testimony are all entirely consistent in stating that after the applicant's removal to Honduras in January 2011, he remained in hiding in that country until his departure in 2012, and did not interact with the gang members in 2011 (Tr. at 74-75, 100; Exh. 7; Exh. 7A at 6-7).

The Immigration Judge also observed that in his declaration, the applicant stated that in 1998 gang members told him that he should leave town or they would kill him the next time they saw him (IJ at 7; Exh. 7A at 4). In his testimony, the applicant stated only that the gang members told them they would give him time to "think about it" after he told them he would not join them (IJ at 7; Tr. at 48-53). We agree with the applicant's statement on appeal that it was entirely plausible that the gang members would both warn the applicant that his refusal to join them would result in his death and provide him with an opportunity to change his mind (Applicant's Br. at 6). In any case, the applicant testified that during that encounter, and thereafter, he feared that he would be killed by the gang for refusing their demand that he join them (Tr. at 53-54). It is reasonable that, when testifying about a short interaction that occurred some 21 years prior to his hearing, the applicant would be unable to recall whether the gang verbally threatened him with death at that time, or he simply feared that they would kill him based on their statements and demeanor during the encounter.

Similarly, it was not inconsistent for the applicant to state in his credible fear interview that he refused to join the MS-13 gang three times despite his testimony that he was only physically

harmed by them on two occasions (IJ at 7; Tr. at 52; Exh. 3; Exh. 7A). As he correctly observes on appeal, the applicant specifically testified that during the course of one of his two encounters with the gang, in 1998, he twice refused their requests that he join them, such that the applicant's description of two encounters but three refusals is consistent (Tr. at 51-52; Applicant's Br. at 5).

In addition, the Immigration Judge observed that the applicant stated in his application and declaration that the gang members broke his nose, yet testified that his nose was not broken (IJ at 7; Tr. at 56; Exh. 7; Exh. 7A at 5). However, while the applicant indeed testified that his nose was not *broken*, he continued on to state that the gang members hit him on the nose with a metal pipe, causing his nose to either "fracture" or "split" (Tr. at 56). While the applicant, as a layperson, may well have been uncertain as to the medical diagnosis of his nose injury, he consistently stated that he suffered a significant injury to his nose when he was hit with a metal pipe. Thus, there is no inconsistency.

The Immigration Judge also found that "[t]he Respondent's demeanor, including his long pause before responding to an inconsistency, his insufficient explanations when confronted with various inconsistencies, and his at times inconsistent, implausible, confusing, and contradictory testimony regarding both material and non-material aspects of his claims, cumulatively, suggest a lack of credibility" (IJ at 8). Adverse credibility findings that are based on demeanor findings are generally entitled to significant deference. *Chen v. U.S. Dep't of Justice*, 426 F.3d 104, 113 (2d Cir. 2005) (stating that "[w]e give particular deference to credibility determinations that are based on the adjudicator's observation of the applicant's demeanor"). However, the Immigration Judge did not provide any examples to support this single conclusory statement, rendering this finding much less persuasive. *See, e.g.*, *Lin v. U.S. Dep't of Justice*, 453 F.3d 99, 109 (2d Cir. 2006) (observing that the Second Circuit is generally more "confident in our review of observations about an applicant's demeanor where, as here, they are supported by specific examples of inconsistent testimony").

We determine that the remainder of the Immigration Judge's findings regarding the applicant's credibility are insufficient to support an overall adverse credibility finding. While the Immigration Judge also found that the applicant had submitted insufficient evidence to corroborate his claim, thus bearing on the applicant's credibility, we observe that the Immigration Judge did not specify what types of evidence would have been reasonably available to the applicant for him to submit (IJ at 8-9). *See Yang v. Gonzales*, 496 F.3d 268, 273 (2d Cir. 2007) (stating that "[a]n applicant's failure to corroborate his or her testimony may bear on credibility, because the absence of corroboration in general makes an applicant unable to rehabilitate testimony that has already been called into question"). While the Immigration Judge appropriately found that some of the evidence submitted was entitled to limited weight, such a finding does not bear on the applicant's credibility, in the absence of a finding that the applicant could reasonably have submitted additional evidence that would have assisting in resolving the credibility concerns raised. *See Liu v. Holder*, 575 F.3d 193, 198 (2d Cir. 2009) (stating that "we require an [Immigration Judge] to specify the points of testimony that require corroboration," though this need not be done *prior* to the Immigration Judge's disposition of the alien's claim). Accordingly, we will reverse the Immigration Judge's adverse credibility finding in this matter.

