



“PARTICULARLY SERIOUS CRIME” BARS TO ASYLUM AND WITHHOLDING

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I. Overview

The INA bars a person from getting asylum or withholding of removal if the applicant, “having been *convicted by a final judgment of a particularly serious crime (PSC)*, constitutes a danger to the community of the United States.”¹ A conviction “by final judgment” includes any conviction where a sentence is imposed even if the sentence is later withheld, deferred, or suspended.² In other words, if a client is convicted of an offense and is sentenced to deferred adjudication, that crime can still be a PSC for withholding and asylum purposes.³ U.S. courts have held that any individual convicted of a PSC automatically constitutes a danger to the community.⁴ This bar is triggered by a conviction of a particularly serious crime, and the government is not required to prove separately that the individual poses a danger to the community.⁵

Particularly Serious Crimes under Asylum Law. Convictions of certain offenses are automatically defined as particularly serious crimes for purposes of qualifying for asylum. Any felony or misdemeanor that qualifies as an “aggravated felony” under INA § 101(a)(43) is automatically a PSC.⁶ The adjudicator must use the categorical approach to determine if the underlying offense is an aggravated felony.⁷ Even if a conviction is not categorically an aggravated felony, an adjudicator can still find that an applicant is statutorily ineligible for asylum because they have been convicted of a PSC.⁸

¹ See INA §§ 208(b)(2)(A)(ii), 241(b)(3)(B)(ii); 8 CFR § 208.13(c).

² See *Matter of D-L-S-*, 28 I&N Dec. 568, 574 (BIA 2022).

³ See *Id.*, 575.

⁴ See *Matter of L-S-*, 22 I&N Dec. 645, 650 (BIA 1999), citing *Matter of K-*, 20 I&N Dec. 418 (BIA 1991), affirming *Kofa v. INS*, 60 F.3d 1084 (4th Cir. 1995). See also *Ramirez-Ramos v. INS*, 814 F.2d 1394, 1397 (9th Cir. 1987) (upholding the BIA’s interpretation as “reasonable” and agreed with the Eleventh Circuit’s view that the “statute sets forth a cause and effect relationship: the fact that the [individual] has committed a particularly serious crime makes the [individual] dangerous within the meaning of the statute.”) (internal cites omitted).

⁵ The United Nations High Commissioner for Refugees (UNHCR) and legal scholars have disagreed with this position. See *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, 30 (Rev. Feb. 2019); <https://www.unhcr.org/en-us/publications/legal/5ddfcdc47/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html>. The UNHCR handbook requires a separate determination of dangerousness before a refugee who committed a particularly serious crime can be expelled. Commentators on international law have also criticized the BIA’s position. See also Goodwin-Gill, *The Refugee in International Law* 140 (1996) (commenting that while it is unclear that a separate showing of danger to the community is required, “principles of natural justice and due process require something more than mere mechanical application of the exception” and that some kind of balancing of the gravity of the crime against the danger must be made).

⁶ See INA § 208(b)(2)(B)(i) and INA § 101(a)(43).

⁷ See *Flores v. U.S. Att’y Gen.*, 856 F.3d 280 (3d Cir. 2017); see also ILRC, *How to Use the Categorical Approach Now* (Oct. 2021). https://www.ilrc.org/sites/default/files/resources/2021_categorical_approach_oct_final2.pdf.

⁸ See *Delgado v. Holder*, 648 F.3d 1095, 1106 (9th Cir. 2011) (en banc) (finding that the Attorney General has the authority to designate offenses as PSCs through case-by-case adjudication for individual asylum cases). See also *Gao v. Holder*, 595 F.3d 549, 557 (4th Cir. 2010); *Ali v. Achim*, 468 F.3d 462, 469 (7th Cir. 2006).

Particularly Serious Crimes When Applying for Withholding of Removal. The INA similarly bars an Immigration Court from granting withholding of removal to a person convicted of a PSC.⁹ This bar also applies to withholding of removal under the Convention Against Torture (CAT) but *does not* apply to deferral of removal under CAT.¹⁰ For withholding of removal purposes, an aggravated felony or a group of aggravated felonies are automatically PSCs only when the person was sentenced to a period of imprisonment of at least five years in the aggregate.¹¹ Sentence enhancements are included in the five-year period.¹² Without a total of five years, aggravated felony convictions are *not necessarily* PSCs for withholding, and the adjudicator must determine whether each offense is an aggravated felony on a case-by-case basis.¹³

NOTE ON PARTICULARLY SERIOUS CRIMES PRE-1990: In most circuits, a conviction entered before November 29, 1990 (the effective date of the Immigration Act of 1990—IMMACT 90), can still be found to be a particularly serious crime per se or on a case-by-case basis. Under the statute, the definitions of an aggravated felony and a particularly serious crime are specifically retroactive.¹⁴ Many circuits have recognized the retroactivity provisions of the statute.¹⁵ However, within the Ninth Circuit, this issue has not been clearly decided. Accordingly, advocates within the Ninth Circuit can make the argument that the aggravated felony definition and the particularly serious crime bar are impermissibly retroactive.¹⁶ Even within the Ninth Circuit if an applicant pleaded guilty to a crime before November 29, 1990, the conviction may be considered as a negative discretionary factor if the relief being sought is asylum.¹⁷

⁹ See INA § 241(b)(3)(B)(iii).

