U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
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Name: R[redacted]-H[redacted], S[redacted]... **A [redacted]-572**

Date of this notice: 8/17/2020

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:
Goodwin, Deborah K.
Pepper, S. Kathleen
Donovan, Teresa L.

Userteam: Docket

File: A[redacted]-572 – Otay Mesa, CA Date: AUG 17 2020

In re: S[redacted] P[redacted] R[redacted]-H[redacted]

IN ASYLUM AND/OR WITHHOLDING PROCEEDINGS

APPEAL

ON BEHALF OF APPLICANT: Murray D. Hilts, Esquire

APPLICATION: Deferral of removal

The applicant, a native and citizen of Mexico, appeals from the Immigration Judge's decision dated March 29, 2018. In that decision, the Immigration Judge found the applicant ineligible for withholding of removal under section 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1231(b)(3), or pursuant to the Convention Against Torture.[1] The Immigration Judge also denied the applicant's application for deferral of removal pursuant to the Convention Against Torture. The appeal will be dismissed in part and sustained in part, and the record will be remanded for further proceedings consistent with this order.

We review an Immigration Judge's factual determinations, including credibility determinations, for clear error. *See* 8 C.F.R. § 1003.1(d)(3)(i). The Board uses a de novo standard of review for questions of law, discretion, judgment, and all other issues in appeals from decisions of Immigration Judges. *See* 8 C.F.R. § 1003.1(d)(3)(ii). The applicant bears the burden of establishing that she is eligible for, and deserving of, all relief sought. *See* section 240(c)(4) of the Act; 8 C.F.R. § 1240.8(d).

The Immigration Judge pretermitted the applicant's application for withholding of removal, finding that she was barred from this form of relief because she had been convicted of trafficking in methamphetamine under section 11379 of the California Health and Safety Code, and that this conviction constitutes an aggravated felony and a "particularly serious crime" (IJ at 3-5). Section 241(b)(3)(B)(ii) of the Act. The Immigration Judge found that the applicant did not carry her burden to show by a preponderance of the evidence that this offense did not qualify as a particularly serious crime ((IJ at 4-5) (citing *Matter of Y-L-, A-G- & R-S-R-*, 23 I&N Dec. 270 (A.G. 2002)). The applicant challenges these findings on appeal, and also argues that the Immigration Judge should have granted her application for deferral of removal under the Convention Against Torture, given the record evidence of her past torture at the hands of a member of a dangerous Mexican drug cartel. Applicant's Br. at 6-13, 20-22.

On appeal, the applicant argues that the Immigration Judge erred in finding her conviction to be an aggravated felony drug trafficking crime, and by applying the rebuttable presumption in *Matter of Y-L-, A-G- & R-S-R-*, 23 I&N Dec. 270 (A.G. 2002) to find that her offense is a particularly serious crime. A conviction arising under section 11379 of the California Health and

[1] The applicant's eligibility for asylum was not at issue below and is not at issue on appeal.

Safety Code is not categorically an aggravated felony under section 101(a)(43)(B) of the Act, because the statute punishes solicitation offenses as well as trafficking offenses. Applicant's Br. at 6-8. We agree. In *Sandoval-Lua v. Gonzales*, 499 F.3d 1121, 1127-28 (9th Cir. 2007), the United States Court of Appeals for the Ninth Circuit held that section 11379(a) of the California Health and Safety Code is a divisible statute that encompasses offenses that both do and do not constitute an aggravated felony under section 101(a)(43)(B) of the Act. *See Sandoval-Lua v. Gonzales*, 499 F.3d at 1128. Although the Immigration Judge conducted a modified categorical analysis of the record of conviction and determined that the applicant's offense involved trafficking (IJ at 4), the record does not support this factual finding. The indictment (in particular, count 3 to which the applicant pled guilty) largely tracks the language of the statute, which would include solicitation offenses that are not "drug trafficking crimes." *See Nath v. Gonzales*, 467 F.3d 1185 (9th Cir. 2006). The Immigration Judge's reliance on the applicant's plea, in which she admitted that she "offered to sell" methamphetamine, does not provide adequate evidence to support a finding that the applicant's offense is a "drug trafficking" aggravated felony. *See U.S. v. Rivera-Sanchez*, 247 F.3d 905, 909 (9th Cir. 2001); *Leyva-Licea v. INS*, 187 F.3d 1147, 1150 (9th Cir. 1999) (finding "offer to sell" is solicitation). Therefore, applying a modified categorical analysis, the record and the facts found by the Immigration Judge do not support a finding that the applicant was convicted of an aggravated felony.

