

STATUTORY BARS TO ASYLUM: WHAT IS SO SERIOUS ABOUT A “PARTICULARLY SERIOUS CRIME?”

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WHAT CONSTITUTES A “PARTICULARLY SERIOUS CRIME?”

A noncitizen convicted of a “particularly serious crime” is ineligible for asylum or withholding of removal. Specifically, a person is statutorily barred from relief if he or she, “having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community.” [*Sections 208(b)(2)(A)(ii), 241(b)(3)(B)(ii) of the Immigration and Nationality Act (INA).*] There is no statutory definition of a particularly serious crime; however, in the context of determining whether an applicant is subject to the bar, a conviction of any aggravated felony is considered to be a conviction of a particularly serious crime and bars asylum eligibility. [*INA §208(b)(2)(B)(i).*] If the applicant was convicted of an aggravated felony that received a five-year or more sentence of imprisonment, the conviction is deemed a particularly serious crime and the applicant is also barred from withholding of removal. [*INA §241(b)(3)(B)(i). But see Matter of Y–L–, 23 I&N Dec. 270 (AG 2002) (conviction involving trafficking in a controlled substance is presumptively a particularly serious crime even if the sentence is less than five years; however, presumption of particularly serious crime may be rebutted).*]

A conviction does not have to be an aggravated felony for it to be considered a particularly serious crime. [*Matter of N–A–M–, 24 I&N Dec. 336, 336 (BIA 2007), aff'd, N–A–M– v. Holder, 587 F.3d 1052 (10th Cir. 2009), cert. denied, 131 S. Ct. 898 (2011).*] Other offenses may be considered a particularly serious crime in the discretion of the immigration judge. Such analysis requires a case-by-case examination of the offense. The Board of Immigration Appeals (BIA) and most federal courts generally apply the following factors:

- (1) the nature of the conviction;
- (2) the circumstances and underlying facts of the conviction; and
- (3) the type of sentence imposed.

[*Id. at 342.*]

Over time, the BIA has eliminated several important criteria that would have contributed significantly to the exercise of favorable discretion. Historically, in applying the bar, the BIA, under *Matter of Frentescu*, 18 I&N Dec. 244, 247 (BIA 1982), also assessed whether an individual is a danger to the community; however, in *Matter of N–A–M–*, the BIA found that its analysis has “evolved” and held that the focus “is on the nature of the crime and not the likelihood of future serious misconduct.” [*Matter of N–A–M–, 24 I&N Dec. at 342.*] To an extent, this stands contrary to the BIA's recognition that the “goal of protecting the public” is “at the heart of the ‘particularly serious crime’ bar,” as an assessment of an applicant's potential danger to the community would be germane for that objective. [*Id. at 341.*] Moreover, without consideration of this highly relevant factor, immigration attorneys are prevented from presenting their clients' cases in the most favorable light. Positive equities or other discretionary factors, such as rehabilitation or the respondent's family or community ties, are not considered to be “significant to the analysis.” [*Matter of R–A–M–, 25 I&N Dec. 657, 662 (BIA 2012); see also Matter of L–S–, 22 I&N Dec. 645, 650–51 (BIA 1999).*]

Additionally, although the length of the sentence may be considered, the BIA has found that this factor "is not the most accurate or salient factor to consider in determining the seriousness of an offense." [*Id.* at 343.] This is another factor that could have contributed considerably to the exercise of discretion.

Another challenge for attorneys is that the immigration judge can review all evidence available in determining whether the statutory bar applies. The standard set forth by the BIA virtually invites a "re-trial" of the original offense if it is not categorically a particularly serious crime. The categorical approach, which limits the evidence that the adjudicator may examine to the record of conviction, is inapplicable to considering whether a crime is particularly serious. In fact, "all reliable information may be considered in making a particularly serious crime determination, including the conviction records and sentencing information, as well as other information outside the confines of a record of conviction." [*Matter of N-A-M-*, 24 I&N Dec. at 342; see also *Anaya-Ortiz v. Holder*, 584 F.3d 673, 678–80 (9th Cir. 2010) (holding that applicant's testimony could be relied upon in a particularly serious crime determination).]

The sole focus on the nature of the conviction and the circumstances and underlying facts of the conviction is plainly to the detriment of the applicant, in most cases, yet these are the standards currently set forth by the BIA. In recent years, the U.S. Supreme Court has repeatedly declined to hear cases testing the limits of the particularly serious crimes bar. [See, e.g., *Gao v. Holder*, 595 F.3d 549 (4th Cir. 2010), cert. denied, 131 S. Ct. 898 (2011) (nonaggravated felony is a particularly serious crime).]

RECENT DEVELOPMENTS: *MATTER OF R-A-M-*, 25 I&N DEC. 657 (BIA 2012)

On January 3, 2012, the BIA, in *Matter of R-A-M-*, held that a conviction for possession of child pornography is a particularly serious crime and applied the bar for withholding for removal, accordingly. [*Matter of R-A-M-*, 25 I&N Dec. at 657.] This case does not appear to introduce any new standards or analysis, but rather, reaffirms the reasoning set forth in *Matter of N-A-M-*, as previously explained. In *Matter of R-A-M-*, the BIA rejected the immigration judge's consideration of the respondent's rehabilitation and the fact that "there was no indication that the respondent had been violent in the past or would be violent in the future." [*Id.* at 660.] The BIA also rejected the judge's reliance on the length of the sentence, stating that "the nature of the respondent's crime is so condemnable that the length of the sentence is less significant to the analysis." [*Id.* at 662. But see *Matter of Juarez*, 19 I&N Dec. 664 (BIA 1988) (a single conviction of a misdemeanor normally is not a particularly serious crime).]