¹⁰ See 8 CFR §§ 1208.16(d), 1208.17(a). Withholding of removal and deferral of removal under CAT are difficult forms of relief to obtain and are limited in their protections. To get either form of CAT protection, the noncitizen must establish that it is more likely than not that they would be tortured in the proposed country of removal by a public official acting in an official capacity or other person acting in an official capacity. 8 CFR §§ 1208.16(c), 1208.18; *Matter of J-G-R-*, 28 I&N Dec. 733 (BIA 2023). The person may be subject to detention while receiving this protection. See INA § 241 and 8 CFR §§ 241 and 1241. For a thorough explanation of CAT relief see ILRC, *Qualifying for Protection under the Convention Against Torture* (November 2023), <https://www.ilrc.org/resources/community/qualifying-protection-under-convention-against-torture>.

¹¹ See INA § 241(c)(3)(B); *Matter of N-A-M-*, 24 I&N Dec. 336, 338 (BIA 2007).

¹² See *Mairena v. Barr*, 917 F.3d 1119 (9th Cir. 2019).

¹³ See *Matter of N-A-M-*, 24 I&N Dec. at 338.

¹⁴ See Immigration Act of 1990 § 515, PL 101-649, 104 Stat 4978 (Nov. 29, 1990); Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, PL 102-232, 105 Stat 1733 (Dec. 12, 1991).

¹⁵ See *Hernandez v. Holder*, 760 F.3d 855 (8th Cir. 2014) citing *Mossaad v. Gonzales*, 244 Fed. App'x 701, 704 n.1 & n.2 (6th Cir. 2007) surveying cases on this issue.

¹⁶ See *Feroz v. INS*, 22 F.3d 225 (9th Cir. 1994) (holding that the statute is retroactive). *But see Kankamalage v. INS*, 335 F.3d 858 (9th Cir. 2003) (holding that the regulations amending the definition are not retroactive).

¹⁷ See *Kankamalege*, 335 F.3d at 865.

Post Conviction Relief: Should the noncitizen be convicted of a crime that might be a PSC, depending on the jurisdiction, post-conviction relief might be an option.¹⁸ Should the advocate think that a person has been convicted of a PSC they should investigate post-conviction relief as early in the process as possible. If the advocate is not a criminal immigration specialist, please consider finding an attorney who specializes in this field or contact the local public defender’s office to see if one of the attorneys can help.

II. What is a Particularly Serious Crime?

A. Factors To Consider

In *Matter of Frentescu*, the BIA set out criteria to determine whether a crime is particularly serious. The adjudicator must consider the following factors in making a PSC determination:

- (a) nature of the conviction;
- (b) sentence;
- (c) whether it was a crime against a person or property; and,
- (d) whether the person is a danger to society.¹⁹

The criteria do not involve weighing the severity of the persecution the individual might face upon removal to their home country. Nor does the determination include a consideration of family or community ties. The focus is solely on the crime itself.

In *Matter of N-A-M-*, the BIA noted that its view of whether a conviction is particularly serious crime has “evolved” since *Frentescu* and the Board no longer engages in a separate analysis of whether the applicant poses a danger to the community.²⁰ The Board noted that it also no longer focuses on the length of sentence imposed and focuses instead on the nature of the crime. Finally, it does not focus on the likelihood of future misconduct. In *Delgado v. Holder*, the Ninth Circuit held that a “crime is particularly serious if the nature of the conviction, the underlying facts and circumstances, and the sentence imposed justify the presumption that the

¹⁸ See ILRC, *Overview of California Post-Conviction Relief for Immigrants* (July 2022), https://www.ilrc.org/sites/default/files/resources/ca_pcr_july_2022.pdf. For a more in depth treatment of this subject see the ILRC manual on California post-conviction relief, *California Post-Conviction Relief for Immigrants: How to use Criminal Courts to Erase the Immigration Consequences of Crimes*, (2023).