Because the particularly serious crime bar does not preclude deferral of removal under the Convention Against Torture, the Immigration Judge considered the applicant's eligibility for such relief. Notably, the standard for protection under the Convention Against Torture pursuant to 8 C.F.R. § 1208.16(c) and deferral of removal under the Convention Against Torture pursuant to 8 C.F.R. § 1208.17 are identical, such that our determination to reverse the Immigration Judge's particularly serious crime finding does not affect our analysis. Moreover, the Immigration Judge did not rely on his adverse credibility finding in assessing the applicant's claim under the Convention Against Torture. We discern no clear error in the Immigration Judge's finding that the applicant did not establish that it is more likely than not he will be subject to torture that is "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity" if returned to Mexico, and we affirm his determination on this issue for the reasons he provided in his decision (IJ at 15-18). *See* 8 C.F.R. §§ 1208.16(c) and 1208.18(a); *Hui Lin Huang v. Holder*, 677 F.3d 130 (2d Cir. 2012) (holding that the Board must review for clear error an Immigration Judge's factual predictions regarding what will likely happen to an alien upon removal); *Matter of Z-Z-O-*, 26 I&N Dec. at 590 (same). While the applicant argues that the Immigration Judge did not correctly apply the "acquiescence" standard for claims under the Convention Against Torture, we determine that he properly cited to, and applied, the correct standard (Applicant's Br. at 15-18). *See, e.g.*, IJ at 12 (stating that "the Respondent does not aver and the evidence does not sufficiently establish that the police in Honduras were aware of, or remained willfully blind to, the private acts from MS-13 gang members during, or after, the Respondent's alleged attack in 2000").

In light of his finding that the particularly serious crime bar served to preclude withholding of removal under section 241(b)(3) of the Act, the Immigration Judge did not assess the merits of the applicant's application for this form of relief. Therefore, we will remand this matter to the Immigration Judge for him to assess whether the applicant has met his burden of proof for statutory withholding of removal, with consideration of his credible testimony. The parties should be afforded an opportunity to update the record, and to make any additional legal and factual arguments desired regarding the applicant's eligibility for relief from removal. The Board expresses no opinion regarding the ultimate outcome of these proceedings.

Accordingly, the following orders will be entered.

ORDER: The appeal is sustained.

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

FOR THE BOARD

ADDENDUM B

Matter of J-J-V-, (BIA July 18, 2017) (unpublished)

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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DHS/ICE Office of Chief Counsel - WAS
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Arlington, VA 22202

Name: J[redacted] V[redacted], J[redacted]

A[redacted]-994

Date of this notice: 7/18/2017

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

Sincerely,

Cynthia L. Crosby
Deputy Chief Clerk

Enclosure

Panel Members:
Pauley, Roger
Guendelsberger, John
Neal, David L

Userteam: Docket

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: [redacted] 994 – Arlington, VA

Date: JUL 18 2017

In re: J[redacted] J[redacted] V[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Benjamin R. Winograd, Esquire

ON BEHALF OF DHS: James R. Rust
Assistant Chief Counsel

APPLICATION: Withholding of removal; Convention Against Torture

The respondent, a native and citizen of El Salvador, has appealed from the portion of the Immigration Judge's February 3, 2017, decision denying his applications for withholding of removal under section 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1231(b)(3), and protection under the Convention Against Torture (CAT), 8 C.F.R. §§ 1208.16-18.[1] The Department of Homeland Security opposes the appeal. For the reasons set out below, the respondent's appeal will be sustained, in part, and the record will be remanded to the Immigration Judge for further proceedings.

We review an Immigration Judge's findings of fact, including credibility determinations, under the "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including issues of law, discretion, and judgment, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

On January 23, 2015, the respondent was convicted in the Circuit Court at Fairfax County, Virginia, of grand larceny from the person in violation of section 18.2-95 of the Virginia Code Annotated (IJ at 2; Exhs. 1-2). The statute, in pertinent part, provides that a person shall be guilty of grand larceny who "commits larceny from the person of another of money or other thing of value of $5 or more[.]" VA. CODE ANN. § 18.2-95. The respondent was sentenced to 3 years of incarceration, but all 3 years were suspended with the conditions of good behavior and supervised probation (IJ at 2,6; Exhs. 1-2).

The respondent contends that the Immigration Judge erred in finding that he was convicted of a particularly serious crime and, consequently, ineligible for withholding of removal under the Act (Respondent's Br. at 8-14). *See* section 241(b)(3)(B)(ii) of the Act, 8 U.S.C. § 1231(b)(3)(B)(ii); 8 C.F.R. § 1208.16(d)(2). We agree.

[1] The respondent has not appealed the Immigration Judge's denial of his application for asylum (IJ at 6). Consequently, we deem this issue waived. *See Matter of R-A-M-*, 25 I&N Dec. 657, 658 n. 2 (BIA 2012) (stating that arguments not raised on appeal are waived).