Instead, the BIA focused on the nature of the offense and the specific facts and circumstances of the crime. In making its determination, the BIA's review extended beyond the record of conviction and it relied on the respondent's testimony, the arrest report, and the presentence report. It acknowledged that possession of child pornography was a less serious offense than producing or distributing it, but nonetheless found that the respondent "contributed to the sexual abuse of children." [*Id.* at 661.] The BIA noted that downloading child pornography creates a demand for its production and that the "circulation of child pornography continues to harm the child's reputation and emotional well-being." [*Id.*] The BIA offers an inconsistent analysis, as it deems the crime as inherently heinous, however, it maintains that an individualized analysis applies, as possession of child pornography is not *per se* a particularly serious crime. [*Id.*]

PRACTICE POINTERS—MAKING YOUR CLIENT'S CONVICTION NOT SO SERIOUS

1. Review your client's criminal record and confirm whether your client has actually been convicted of a crime for immigration purposes. [See *INA* §§208(b)(2)(A)(ii), 241(b)(3)(B)(ii).] For purposes of the statutory bar, your client must have "been convicted by a final judgment of particularly serious crime." If a final judgment is not readily available, submit a request for your client's "rap sheet" to the Federal Bureau of Investigation (FBI). [Instructions available at www.fbi.gov/about-us/cjis/background-checks/submitting-an-identification-record-request-to-the-fbi.]
2. Work with criminal counsel to preserve your client's eligibility for relief before his or her criminal judgment is final.

- a. Avoid conviction of a particularly serious crime (*i.e.*, any aggravated felony) in order to preserve eligibility for asylum.
 - b. If you cannot avoid an aggravated felony conviction, try to avoid conviction of a particularly serious crime (*i.e.*, aggravated felony with a sentence of five years or more), or an aggravated felony involving unlawful trafficking in a controlled substance (regardless of sentence), in order to preserve eligibility for withholding of removal.
 - c. If your client will be able to avoid removal, try to seek a disposition of the criminal case that will not bar the finding of good moral character necessary for citizenship.
3. Work with criminal counsel to determine whether post-conviction relief in criminal court is an option in order to modify or vacate a conviction of a particularly serious crime. In order to eliminate the conviction for immigration purposes, a conviction must be vacated due to a procedural or substantive defect in the underlying criminal proceeding, rather than for reasons related to rehabilitation or hardship. [*Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003).]
 4. If the offense is related to drug trafficking, try to prove in immigration court that under the circumstances of your case, the crime was not particularly serious.
 - a. Despite *Matter of Y-L-*'s holding that a drug trafficking offense is presumptively a particularly serious crime, the BIA states specific conditions where the presumption of particularly serious crime may be rebutted under "extraordinary and compelling" circumstances. [See *Matter of Y-L-*, at 276-77.] Although the threshold is extremely difficult to meet, practitioners should not overlook this exception.
 - b. Research the law in your circuit to determine whether you can avoid the stringent *Y-L-* standard. For instance, the U.S. Court of Appeals for the Ninth Circuit has held, in the drug trafficking context, that a change in the law by the BIA cannot be applied retroactively. [See *Miguel-Miguel v. Gonzales*, 500 F.3d 941, 946 (9th Cir. 2007).] Accordingly, the more liberal *Frentescu* criteria would apply for a pre-2002 drug trafficking offense. Even if your case is bound by *Y-L-*, practitioners should still present this retroactivity argument, if applicable.
 5. Object to unreliable evidence presented in immigration court and provide direct testimony, if helpful to your client. This is especially important given the standard recently reaffirmed by the BIA in *Matter of R-A-M-*, which allows the immigration judge to consider all evidence available in making a particularly serious crime determination. Depending on the circumstances, putting on direct evidence of what "actually happened" may benefit your client, as U.S. Immigration and Customs Enforcement (ICE) is unlikely to present witnesses or other direct evidence outside of police reports and court documents.
 6. Lastly, even if there is a finding that an applicant was convicted of a "particularly serious crime," your client may still qualify for deferral or removal under the Convention Against Torture (CAT) if he or she would be tortured if removed. If an immigration judge finds that a statutory bar prohibits withholding of removal, he or she *must* grant deferral of removal if the applicant qualifies for protection under the CAT. [8 CFR §1208.17(a).] A person granted deferral of removal receives a final order and may become eligible for release on bond under an order of supervision. Deferral does not confer any lawful or permanent immigration status and status may be terminated if the judge finds that there is no longer a likelihood of torture in the individual's country. [8 CFR. §1208.17(b).]

A "particularly serious crime" determination can prevent a deserving applicant from receiving protection through asylum or withholding of removal. It is vital that all steps are taken at the appropriate procedural junctures to avoid such convictions, either during the pleading phase in criminal court, or through post-conviction relief. If avoiding the conviction is not possible, the applicant may be forced to present his or her case in an unfavorable setting where most evidence is permitted and discretionary factors, such as rehabilitation, etc., will not be considered, even in the most compelling cases. All proactive measures available must be taken to preserve relief for your client and to avoid a particularly serious problem.