¹⁹ See 18 I&N Dec. 244, 247 (BIA 1982); see also *Martins v. INS*, 972 F.2d 657, 660 (5th Cir. 1992) (trafficking heroin was considered to be a particularly serious crime); *Mahini v. INS*, 779 F.2d 1419 (9th Cir. 1986) (possession and intent to distribute heroin); *Crespo-Gomez v. Richard*, 780 F.2d 932 (11th Cir. 1986) (possession of cocaine for sale); *Matter of Carballe*, 19 I&N Dec. 357 (BIA 1996) (robbery with firearm, attempted robbery with firearm, grand theft second degree and accessories after the fact), *superseded by statute as stated in Alphonsus v. Holder*, 705 F.3d 1031 (9th Cir. 2013); see also *Matter of Rodriguez-Coto*, 19 I&N Dec. 208 (BIA 1985).

²⁰ See 24 I&N Dec. 336.

convicted immigrant is a danger to the community.”²¹ Nonetheless, courts still refer to the *Frentescu* standards, as modified by *Matter of N-A-M*.²²

Matter of N-A-M clarified the scope of information that may be used to determine whether a crime is a PSC. The BIA recognized it had previously held that certain crimes may be classified as particularly serious crimes *per se* without proceeding to an individualized examination, but that it “generally examined a variety of factors” and considered individualized circumstances.²³

Apart from cases involving aggravated felonies, whether an offense is a PSC is determined by case law. The Attorney General may designate *per se* particularly serious crimes by regulation but may also determine particularly serious crimes on a case-by-case basis.²⁴ Because the INA is silent on how adjudicators should determine whether an offense is particularly serious,²⁵ the BIA has developed a two-step framework for this analysis.

- **Step One:** the adjudicator determines whether the elements of the offense fall within the “ambit” of a particularly serious crime.²⁶ “If the elements of the offense do not potentially bring the crime into a category of particularly serious crimes,” the inquiry is over.²⁷ In this context, “crimes against persons are more likely to be particularly serious than are crimes against property.”²⁸
- **Step Two:** if the elements of the crime fall within the ambit of a particularly serious crime, then the adjudicator considers the “nature of the conviction, the type of sentence imposed, and the circumstances and underlying facts of the conviction.”²⁹ The court should consider “all reliable information and [is] not limited to reviewing the record of conviction and sentencing information.”³⁰ Advocates should challenge the government’s attempts to use unreliable evidence, such as police reports and unsworn statements, in making a particularly serious crime determination.

²¹ See *Delgado*, 648 F.3d at 1107 (the limit on judicial review in INA § 242(a)(2)(B)(ii), does not bar review of whether an offense constitutes a particularly serious crime, because it “bars court review of discretionary decisions only when Congress itself set out the Attorney General’s discretionary authority in the statute” quoting *Kucana v. Holder*, 558, U.S. 233 (2010)); see also *Valerio-Ramirez v. Sessions*, 882 F.3d 289, 294 (1st Cir. 2018).

²² See *Anaya-Ortiz*, 594 F.3d 673, 679 (9th Cir. 2010); *Gao v. Holder*, 595 F.3d 549, 557 (4th Cir. 2010). *Nethagani v. Mukasey*, 532 F.3d 150, 155–56 (2d Cir. 2008); but see *Alaka v. Att’y Gen. of the U.S.*, 456 F.3d 88, 105 (3d Cir. 2006).

²³ See *Matter of Q-T-M-T-*, 21 I&N Dec. 639, 650 (BIA 1996); *Matter of Garcia-Garrocho*, 19 I&N Dec. 423, 426 (BIA 1986) (looking at the elements of the offense of burglary in the first degree and finding that, on its face, such a crime is a particularly serious one).

²⁴ See *Delgado*, 648 F.3d 1095.

²⁵ See *Chong v. INS*, 264 F.3d 378, 387 (3d Cir. 2001).

²⁶ See *Matter of N-A-M-*, 24 I&N Dec. at 342.

²⁷ See *Id.* See also *Ojo v. Garland*, 25 F.4th 152, 165 (2d Cir. 2022).

²⁸ See *Ojo*, 25 F.4th at 165, citing *Nethagani v. Mukasey*, 532 F.3d 150, 155 (2d Cir. 2008).

²⁹ See *Matter of N-A-M-*, 24 I&N Dec. at 342; see also *Anaya-Ortiz v. Mukasey*, 594 F.3d 673, 678 (9th Cir. 2010).

³⁰ See *Matter of N-A-M-*, 24 I&N Dec. at 343.