An alien is ineligible for withholding of removal if he has been convicted by a final judgment of a particularly serious crime. Section 241(b)(3)(B)(ii) of the Act; 8 C.F.R. § 1208.16(d)(2).[2] Regardless of the sentence imposed, an offense may qualify as a particularly serious crime after considering the nature of the conviction, the type of sentence imposed, and the underlying circumstances of the conviction. *Matter of N-A-M-*, 24 I&N Dec. 336, 337(BIA 2007); *see also Gao v. Holder*, 595 F.3d 549, 557 (4th Cir. 2010) (stating the Board determines whether a crime is particularly serious by considering factors like the nature of the conviction, the type of sentence imposed, and the circumstances of the crime). Crimes against persons are more likely to be considered serious. *Matter of N-A-M-*, 24 I&N Dec. at 343 (finding that felony menacing in Colorado was a particularly serious crime based on its nature, i.e., its elements, because it requires that a person use, or represent that she is armed with, a deadly weapon and place or attempt to place another in fear of serious bodily injury).

The language of the statute "provides the essential key" in assessing whether a crime is particularly serious. *Matter of G-G-S-*, 25 I&N Dec. 339, 344 (BIA 2014). "If the elements of the offense do not potentially bring the crime into a category of particularly serious crimes, the individual facts and circumstances of the offense are of no consequence, and the alien would not be barred from a grant of withholding of removal." *Matter of N-A-M-*, 24 I&N Dec. at 342. However, if the elements of an offense are potentially "within the ambit of a particularly serious crime, all reliable information" may be considered, including sentencing information and conviction records. *Matter of G-G-S-*, 25 I&N Dec. at 343.

The Immigration Judge's finding that the respondent's conviction for grand larceny from the person under section 18.2-95 of the Virginia code is a particularly serious crime will be reversed. As set out above, the initial, and potentially only required analysis, is based on the nature, i.e., the elements of the statute. *Matter of G-G-S-*, 25 I&N Dec. at 344. As pointed out by the respondent, larceny from the person in Virginia does not require direct physical contact with the victim (Respondent's Br. at 9-10). *See Garland v. Commonwealth*, 446 S.E.2d 628, 629-30 (Va. Ct. App. 1994) (stating that theft from the person can include theft of property in the victim's custody or control. For example, taking money from under the driver's seat of a car being operated). In addition, unlike robbery, grand larceny from the person does not require a taking by violence or intimidation. *See Commonwealth v. Hudgins*, 611 S.E.2d 362, 365 (Va. 2005); *see also Winn v. Commonwealth*, 462 S.E.2d 911, 912-13 (Va. Ct. App. 1995) (discussing the violence and intimidation required for a robbery). Finally, larceny from the person in Virginia is categorized as a "crime against property" under Chapter 5 of section 18.2 of the Virginia code.[3] Based on the foregoing, we conclude that the elements of larceny from the person in Virginia under section

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[2] Because the respondent was not sentenced in the aggregate to at least 5 years of confinement, his conviction does not qualify as a per se particularly serious crime (IJ at 6-7; Respondent's Br. at 9; Exh. 2 (Sentencing Order at 2)). *See* section 241(b)(3)(B)(iv) of the Act; *Matter of N-A-M-*, 24 I&N at 341-42.

[3] Robbery, in contrast, is categorized in Virginia as a "crime against the person" under Chapter 4 of section 18.2 of the Virginia Code.

18.2-95 do not fall within the ambit of a particularly serious crime, and, consequently, there is no need to consider the underlying facts of the offense.[4]

Because the respondent is not barred from pursuing withholding of removal under the Act, we deem it appropriate to remand the record to the Immigration Judge to consider the respondent's application for said relief on the merits. On remand, the parties will be permitted to submit additional arguments and evidence pertinent to the respondent's application for withholding of removal. We express no opinion on the ultimate outcome of this case. Accordingly, the following orders are entered.[5]

ORDER: The respondent's appeal is sustained with regard to his eligibility to apply for withholding of removal under the Act.

FURTHER ORDER: The Immigration Judge's February 3, 2017, decision is reversed and vacated with regard to the finding that the respondent is ineligible for withholding of removal under the Act based on a particularly serious crime.

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

FOR THE BOARD

[4] Although not dispositive to our decision, we also observe that the respondent was a juvenile at the time of the offense and all three years of his sentence were suspended (IJ at 1,6; Exh. 2). We also acknowledge that the submitted police report contains troubling details regarding the conduct of acquaintances of the respondent who robbed a man and hit him with a bottle (IJ at 6-7; Exh. 9). However, the report seems to indicate that at most the respondent acted as a lookout for these individuals (*see* I.J. at 5; Respondent's Br. at 10-11; Exh. 9 at 32). Although certainly criminal conduct, we find that this conduct does not rise to the level of a particularly serious crime.

[5] Thus, we deem it unnecessary to address the respondent's eligibility under the CAT at this time.

ADDENDUM C

Matter of H-H-S-M-, (BIA Dec. 12, 2019) (unpublished)

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

Madeo, Donald F
Youman Madeo & Fasano
299 Broadway
Suite 810
New York, NY 10007

DHS/ICE Office of Chief Counsel - NYD
201 Varick, Rm. 1130
New York, NY 10014

Name: S[redacted] M[redacted], H[redacted] ... **A [redacted]-551**

Date of this notice: 12/12/2019

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:
Greer, Anne J.
O'Connor, Blair
Wilson, Earle B.

