**U.S. Department of Justice**

Executive Office for Immigration Review

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

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**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

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



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.

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
SAN DIEGO, CALIFORNIA

File: [redacted]348 June 14, 2017

In the Matter of

| | | |
|---|---|---|
| LUCIO GAYOSO MALDONADO | ) | IN REMOVAL PROCEEDINGS |
| RESPONDENT | ) | |

CHARGES: Section 212(a)(6)(A)(i) of the Immigration and Nationality Act - alien present in the United States without having been properly admitted or paroled.

APPLICATIONS: Asylum, withholding of removal under Section 241(b)(3) of the Act, withholding or deferral of removal under the United Nations Convention Against Torture and voluntary departure at the conclusion of the proceedings in the alternative.

ON BEHALF OF RESPONDENT: Murray Hilts

ON BEHALF OF DHS: Jonathan Grant

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a single male, native and citizen of Mexico. The United States Department of Homeland Security brought these removal proceedings against the respondent under the authority of the Immigration and Nationality Act. Proceedings were commenced with the filing of the Notice to Appear with the immigration court. See Exhibit Number 1.

The respondent, through counsel, subsequently admitted all of the

allegations contained in the Notice to Appear and conceded removability as charged as an alien present in the United States without having been properly admitted or paroled into this country. Based on the respondents admissions and concessions the court concludes that removability as charged has been established.

The respondent ultimately declined to designate a country of removal and Mexico was directed by the court upon recommendation by the Department of Homeland Security. The respondent applied for relief by filing an application form I-589 and requesting asylum under Section 208(a) of the Act. Applications for asylum shall also be considered as applications for withholding of removal under Section 241(b)(3) of the Act. The respondent also requests withholding or deferral of removal under the United Nations Convention Against Torture. And then, finally, the respondent seeks voluntary departure under Section 240B(b) of the Act in the alternative.

The respondent's form I-589 application is contained in the record. Prior to admission of the application the respondent was given an opportunity to make any necessary corrections to the application and then swore or affirmed before this court that the contents of the application were all true and correct to the best of his knowledge.

The burden of proof is on the respondent to establish that he is eligible for asylum or withholding of removal under Section 241(b)(3) of the Act or relief under the United Nations Convention Against Torture. The provisions of the REAL ID Act of 2005 apply to the respondent's application as it was filed on or after May 11, 2005.

In the respondent's case there is an initial threshold matter that he would have to meet with respect to both his application for asylum and his applications for withholding of removal under Section 241(b)(3) of the Act as well as withholding of removal under the United Nations Convention Against Torture and that issue is whether

the respondent has been convicted of a particularly serious crime

In Anaya-Ortiz v. Holder, 584 F.3d 673 (9th Cir. 2010) the court of appeals for the 9th Circuit dismissed a petition for review in a case were the administrative review board had determined that an applicant who was convicted for driving under the influence had been convicted of a particularly serious crime. Generally, in determining whether a crime is particularly serious requires a case by case analysis using "such factors as the nature of the conviction, the circumstances and underlying facts of the conviction, the type of sentence imposed, and more importantly, whether the type and circumstances of the crime indicate that the alien will be a danger to the community." Matter of Frentescu, 18 I&N Dec. 244 (BIA 1982) superseded by statute in part as recognized in Miguel-Miguel v. Gonzalez, 500 F.3d 941 (9th Cir. 2007); see also Matter of L-S-, 22 I&N Dec. 645 (BIA 1999), and Matter of ~~N~~M-A-M-, 24 I&N Dec. 336 (BIA 2007).

In Anaya-Ortiz, supra, the applicant had been convicted of driving under the influence and in such condition ran into an elderly woman's home causing part of the wall to collapse on her ~~substantial damage~~ In reviewing the totality of the circumstances the immigration judge concluded that respondent's crime was particularly serious. The Board of Immigration Appeals upheld that determination and the court of appeals dismissed the petition for review. In comparison, in this case the respondent also had an incident where he was under the influence of alcohol and had a hit and run. But fortunately for the respondent and for everyone he hit a parked car with no one inside. So there was damage to a vehicle but no damage to a ~~that~~ person. And under the circumstances he does not appear to have been convicted of DUI at that time, it was hit and run. Although the respondent in his testimony here today admits not only that he had consumed alcohol but that it did influence his driving. Perhaps one could say that

the respondent was just lucky because although he had had prior warnings there was no one in the car when he hit it.

This does not mean that the respondent has not been convicted of a particularly serious crime because there is also case law which talks about the cumulative ~~accumulative~~effect ~~affect~~ of DUIs. And this is the case of Delgado v. Holder, 648 F.3d 1095 (9th Cir. 2011) where the court of appeals for the 9th Circuit stated that DUI convictions, when viewed cumulatively, may rise to the level of a particularly serious crime. The court concludes that this is exactly the type of case where a string of DUIs rises to the level, when viewed cumulatively, of being a particularly serious crime. The record reflects that respondent had multiple encounters with law enforcement, all of which either involved alcohol or resulted in convictions where alcohol is actually an element. Here the respondent apparently had a domestic violence arrest in 2001, and although it did not lead to a conviction because the respondent was subsequently turned over to the immigration authorities which resulted in a voluntary return, he . ~~He~~ admits that on this occasion he was drinking alcohol. And when the respondent came back into the United States in 2005 he was arrested and convicted for driving under the influence. Then in 2006 the respondent was arrested and convicted for the hit and run mentioned earlier. His testimony includes that he was under the influence and that influenced his driving at that time. In 2008 again the respondent was again arrested and convicted for driving under the influence. In 2010 the respondent was arrested and convicted for driving under the influence. On September 23, 2014, the respondent was arrested and convicted of driving on a suspended license, which had been suspended because the respondent had a history of driving under the influence. So clearly, the court would find that at least the respondent's 2010 offense for driving under the influence where there were two prior

occasions of driving under the influence and two additional arrests where alcohol was involved results under the cumulative assessment in Matter of Frentescu and Delgado to be a particularly serious crime. Even then, the conduct didn't end because the respondent had no business driving at all in 2014 when his license had been suspended for his prior DUI conduct. So the court concludes under Matter of Frentescu and also the court of appeals decision in Delgado v. Holder, supra, that the respondent has been convicted of a particularly serious crime and therefore is statutorily barred from asylum, withholding of removal under Section 241(b)(3) of the Act and withholding of removal under the United Nations Convention Against Torture.