Under this analysis, if the elements of an offense do not bring the crime into the category or “ambit” of a particularly serious crime, the individual facts and circumstances of the offense are inconsequential.³¹ Additionally, the Board specifically rejected the notion that a crime must be an aggravated felony to be a particularly serious crime.³²

As explained in the introduction, the particularly serious crime standard for withholding of removal is distinct from the asylum standard. For withholding of removal, there is only one class of per se particularly serious crimes — aggravated felonies with a five-year sentence. If a person has been convicted of several aggravated felonies, the adjudicator must aggregate the sentences to determine if they fall within the five-year timeframe.³³ All other convictions (non-aggravated felonies) must be treated on a case-by-case basis.³⁴ Some immigration judges will skip over the preliminary consideration of whether the elements of the offense “potentially bring the crime into a category of particularly serious crimes,” or they might create a hybrid approach of blending the two steps and analyzing the facts without first considering the nature of the crime.³⁵ “Compliance with *Matter of N-A-M-* requires more than a mere acknowledge[ment]”; it requires the actual undertaking of the necessary evaluation devoid of any legal error.”³⁶ The BIA’s failure to apply its own precedent correctly for the particularly serious crime determination is reversible error.³⁷

Practice Tip: If your client has a misdemeanor or a non-violent felony conviction, remind the court that if the elements of the offense do not bring the crime into the ambit of particularly serious crimes, the inquiry ends. The individual facts and circumstances of the offense are of no consequence and the noncitizen cannot be barred from a grant of asylum or withholding. Only if the elements bring the conviction into the ambit of a particularly serious crime can the court look to step two. A single conviction of a misdemeanor offense without unusual circumstances is typically not a PSC.³⁸

³¹ See *Id.* at 342.

³² See *Id.* The Ninth Circuit upheld this finding in *Delgado*, 648 F.3d at 1105.

³³ See *Matter of N-A-M-*, 24 I&N Dec. at 338.

³⁴ See *Blandino-Medina v. Holder*, 712 F.3d 1338, 1345–46 (9th Cir. 2013).

³⁵ See e.g. *Farooq v. Attorney General United States*, 2023 WL 1813597; see also *Luziga v. Attorney General of the United States*, 937 F.3d 244, 248, 254-55 (3rd Cir. 2022) (finding that on remand, the agency should first determine whether the elements of Luziga’s offense potentially fall within the ambit of a particularly serious crime, and that only then may the court proceed to consider the facts and circumstances particular to Luziga’s case).

³⁶ See *Ojo v. Garland*, 25 F.4th 152, 168 (2d Cir. 2022), citing *Luziga*, 937 F.3d at 254.

³⁷ See *Id.* see also *Cruz v. Attorney General of the United States*, 452 F.3d 240, 250 (3d Cir. 2006); *Johnson v. Ashcroft*, 286 F.3d 696, 700 (3d Cir. 2002); *Saleh v. Sessions*, 756 F.App’x 502, 508 (6th Cir. 2018).

³⁸ See *Matter of Juarez*, 19 I&N Dec. 664 (BIA 1988) (misdemeanor conviction for assault upon another with a deadly weapon was not a particularly serious crime). Advocates should be aware that *Juarez* is an older case and predates *Matter of N-A-M-*. That said, it has never been vacated and advocates should argue that it is still precedential and good law.

Example: Maryam is convicted of misdemeanor assault. She is sentenced to two days in jail, but her sentence is suspended, and she is sentenced to three years of probation. It is her sole conviction. This conviction arguably would not fall within the ambit of a PSC. It is her only conviction, and it is a misdemeanor.³⁹

Mitigating factors: According to the BIA, adjudicators are not required to analyze the mitigating circumstances surrounding the offense, and, in fact, the BIA discouraged such considerations, explaining that “offender characteristics” are irrelevant because they “may operate to reduce a sentence but do not diminish the gravity of a crime.”⁴⁰ There is an argument that this holding is incorrect; and that a categorical rule preventing the adjudicator from considering mitigating circumstances undermines the ability of EOIR to conduct a case-by-case analysis.⁴¹ However, no court has overturned the BIA’s ruling. This prohibition on considering mitigating factors does not apply to mental health issues. Mental health is different.⁴²

Mental Health Factors: In 2014, the BIA held that a person’s mental health was not a factor to be considered in a particularly serious crime analysis and that adjudicators were constrained by how the mental health issues were addressed as part of the criminal proceedings.⁴³ The Eighth and Ninth Circuits rejected *Matter of G-G-S-* as inadequately reasoned and in conflict with BIA precedent.⁴⁴

The Ninth Circuit had three concerns about this holding and refused to defer to the BIA’s decision finding that the decision was unreasonable.⁴⁵

- First, the Ninth Circuit found that a categorical rule preventing the adjudicator from considering the noncitizen’s mental health undermines the ability of EOIR to conduct a case-by-case analysis in the case.⁴⁶
- Second, the Ninth Circuit found that the BIA erred in holding that it could not “reassess” the criminal court’s holdings. The court pointed out that consideration of mental-health-related evidence does not require the immigration courts to assess criminal culpability or the validity of the conviction. The immigration courts may consider reliable evidence as a part of the separate determination of dangerousness. The immigration court must determine whether the circumstances of the underlying crime are “so serious as to

³⁹ The facts of Maryam’s case roughly resemble *Matter of Juarez*.