Userteam: Docket

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A[redacted]-551 – New York, NY

Date: DEC 12 2019

In re: H[redacted] H[redacted] S[redacted] M[redacted] a.k.a. [redacted]

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Donald F. Madeo, Esquire

ON BEHALF OF DHS: Shantal D. Sparks
Assistant Chief Counsel

The respondent, a native and citizen of El Salvador, has appealed from the Immigration Judge's June 14, 2019, decision (1) denying his applications for asylum and withholding of removal, and (2) granting his application for protection under the Convention Against Torture. *See* sections 208 and 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158, 1231(b)(3); 8 C.F.R. §§ 1208.13, 1208.16-1208.18. The Department of Homeland Security ("DHS") has appealed and and challenges the Immigration Judge's grant of the respondent's application for protection under the Convention Against Torture. The respondent filed a motion to dismiss the DHS's appeal as untimely. The respondent's motion will be denied, his appeal will be sustained, the DHS's appeal will be sustained, and the record will be remanded for further proceedings.

We review the findings of fact, including the determination of credibility, made by the Immigration Judge under the "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including issues of law, discretion, or judgment, under the de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

As an initial matter, the respondent asserts that the DHS's appeal should be dismissed as untimely (Motion to Dismiss at 2). As the Immigration Judge issued his decision on June 14, 2019, the DHS's Notice of Appeal ("NOA") was due by June 15, 2019. *See* 8 C.F.R. § 1003.38(b) (explaining that a NOA to the Board must be filed within 30 calendar days). In support of his motion, the respondent provided a copy of the filing receipt, which indicates that the DHS submitted its NOA on July 16, 2019 (Motion to Dismiss, Exh. C). However, the date appears to be a scrivener's error, because the date stamp on the DHS's NOA indicates that the Board received the document on July 15, 2019 (NOA at 1). Therefore, because the record contains proof that the DHS timely filed the appeal, the respondent's motion to dismiss the DHS's appeal is denied.

On appeal, the respondent asserts that the Immigration Judge erred in finding that he was ineligible from withholding of removal because he was convicted of a particularly serious crime (Respondent's Br. at 3-4).[1] An alien who has been convicted of a particularly serious crime is not

[1] Although the respondent asserts on appeal that he is also eligible for asylum, we note that he does not meaningfully challenge the Immigration Judge's alternative finding that his asylum

eligible for withholding of removal. *See* section 241(b)(3)(B)(ii) of the Act; 8 U.S.C. § 1231(b)(3)(B)(ii). Although "[t]he Immigration and Nationality Act does not define a 'particularly serious crime,'" it "does state parameters . . . for crimes that are particularly serious per se." *Nethagani v. Mukasey*, 532 F.3d 150, 155 (2d Cir. 2008) (internal modification omitted). In the withholding context, "if an alien has been convicted of one or more aggravated felonies that result in an aggregate prison sentence of at least five years, then he [or she] has per se been convicted of a particularly serious crime." *Id.* at 155 n.3 (internal modification omitted). If a conviction is not a particularly serious crime per se, an Immigration Judge may still determine that the conviction is for a particularly serious crime by examining "(1) 'the nature of the conviction,' (2) 'the circumstances and underlying facts of the conviction,' (3) 'the type of sentence imposed[,] and (3) whether the type and circumstances of the crime indicate that the alien will be a danger to the community.'" *Id.* at 155, *quoting Matter of Frentescu*, 18 I&N Dec. 244, 247 (BIA 1982), *modified by Matter of C-*, 20 I&N Dec. 529 (BIA 1992).

In determining whether the respondent was convicted of a particularly serious crime, the Immigration Judge considered the respondent's 2007 conviction for aggravated driving while intoxicated (DWI), and his conviction for a second DWI, which occurred in 2016 (IJ at 8). The Immigration Judge analyzed the underlying facts and circumstances of each conviction and stated that he "f[ound] that th[e] two convictions [established] that the respondent ha[d] been convicted of a particularly serious crime" (IJ at 8). It therefore appears that the Immigration Judge erred by combining the underlying facts and circumstances of the 2007 and 2016 DWIs to find that both convictions together established that the respondent had committed a particularly serious crime (IJ at 8). Under these circumstances, we agree with the respondent that remand is warranted for a new analysis regarding whether (1) the respondent's convictions constitute aggravated felonies that have an aggregate prison sentence of at least 5 years, or (2) either of the respondent's convictions—individually—constitute a particularly serious crime under the relevant framework. *See Matter of R-A-M-*, 25 I&N Dec. 657, 659 (BIA 2012) (explaining that "whether an offense is a particularly serious crime" is determined "on a case by case basis" by "examin[ing] the nature of *the* conviction, . . . and underlying facts of *the* conviction" (internal emphasis added)).