Given this, an analysis under *Matter of Y-L-, A-G- & R-S-R-,* does not govern the resolution of the question whether the applicant's conviction constitutes a "particularly serious crime," and the rebuttable presumption that her offense is dangerous does not apply. A particularly serious crime need not be an aggravated felony. *Matter of N-A-M-*, 24 I&N Dec. 336, 338-40 (BIA 2007) abrogated on other grounds by *Flores-Vega v. Barr*, 932 F.3d 878 (9th Cir. 2019).[2] Rather, we consider whether the applicant's offense is particularly serious in the context of an analysis of whether the crime is dangerous. *See Matter of G-G-S-*, 26 I&N Dec. 339, 342 (BIA 2014). In determining whether the applicant's conviction constitutes a "particularly serious crime" that poses a "danger to the community of the United States," we consider an Immigration Judge's findings on the nature of the conviction, the sentence imposed, and the circumstances and underlying facts of the offense. *See Matter of Frentescu*, 18 I&N Dec. 244, 247 (BIA 1982), *modified on other grounds by Matter of C-*, 20 I&N Dec. 529 (BIA 1992); *Matter of N-A-M-*, 24 I&N Dec. at 342; *Delgado v. Holder*, 648 F.3d at 1106-07.

In this matter, the Immigration Judge found without clear error that the applicant was convicted for being involved as an interpreter in a transaction involving the sale of approximately one kilogram of methamphetamine, worth potentially thousands of dollars (IJ at 5). But the record lacks other detailed findings about the applicant's role in the offense, the sentence she received, and the nature of the offense, that are necessary to reach a conclusion as to whether the applicant's offense is a particularly serious crime pursuant to *Matter of Frentescu.* We accordingly will

[2] The Ninth Circuit has deferred to the Board's framework for considering when a conviction constitutes a particularly serious crime and has also recognized that such crimes are not limited to a statutorily-defined aggravated felonies. *Delgado v. Holder*, 648 F.3d 1095, 1102-06 (9th Cir. 2011); *see* section 241(b)(3)(B)(ii) of the Act.

remand the record for the Immigration Judge to further consider the applicant's eligibility for withholding of removal under section 241(b)(3) of the Act, to include whether the "particularly serious crime" bar applies to her application for this relief.

Turning to the application for deferral of removal pursuant to the Convention Against Torture, which was based on the applicant's fear of future torture from the drug cartel member who assaulted and tortured her some 25 years ago, we will affirm the Immigration Judge's denial of this relief for the reasons set forth in her decision (IJ at 5-11). Given the passage of a significant period of time, we discern no clear error the Immigration Judge's finding that the applicant has not submitted evidence that establishes a clear probability that she would be singled out for torture in the future by the member of the drug cartel who severely abused and mistreated her in the past (*Id.* at 9). *Ridore v. Holder*, 696 F.3d 907 (9th Cir. 2012). We affirm as lacking clear error the Immigration Judge's finding that the applicant has not submitted evidence that establishes a clear probability that she would be harmed by persons acting with the consent or acquiescence of the government (*Id.* at 10). *Garcia-Milian v. Holder*, 755 F.3d 1026, 1034 (9th Cir. 2014) (general ineffectiveness in preventing or investigating criminal activities does not raise an inference that public officials are likely to acquiesce in torture). Therefore, the applicant is unable to prove her eligibility for relief under the Convention Against Torture.

Accordingly, the following orders will be entered.

ORDER: The applicant's appeal of the Immigration Judge's denial of her application for protection under the Convention Against Torture is dismissed.

FURTHER ORDER: The applicant's appeal of the denial of her application for withholding of removal under the Act is sustained, and the record is remanded for further proceedings consistent with this order.

FOR THE BOARD