⁴⁰ See *Matter of N-A-M-*, 24 I&N Dec. at 343.

⁴¹ See *Gomez-Sanchez v. Sessions*, 892 F.3d 985, 992 (9th Cir. 2018).

⁴² See *Matter of B-Z-R-*, 28 I&N Dec. 563 (A.G. 2022) *overruling* *Matter of G-G-S-*, 26 I&N Dec. 339 (BIA 2014).

⁴³ *Matter of G-G-S-*, 26 I&N Dec. 339 (BIA 2014).

⁴⁴ See *Gomez-Sanchez*, 892 F.3d at 985; *Shazi v. Wilkinson*, 988 F.3d 441 (8th Cir. 2021).

⁴⁵ *Chevron U.S.A., Inc. v. N.R.D.C., Inc.*, 467 U.S. 837 (1984) (under *Chevron* the courts must afford deference to an agency’s reasonable interpretations of ambiguous statutes that the agency is charged with administering).

⁴⁶ *Gomez-Sanchez*, 892 F.3d at 992.

justify removal to a country where there is a significant risk of persecution.”⁴⁷ Moreover, for a variety of reasons, the criminal court may never have considered the defendant’s mental state (the crime may have been a strict liability offense, or may have only required a mens rea of negligence, or the sentencing judges may have exercised their discretion and chose not to consider the defendant’s mental health).⁴⁸

- Third, the Ninth Circuit found that the BIA’s conclusion that mental health evidence was irrelevant as it did not lessen the danger the noncitizen posed to the community was unreasonable. The Ninth Circuit found this conclusion was inconsistent with the BIA’s own precedent of recognizing the relevance of motivation and intent to the particularly serious crime determination.⁴⁹

Similarly, the Eighth Circuit found the BIA’s decision to be problematic. Like the Ninth Circuit, the Eighth Circuit recognized that the mental health evidence that a noncitizen wishes to offer in immigration court may never have been presented to the criminal court. “Whether and to what extent an individual’s mental illness or disorder explains why a crime is particularly serious or not for immigration purposes is a distinct determination to be resolved by the IJ and the BIA.”⁵⁰ Accordingly, the court concluded that all reliable information pertaining to the nature of the crime including evidence of mental illness, can be considered in a PSC analysis.

Example. Lisbet was a survivor of domestic violence and had developed post-traumatic stress disorder. She was convicted of assaulting her abuser. While this set of circumstances may not have provided a defense to a criminal conviction, these circumstances would bear substantially on the immigration court’s determination of whether Lisbet had been convicted of a particularly serious crime and posed a danger to the community.⁵¹

The Attorney General took up this issue in *B-Z-R-*, noting that there was a circuit split between the Eighth and Ninth Circuits (rejecting *Matter of G-G-S-*) and the Tenth Circuit which had followed *G-G-S-*.⁵² The AG vacated *Matter of G-G-S-* holding that none of the rationales provided by the BIA justified the exclusion of mental health evidence.⁵³ The AG reiterated that “the essential key in determining whether an offense is particularly serious is whether it “indicates that the [respondent] poses a danger to the community.”⁵⁴ First, the AG noted that “the inquiry into whether a conviction is “particularly serious” does not involve any reassessment of criminal culpability. It concerns a distinct question: whether a respondent, having been convicted by a final judgment of a particularly serious crime, constitutes a danger

⁴⁷ See *Id.*, at 994.

⁴⁸ See *Id.*, at 994.

⁴⁹ See *Id.* at 996 citing *Matter of L-S-*, 22 I&N Dec. 645, 655-56 (BIA 1999) (finding that alien smuggling was not a particularly serious crime because the noncitizen did not intend to harm the victim).

⁵⁰ See *Shazi*, 988 F.3d at 450.

⁵¹ This example is from a footnote in *Gomez-Sanchez*. 892 F.3d at 996 n.10.

⁵² See *Birhanu v. Wilkinson*, 990 F.3d 1242 (10th Cir. 2021) vacated and remanded *Birhanu v. Garland*, 142 S. Ct. 2862 (2022) (remanding the case in light of the Attorney General’s decision in *Matter of B-Z-R-*).

⁵³ See *B-Z-R-*, 28 I&N Dec. at 566.