Turning to the DHS's appeal, the DHS asserts that the Immigration Judge erred in granting the respondent's application for protection under the Convention Against Torture (DHS's Br. at 13-15). As an applicant for protection under the Convention Against Torture, the respondent must show that it is "more likely than not" that (1) he will be tortured in El Salvador, and that (2) the torture will be inflicted by or with the consent or acquiescence (including willful blindness) of a public official or person acting in an official capacity. *See* 8 C.F.R. § 1208.16(c)(2); *Khouzam v. Ashcroft*, 361 F.3d 161, 168 (2d Cir. 2004).

application was untimely (IJ at 4-5; Respondent's Br. at 2-5). Therefore, we deem the issue to be waived, and the respondent is not eligible for asylum. *See Matter of R-A-M-*, 25 I&N Dec. 657, 658 n.2 (BIA 2012) (stating that, where a respondent fails to appeal an issue addressed in an Immigration Judge's decision, that issue is waived before the Board); *see also Matter of A-B-*, 27 I&N Dec. 316, 340 (A.G. 2018) (explaining that, if an asylum application is fatally flawed in one respect, an Immigration Judge or the Board need not examine the remaining elements of the asylum claim).

In support of his decision, the Immigration Judge found that (1) the national police in El Salvador engage in systematic violence against gay men, and (2) "prosecutors provide little, if any, assistance with respect to any complaints [against] the police" (IJ at 11; Exh. 8 at 128-29). The DHS asserts that the Immigration Judge did not sufficiently address the country conditions evidence in this regard. Although the Immigration Judge found that the country condition reports demonstrate that the Salvadoran "national police engage in violence against gay men and other members of sexual minorities," and that this violence "includes torture," the country condition reports to which he cites generally do contain additional, relevant information, as noted by the DHS. On remand, the Immigration Judge should more fully address this evidence. The parties may supplement the record with additional argument and evidence.

Accordingly, the following orders will be entered.

ORDER: The respondent's motion is denied.

FURTHER ORDER: The respondent's appeal is sustained.

FURTHER ORDER: The Department of Homeland Security's appeal is sustained.

FURTHER ORDER: The record is remanded to the Immigration Court for further proceedings consistent with the foregoing opinion.

FOR THE BOARD

ADDENDUM D

Matter of S-D-S-C-, (BIA May 3, 2019) (unpublished)

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

Cisneros Vilchis, Brenda A
ECBA Volunteer Lawyers Project, Inc.
8 South Lyon Street
Batavia, NY 14020

DHS/ICE Office of Chief Counsel - BTV
4250 Federal Dr.
Batavia, NY 14020

Name: S[redacted] C[redacted], S[redacted]... **A[redacted]-765**

Date of this notice: 5/3/2019

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:
Baird, Michael P.
Greer, Anne J.
Donovan, Teresa L.

Userteam: Docket

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A[redacted]-765 – Batavia, NY

Date: MAY - 3 2019

In re: S[redacted] D[redacted] S[redacted] C[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Brenda A. Cisneros Vilchis, Esquire

ON BEHALF OF DHS: Peter J. Marché
Assistant Chief Counsel

APPLICATION: Withholding of removal; Convention Against Torture

The respondent, a native and citizen of the Philippines, appeals from an Immigration Judge's October 15, 2018, decision denying her applications for withholding of removal under section 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1231(b)(3), and protection pursuant to the Convention Against Torture, 8 C.F.R. §§ 1208.16(c)-1208.18.[1] The appeal will be sustained and the record will be remanded.

This Board reviews the Immigration Judge's factual findings, including credibility findings and predictions as to the likelihood of future events, for clear error. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

The record supports the Immigration Judge's determination that on January 20, 2017, the respondent was convicted of bail jumping—underlying offense theft by unlawful taking in the third degree for which a sentence of 3 years of imprisonment may be imposed—in violation of N.J.S.A. § 2C:29-7, with a maximum sentence of 2 years or more of imprisonment (IJ at 1-2, 6; Tr. at 19-21; Exhs. 1-1A; Exh. 2; Exh. 3, Tab C). We also will not disturb the Immigration Judge's finding that on December 27, 2017, the respondent was convicted of bail jumping in the third degree pursuant to N.Y.P.L. § 215.55, and sentenced to 6 months of incarceration (IJ at 5-6; Tr. at 41; Exh. 2).

The respondent argues that the Immigration Judge erroneously concluded that her bail jumping convictions were for particularly serious crimes barring her from receiving withholding of removal under section 241(b)(3)(B)(ii) of the Act considering the nature of the convictions, the

[1] The respondent does not dispute that she is ineligible for asylum on the basis of the time bar of section 208(a)(2)(B) of the Act, 8 U.S.C. § 1158(a)(2)(B) (IJ at 3 n.2). Likewise, the respondent has not challenged the Immigration Judge's ruling that she is ineligible for asylum pursuant to the particularly serious crime bar of section 208(b)(2)(A)(ii) of the Act due to her conviction for an aggravated felony, as defined in section 101(a)(43)(T) of the Act, 8 U.S.C. § 1101(a)(43)(T) (IJ at 6 n.3; Tr. at 11-12). *See* section 208(b)(2)(B)(i) of the Act.

sentences imposed, and the facts underlying the convictions (Respondent's Br. at 5-6). *See Matter of N-A-M-*, 24 I&N Dec. 336, 342 (BIA 2007); *see also Nethagani v. Mukasey*, 532 F.3d 150, 155 (2d Cir. 2008). We agree.