⁵⁴ See *Id.* at 563 (cleaned up) citing *Matter of Carballe*, 19 I&N Dec. 357, 360 (BIA 1986).

to the community of the United States.”⁵⁵ Second, the AG noted that “a respondent’s mental health condition may bear directly on whether the respondent poses a danger to the community.”⁵⁶

The mental health of the applicant is relevant both for purposes of asylum and withholding of removal.⁵⁷

Example: Guillermo was diagnosed with severe schizophrenia several years ago. He was not taking his medication and he swung a weightlifting bell at a storeowner, injuring him. Guillermo was convicted of felony assault with a deadly weapon and sentenced to two years of imprisonment. During the criminal proceedings, the storeowner testified that Guillermo wasn’t “all there.” The adjudicator can consider Guillermo’s mental health to determine whether he committed a PSC and is a danger to the community. The fact that Guillermo may have been having a psychotic episode related to his mental illness can help show that Guillermo’s offense was not a PSC.

B. Aggravated Felonies

The terms “particularly serious crime” and “aggravated felony” have a complex interaction that has changed under the statute over time, and they apply differently to asylum than to withholding of removal claims. “Aggravated felony” is a term of art defined in INA § 101(a)(43), which lists dozens of common law terms and references to federal statutes. Federal and state offenses can be aggravated felonies, as can foreign offenses for which the period of imprisonment ended within the previous fifteen years.⁵⁸ Even certain misdemeanor offenses can be held to be aggravated felonies. Whether or not a conviction is an aggravated felony is a complicated area of the law. Therefore, the practitioner should carefully examine every offense to determine whether it is an aggravated felony.

1. Asylum

For purposes of asylum, *any* aggravated felony is automatically defined as a PSC.⁵⁹ This definition could include something such as a nonviolent theft offense with a one-year suspended sentence.⁶⁰ However, whether the underlying crime is an aggravated felony is subject to the categorical analysis.⁶¹

⁵⁵ See *Id.* 28 I&N Dec. at 566.

⁵⁶ See *Id.* at 567.

⁵⁷ See *Id.*

⁵⁸ See INA § 101(a)(43).

⁵⁹ See INA § 208(b)(2)(B)(i) and 8 CFR 208.13(c)(2)(D).

⁶⁰ See INA 101(a)(43)(G) defining an aggravated felony as a theft offense for which the term of imprisonment is at least one year.

⁶¹ See *Flores v. U.S. Att’y Gen.* 856 F.3d 280 (3d Cir. 2017).

Proposed Criminal Bars to Asylum: Currently Enjoined

DHS and DOJ proposed a significant regulatory expansion of the criminal bars to asylum in July 2020.⁶² The proposed regulations substantially expanded the categories of offenses that will be deemed PSCs including any felony conviction and several categories of misdemeanors like possession of a controlled substance, driving under the influence, and domestic violence offenses. These regulations have been enjoined and are not currently in effect.⁶³ This advisory, therefore, does not address the impact of these regulations on the existing PSC framework.

2. Temporary Protected Status (TPS)

The statutory bars to asylum apply to TPS applications too.⁶⁴ If a person has been convicted of an aggravated felony or a PSC, they are statutorily ineligible for TPS.

3. Withholding of Removal

For purposes of withholding of removal, by contrast, not all aggravated felonies are defined as PSCs.⁶⁵ While there is a presumption that an aggravated felony is a PSC, it is not automatically one unless the applicant was sentenced to an aggregate term of imprisonment of at least five years for one or more aggravated felonies.⁶⁶ For example, the BIA found that despite the fact that it was an aggravated felony, a federal conviction for alien smuggling was not a PSC for purposes of withholding when there was no violence or serious injury, and a sentence of three months was imposed. But as an aggravated felony, it was a PSC for purposes of asylum.⁶⁷

C. Case Law Determinations on PSCs

Below are charts of common offenses found to be PSCs and offenses found not to be PSCs. These mini charts can help you start researching whether your client’s particular offense is a particularly serious crime.⁶⁸

⁶² See Procedures for Asylum and Bars to Asylum Eligibility, 84 Fed Reg. 69,640 (proposed Dec. 19, 2019).

⁶³ See *Pangea Legal Servs. v. U.S. Dep’t of Homeland Sec.*, 512 F. Supp. 3d 966 (N.D. Cal. 2021). The Office of Immigration Litigation is maintaining a spreadsheet on the effective regulations, which is a useful resource for tracking the status of many regulations that were proposed during the Trump Administration but were later fully or partially enjoined by courts. This spreadsheet is available at https://nipnlg.org/sites/default/files/2023-05/2023_30Jan-OIL-currently-effective-regs.pdf.

⁶⁴ See INA § 244(c)(2)(B)(ii); 8 CFR § 244.4(a).

⁶⁵ See *Lopez-Cardona v. Holder*, 662 F.3d 1110, 1111-12 (9th Cir. 2011).

⁶⁶ See 8 CFR 208.16(d)(3).

⁶⁷ See *Matter of L-S-*, 22 I&N Dec. 645 (BIA 1999).

⁶⁸ In 2018, the Immigration Defense Project also published a helpful chart that lists PSCs as found by the BIA and the Federal Circuit Courts. See IDP, “Particularly Serious Crime” Bars on Asylum and Withholding of Removal (July 2018), https://www.immigrantdefenseproject.org/wp-content/uploads/IDP_Chart_FINAL.pdf.

Cases Finding Particularly Serious Crimes

Statutory Offense and State	Citation
Felony Assault (MN)	<i>Jama v. Wilkinson</i> , 990 F.3d 1109 (8th Cir. 2021)
Battery with a Dangerous Weapon (WI)	<i>Ali v. Achim</i> , 468 F.3d 462 (7th Cir. 2006)
Felony Battery (FL)	<i>Matter of D-L-S-</i> , 28 I&N Dec. 568 (BIA 2022)
Burglary of a Dwelling (NY)	<i>Matter of Garcia-Garrocho</i> , 19 I&N Dec. 423 (BIA 1985)
Possession of Child Pornography (CA)	<i>Matter of R-A-M-</i> , 25 I&N 657 (BIA 2012)
Domestic Violence (TX)	<i>Aviles-Tavera v. Garland</i> , 22 F.4th 478 (5th Cir. 2022)
Driving Under the Influence (This ground may only apply to felony DUIs or DUIs with injury) (CA)	<i>Avendano-Hernandez v. Lynch</i> , 800 F.3d 1072 (9th Cir. 2015) (felony DUI causing injury under California law is a PSC); <i>Anaya-Ortiz v. Mukasey</i> , 594 F.3d 673 (9th Cir. 2010) (DUI resulting in injury is a PSC)
Vehicular Homicide (WI)	<i>Ruderman v. Whitaker</i> , 914 F.3d 567 (7th Cir. 2019)
Identity Theft (Federal)	<i>Valerio-Ramirez v. Sessions</i> , 882 F.3d 289 (1st Cir. 2018)
Mail Fraud (Federal)	<i>Arbid v. Holder</i> , 700 F.3d 379 (9th Cir. 2012)
First Degree Manslaughter (NY)	<i>Ahmetovic v. INS</i> , 62 F.3d 48 (2d Cir. 1995)
Felony Menacing (CO)	<i>Matter of N-A-M-</i> , 24 I&N Dec. 336 (BIA 2007)
Robbery (FL) and (CA)	<i>Matter of L-S-J-</i> , 21 I&N Dec. 973 (BIA 1997) (Florida robbery is a PSC); <i>Matter of Carballe</i> , 19 I&N Dec. 357 (BIA 1986); <i>Matter of Rodriguez-Coto</i> , 19 I&N Dec. 208 (BIA 1985) (California robbery is a PSC)
Securities Fraud (Federal)	<i>Kaplun v. U.S. Att’y Gen.</i> , 602 F.3d 260 (3d Cir. 2010)
Sexual Abuse (NY)	<i>Flores v. Holder</i> , 779 F.3d 159 (2d Cir. 2015)
Strangulation (PA)	<i>Sunwar v. Att’y Gen. of U.S.</i> , 989 F.3d 239 (3d Cir. 2010)
Tampering with Evidence (NY)	<i>Denis v. U.S. Att’y Gen.</i> , 663 F.3d 201 (3d Cir. 2011)

Cases Finding Crime Was Not a PSC

Statutory Offense	Citation
A Single Misdemeanor Assault (CA)	<i>Matter of Juarez</i> , 19 I&N Dec. 664 (BIA 1988) (single conviction for misdemeanor assault is not a PSC)
Accessory after the Fact (with a sentence of one year or less) ⁶⁹ (SC)	<i>Flores v. Att’y Gen. U.S.</i> , 856 F.3d 280 (3d Cir. 2017)
Alien Smuggling (Federal)	<i>Matter of L-S-</i> , 22 I&N Dec. 654 (BIA 1999)
Burglary with Intent to Commit Theft (IL)	<i>Matter of Frentescu</i> , 18 I&N Dec. 244 (BIA 1982)
Resisting Arrest (CA)	<i>Alphonsus v. Holder</i> , 705 F.3d 1031 (9th Cir. 2013)
Simple Possession of a Controlled Substance (unknown jurisdiction)	<i>Matter of Toboso-Alfonso</i> , 20 I&N Dec. 819 (BIA 1990)
Unlawful Taking and Driving of Vehicle (CA)	<i>Matter of V-S-Z-</i> , 22 I&N Dec. 1338 (BIA 2000)