In relevant part, the New Jersey bail jumping statute provides:

> A person set at liberty by court order, without or without bail, or who has been issued a summons, upon condition that he will subsequently appear at a specified time and place in connection with any offense or any violation of law punishable by a period of incarceration, commits an offense if, without lawful excuse, he fails to appear at that time and place.

N.J.S.A. § 2C:29-7. Furthermore, the New York bail jumping statute states:

> A person is guilty of bail jumping in the third degree when by court order he has been released from custody or allowed to remain at liberty, either upon bail or upon his own recognizance, upon condition that he will subsequently appear personally in connection with a criminal action or proceedings, and when he does not appear personally on the required date or voluntarily within thirty days thereafter.

N.Y.P.L. § 215.55.

We conclude that the elements of these offenses potentially bring them within the ambit of particularly serious crimes. *See Matter of N-A-M-*, 24 I&N Dec. at 342. In this regard, we acknowledge the Immigration Judge's reasoning that bail jumping conveys an inherent disregard for a court's authority (IJ at 7). At the same time, the offenses require no serious threat to others. *Cf. id.* at 343 (alien found convicted of a particularly serious crime where the relevant Colorado menacing statute required using, or representing that one was armed with, a deadly weapon and knowingly placing or attempting to place another person in fear of imminent, serious bodily injury). The respondent further testified that she committed the New Jersey offense because she could not obtain transportation to her sentencing hearing while living in New York, and she committed the New York offense because she could not control her drug addiction (IJ at 6; Tr. at 69-70, 78). Although we do not suggest that these facts underlying the respondent's bail jumping convictions excuse her criminal conduct, the facts do not indicate that her crimes rose to the level of "particularly serious." *See id.* at 342. Finally, we disagree with the Immigration Judge's finding that it is significant that the respondent committed other criminal offenses after jumping bail, as factors which are subsequent and unrelated to the bail jumping offenses are not germane to whether *bail jumping itself* is a particularly serious crime (IJ at 6-7). *See id.* at 343. For these reasons, we reverse per our de novo review the Immigration Judge's ruling that the respondent's bail jumping convictions were for particularly serious crimes which bar her from receiving withholding of removal under section 241(b)(3)(B)(ii) of the Act.

The respondent asserts that she has otherwise demonstrated eligibility for withholding of removal (Respondent's Br. at 8-11). We will remand the record for the Immigration Judge to consider this question as a matter of first impression. *See* 8 C.F.R. § 1003.1(d)(3)(iv) (the Board may remand when additional fact-finding is required in a given case).

Moreover, in light of our foregoing rulings, we reverse per our de novo review the Immigration Judge's holding that the respondent is ineligible for withholding of removal under the Convention Against Torture pursuant to 8 C.F.R. § 1208.16(d)(2) (IJ at 9-10). On remand, the Immigration Judge should determine in the first instance the respondent's eligibility for withholding of removal under the Convention Against Torture. *See* 8 C.F.R. § 1208.16(c).

The Immigration Judge may take whatever action he deems necessary to comply with our order. We express no opinion as to the ultimate outcome of the case.

Accordingly, the following order is entered.

ORDER: The appeal is sustained and the record is remanded for the entry of a new decision consistent with this opinion.

FOR THE BOARD

ADDENDUM E

Matter of L-G-M-, (BIA Sept. 24, 2018) (unpublished)

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

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DHS/ICE Office of Chief Counsel - SND
880 Front St., Room 2246
San Diego, CA 92101-8834

Name: G[redacted] M[redacted], L[redacted] **A[redacted]-348**

Date of this notice: 9/24/2018

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:
Wendtland, Linda S.
Greer, Anne J.
Crossett, John P.

Userteam: Docket

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: [redacted]348 – San Diego, CA

Date: SEP 24 2018

In re: L[redacted] G[redacted] M[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Murray D. Hilts, Esquire

ON BEHALF OF DHS: Jonathan Grant
Assistant Chief Counsel

APPLICATION: Asylum; withholding of removal; Convention Against Torture; voluntary departure

The respondent, a native and citizen of Mexico, appeals from the Immigration Judge's June 14, 2017, decision denying his applications for asylum and withholding of removal pursuant to sections 208 and 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158, 1231(b)(3), protection under the Convention Against Torture, 8 C.F.R. §§ 1208.16(c)-1208.18, and voluntary departure under section 240B(b) of the Act, 8 U.S.C. § 1229c(b). The record will be remanded.