D. Drug Trafficking Offenses

Drug tracking offenses are their own special category. An aggravated felony drug trafficking offense is categorically a bar to asylum as a PSC.⁷⁰ However, for withholding of removal, there is a rebuttable presumption that a conviction for drug trafficking is a particularly serious crime.⁷¹ At least one circuit is questioning this presumption and is calling on the Attorney General to reconsider *Matter of Y-L-*, in light of “Congress’s increasingly nuanced view of drug trafficking offenses.”⁷² As of the writing of this Advisory, a drug trafficking offense is not a particularly serious crime under the following circumstances:

- The applicant was peripherally involved in a transaction involving only a small amount of drugs and money;
- No violence occurred; and,
- Minors were not affected.⁷³

⁶⁹ A conviction for accessory after the fact with a sentence of more than one year is an aggravated felony and may be a particularly serious crime. *Pugin v. Garland*, 143 S. Ct. 1833 (2023).

⁷⁰ See INA § 101(a)(43)(B).

⁷¹ See *Matter of Y-L-*, 23 I&N Dec. 270 (A.G. 2002).

⁷² See *Carvalho v. Garland*, 18 F.4th 66, 71 (1st Cir. 2021).

⁷³ See *Matter of Y-L-*, 23 I&N Dec. 270 (A.G. 2002). The Ninth Circuit has held that this standard may be applied to convictions on or after May 5, 2002. See *Miguel-Miguel v. Gonzales*, 500 F.3d 941, 947 (9th Cir. 2007).

An advocate may present evidence and testimony to prevent a PSC finding where drug trafficking was involved.

Other than the aggravated felony bars, the determination of whether an offense is a particularly serious crime is made on a case-by-case basis, based on factors such as whether the offense involved violence against people, the extent of injury, the length of sentence, and other factors. The adjudicator may look outside the confines of the record of conviction.⁷⁴

III. Conclusion

Determining whether a crime is particularly serious is a legally and factually intensive step in determining an applicant’s eligibility for asylum, withholding of removal, and CAT protection. For asylum, any aggravated felony is categorically a PSC and therefore, a bar. But never presume a crime is an aggravated felony – no matter how bad the title of the law. Similarly, never presume a crime is not an aggravated felony – no matter how innocuous the title of the law.⁷⁵ Advocates must research whether a particular offense is an aggravated felony.

For withholding of removal (under the INA or CAT), any person convicted of an aggravated felony, or several aggravated felonies, with an aggregate term of imprisonment of five years or more, has been convicted of a particularly serious crime. Unless the person has been sentenced to an aggregate term of five years, the conviction is not a per se particularly serious crime.⁷⁶ To determine whether a conviction is a particularly serious crime, the adjudicator must use a two-step analysis. First, the crime must fall within the ambit of a PSC. Next the circumstances surrounding the crime must support a finding of a PSC. Simply because a court or the BIA has found a similar offense (or the exact offense) to be a PSC does not mean that you should not fight the designation. Also, as stated above, remember that based on your jurisdiction, post-conviction relief may be an option for the applicant and should be pursued.

⁷⁴ See *Hernandez v. Garland*, 52 F.4th 757, 766 (9th Cir. 2022); *Matter of D-L-S-*, 28 I&N Dec. 568, 577 (BIA 2022).

⁷⁵ See *Diaz-Quirazco v. Barr*, 931 F.3d 830, 845 (9th Cir. 2019) (the definition of a conviction “does not depend on the moniker the state affixed on the offense”). For more information about aggravated felonies see, ILRC, *Practice Advisory, Aggravated Felonies* (April 2017), https://www.ilrc.org/sites/default/files/resources/aggravated_felonies_4_17_final.pdf; ILRC, *How to Use the Categorical Approach Now* (October 2021), https://www.ilrc.org/sites/default/files/resources/2021_categorical_approach_oct_final2.pdf. See also, ILRC, *California Quick Reference Crimes Chart* (August 2023) <https://calchart.ilrc.org>.

⁷⁶ For more information about sentencing (in California), see ILRC, *California Sentences and Immigration* (November 2020).



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About the Immigrant Legal Resource Center

The Immigrant Legal Resource Center (ILRC) works with immigrants, community organizations, legal professionals, law enforcement, and policy makers to build a democratic society that values diversity and the rights of all people. Through community education programs, legal training and technical assistance, and policy development and advocacy, the ILRC's mission is to protect and defend the fundamental rights of immigrant families and communities.