We review the findings of fact made by the Immigration Judge, including the determination of credibility, for clear error. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including questions of judgment, discretion, and law, de novo. 8 C.F.R. § 1003.1(d)(3)(ii). The Immigration Judge found both the respondent and his mother credible (IJ at 12).

The respondent's application for asylum, withholding of removal, and protection under the Convention Against Torture is based on his fear of being harmed by criminal cartel members in Mexico (IJ at 5-6). The Immigration Judge concluded that the respondent was ineligible for asylum and withholding of removal under both the Act and the Convention Against Torture because he has been convicted of a particularly serious crime (IJ at 2-5). The Immigration Judge also concluded that the respondent did not meet his burden of proof to establish eligibility for deferral of removal under the Convention Against Torture because his fear of being tortured in Mexico is speculative and because he did not establish that Mexican officials would acquiesce in his torture by private actors (IJ at 5-6). The Immigration Judge also denied the respondent's application for voluntary departure, concluding that he was not a person of good moral character and did not establish that he warranted such relief in discretion (IJ at 6-8).

The respondent's removability is undisputed. According to the Immigration Judge, the respondent is ineligible for asylum and withholding of removal because he has been convicted of a "particularly serious crime" within the meaning of sections 208(b)(2)(A)(ii) and 241(b)(3)(B)(ii) of the Act (IJ at 2-5). The factual basis for that determination is the respondent's 2010 conviction for driving while under the influence of alcohol with two or more prior DUI convictions within 10 years in violation of sections 23152(b) and 23546 of the California Vehicle Code, for which he

was sentenced to 120 days in county jail (IJ at 4; Exh. 15 at 49-52). Specifically, although the offense is not a particularly serious crime by virtue of its status as an aggravated felony, the Immigration Judge nonetheless found it particularly serious based on the nature of the conduct prohibited by sections 23152(b) and 23546 of the California Vehicle Code and the facts and circumstances surrounding its commission (IJ at 3-5). The Immigration Judge also appears to have considered the respondent's complete criminal history, including conduct that did not result in a conviction, in assessing whether the respondent has been convicted of a particularly serious crime (IJ at 3-4). The respondent challenges that determination on appeal, arguing that the offense does not rise to the level of a "particularly serious crime."

When an applicant for asylum and withholding of removal has been convicted of an offense that is neither an aggravated felony nor a "particularly serious crime" based solely on its elements, we assess the applicant's eligibility for protection by examining "the nature of the conviction, the type of sentence imposed, and the circumstances and underlying facts of the conviction." *Matter of N-A-M-*, 24 I&N Dec. 336, 342 (BIA 2007); *see also Matter of Frentescu,* 18 I&N Dec. 244, 247 (BIA 1982)).

We agree with the Immigration Judge that driving while intoxicated is an exceedingly dangerous crime, and we in no way condone the respondent's actions. *Accord Matter of Siniauskas*, 27 I&N Dec. 207 (BIA 2018). In our precedential decisions, however, we have generally reserved the "particularly serious crime" designation for offenses of exceptional gravity. *See, e.g., Matter of R-A-M-*, 25 I&N Dec. 657, 662 (BIA 2012) (possession of child pornography); *Matter of N-A-M-*, 24 I&N Dec. at 343 (felony menacing involving the use or threatened use of a deadly weapon); *Matter of Y-L-*, 23 I&N Dec. 270, 274 (A.G. 2002) (drug trafficking); *Matter of S-V-*, 22 I&N Dec. 1306, 1308-09 (BIA 2000) (robbery), *disagreed with on other grounds by Zheng v. Ashcroft*, 332 F.3d 1186, 1194-96 (9th Cir. 2003); *Matter of L-S-J-*, 21 I&N Dec. 973, 975 (BIA 1997) (robbery with a deadly weapon); *Matter of B-*, 20 I&N Dec. 427, 429-30 (BIA 1991) (aggravated battery with a firearm); *Matter of Garcia-Garrocho*, 19 I&N Dec. 423, 425-26 (BIA 1986) (burglary of a dwelling while armed with a deadly weapon or causing injury to another); *Matter of Carballe*, 19 I&N Dec. 357, 360 (BIA 1986) (armed robbery with a firearm).

Not all serious crimes can be "*particularly* serious." Indeed, we have expressly held that, "except possibly in unusual circumstances ..., we would not find a single conviction for a misdemeanor offense to be a 'particularly serious crime.'" *Matter of Juarez*, 19 I&N Dec. 664, 665 (BIA 1988) (finding no particularly serious crime where the applicant was convicted in a municipal court for misdemeanor assault with a deadly weapon). We have also concluded that even serious felonies such as residential burglary and alien smuggling may not be *particularly* serious on their facts. *See Matter of Frentescu*, 18 I&N Dec. at 247 (holding that burglary with intent to commit theft was not a particularly serious crime where "there [was] no indication that the [burglarized] dwelling was occupied or that the applicant was armed; nor [was] there any indication of an aggravating circumstance."); *Matter of L-S-*, 22 I&N Dec. 645, 655-56 (BIA 1999) (holding that alien smuggling was not a particularly serious crime, even though the offense posed some risk to the alien hidden in the floor of a van, because "there [was] no indication the [applicant] intended to harm the smuggled alien" and the applicant "did not, in fact, cause her harm."); *see also Alphonsus v. Holder*, 705 F.3d 1031, 1048-49 (9th Cir. 2013) (stating, that the line must be drawn so that particularly serious crimes are not a major proportion of crimes generally, that

"particularly" in this context means "in a special or unusual degree," or "to an extent greater than in other cases or towards others," and that the Board has generally adhered to the notion that only relatively "grave" crimes are considered particularly serious, though not always)(internal quotation marks omitted).

At the relevant time, section 23152(b) of California Vehicle Code (2010) stated that "[i]t is unlawful for any person who has 0.08 percent or more, by weight, of alcohol in his or her blood to drive a vehicle." Further, under section 23546(a) of the California Vehicle code—applicable here—a defendant who has been convicted of two prior DUI offenses within the last 10 years is subject to a sentence of imprisonment in the county jail for not less than 120 days nor more than 1 year. Neither statute requires any aggravating element (in addition to the DUI recidivism), such as injury to another person or damage to property. *Cf. Avendano-Hernandez v. Lynch*, 800 F.3d 1072, 1078 (9th Cir. 2015) (affirming this Board's determination that a conviction under California Health & Safety Code § 23153(b) for driving under the influence and causing bodily injury to another person is a particularly serious crime); *Anaya-Ortiz v. Holder*, 594 F.3d 673, 679-80 (9th Cir. 2010) (same). It does not appear that any of the respondent's DUI offenses involved an accident, much less injury to a victim (IJ at 6; Exh. 15 at 49-52). *See, e.g., Matter of R-A-M-*, 25 I&N Dec. at 662; *Matter of N-A-M-*, 24 I&N Dec. at 343; *Matter of L-S-*, 22 I&N Dec. at 649; *Matter of Frentescu*, 18 I&N Dec. at 247; *Matter of L-S-J-*, 21 I&N Dec. at 974-75.

Considering the nature of the respondent's conviction and sentence, as well as the circumstances and underlying facts of the offense, we conclude that his offense of recidivist DUI with a blood alcohol concentration of .08 or higher—while very serious—does not constitute a particularly serious crime absent damage or immediate danger to persons or property. While *Delgado v. Holder*, 648 F.3d 1095, 1107-08 (9th Cir. 2011) (en banc) implies that a recidivist DUI conviction may be a particularly serious crime under some circumstances (a question we need not decide), the respondent's conviction here is not for a particularly serious crime based on the particular circumstances present in this case.

Moreover, the Immigration Judge's apparent reliance on the respondent's complete history of contacts with the criminal justice system, including incidents that did not result in charges or convictions, to assess whether an individual crime is particularly serious, is erroneous. Rather, the focus of the analysis is on the "the nature of the *conviction*, the type of sentence imposed, and the circumstances and underlying facts of the *conviction*." *Matter of N-A-M-*, 24 I&N Dec. at 342 (emphasis added). The Immigration Judge's consideration of the respondent's contacts with the criminal justice system would be appropriate in the context of a discretionary determination or an assessment of good moral character under the catch-all provision set-forth in section 101(f) of the Act, 8 U.S.C. § 1101(f). However, it is not appropriate in the context of determining whether the nature of the conviction, the type of sentence imposed, and the circumstances and underlying facts of the conviction render it a particularly serious crime.[1] We therefore conclude that the respondent

[1] We clarify that we are not holding that recidivism is an irrelevant consideration with respect to determining whether a particular conviction constitutes a particularly serious crime. Rather, where, as here, the recidivism was proven as an element of the offense, it is appropriately considered in examining "the nature of the conviction, the type of sentence imposed, and the circumstances and

is not subject to the particularly serious crime bars to asylum and withholding of removal. *See* sections 208(b)(2)(A)(ii) and 241(b)(3)(B)(ii) of the Act.[2] The record will be remanded to determine whether the respondent otherwise qualifies for such relief.

ORDER: The appeal is sustained, the Immigration Judge's decision is vacated in part, and the record is remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

FOR THE BOARD

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underlying facts of the conviction." *Matter of Frentescu*, 18 I&N Dec. 247. However, in this case, in considering the respondent's complete history of contacts with the criminal justice system over many years, the Immigration Judge went well beyond considerations that can reasonably illuminate the seriousness of the particular conviction at issue here (IJ at 3-4).

[2] In light of this decision, we decline to consider the other arguments raised on appeal by the respondent at this time.

CERTIFICATE OF SERVICE

I, Philip L. Torrey, hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: December 28, 2020

/s/ Philip L. Torrey
Philip L. Torrey