The only application that the respondent has based on concern of return to Mexico therefore is deferral of removal. To establish eligibility for deferral of removal the respondent bears the burden of proving that it is more likely than not that he would be tortured as defined in the regulations if removed to the proposed country of removal. The torture must be 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. Acquiescence requires that the public official have prior awareness of the activity and thereafter breech his or her legal responsibility to intervene to prevent such activity.

Here the respondent related two incidents where he suffered harm in Mexico in the past but neither ~~whether it~~ rises to the level of past torture within the definition of the regulations.

The respondent's concern upon return to his home country is summarized in his application at Page 5, Part B, Number 1A, where he states, "I fear to return to my country of birth. My family has suffered multiple attacks. In December of 2013 my brother Salomon Contreras Maldonado was kidnapped and robbed by members of the Zetas. He was threatened not to report this to the police. In March of 2015 criminals

broke into my daughter Esmeralda Gayoso's house in Veracruz, Mexico. They beat her husband and son and threatened my daughter. They believed my son-in-law had money because he's a taxi driver. In February of 2016 my stepson Jose Alphonso Delacruz [phonetic] and his brother were beaten and robbed by gang members in early a.m. hours."

Each of these incidents does not appear to be related to the other. All appear to be based on motivation by criminals or a criminal group to kidnap or rob various members of the respondent's family. However, for the respondent to say that it is more likely than not that he will be tortured upon return is still speculative. Moreover, the respondent has not addressed nor satisfied the requirement also of showing that the torture must be 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. Again, acquiescence requires that the public official have prior awareness of the activity and therefore breech his or her legal responsibility to intervene to prevent such activity. The respondent alleges here neither that the police or any other government authority instigated or consented to the harm against his family members. But also that there is ~~there's~~ no indication that the harm was reported to the police to give them an opportunity to intervene to prevent such activity. The court concludes that the respondent's evidence is insufficient to show deferral of removal under the United Nations Convention Against Torture.

The respondent has asked for voluntary departure at the conclusion of proceedings. He is not an arriving alien. The Notice to Appear does seem to have been served more than one year after the respondent's last entry into the United States. Although he has a string of DUI convictions they do not bar him statutorily on the face of the numerical sections, Section 101(f)~~F~~. However, there is a final sentence in Section

101(f)F that refers to a accumulative assessment of negative factors and here the respondent has a string of DUIs that constitutes a clear danger to the community. He has alleged that he no longer drinks, but this string of arrests and convictions related to alcohol span many years, much longer than the period in which the respondent states he no longer has a problem with alcohol. Therefore, his conduct continues to represent a specific danger to the community and either an inability or unwillingness to change his behavior. The court would find that he has not shown good moral character under the last sentence of 101(f)F for the purposes of voluntary departure. But even in the alternative, assessing all of the elements of record, all of the factors, including the presence of the respondent's son who has been granted DACA here in the United States, the court would find that the respondent is not eligible for voluntary departure in the exercise of discretion.

Again, starting with his DUI record, it's been noted that "No one can seriously dispute the magnitude of the drunken driving problem or the state's interest in eradicating it. Media reports of alcohol related death and mutilation on the nation's road are legion. The anecdotal is confirmed by the statistical drunk drivers causing annual death toll of over 45,000. And in the same time span caused nearly 1 million personal injuries and more than 5 billion dollars in property damage." This comes from a United States Supreme Court decision in 1990. One can only estimate that the damage has continued since the decision was issued and is no less dangerous than it was at the time the Supreme Court uttered these words.

The record also reflects that the respondent not only has the string of convictions here in the United States, but apparently also has been ushered out of the United States on more than one occasion. He admits to "multiple" voluntary departure in his application although he's not in a position to specify how many, clearly the

respondent has been made quite aware that he had no right to come back into the United States. So not only is he presenting a danger to the community through his alcohol related arrests, but he is also ignoring the clear indication that he had no right to actually even be in the United States.

The court has considered the amount of time that the respondent has been here, the presence of his son on DACA, but at the same time the respondent appears to have no other strong family ties of a legal relationship. He speaks of having a partner but is not currently married. And the respondent's son is an adult who may receive some support from his father but is living in a separate room paying his own rent and is well into his 20's. The court finds that the respondent's past history is not overcome by the positive equities in the case. And that he has already had his second chance to make good on a promise not to return to the United States after a voluntary return, albeit administratively. The court concludes that on the assessment of all the equities the respondent is not eligible for voluntary departure in the exercise of discretion.

There is no other application before the court. The record will reflect that there were ~~was~~ early discussions in the case as to whether the Department of Homeland Security would entertain a request for prosecutorial discretion from the respondent. The respondent was given time to pursue this, but ultimately the DHS declined to extend prosecutorial discretion. Obviously, this is not a matter that is to be decided by the court but the record should reflect that even on this circumstances time was given to the respondent to look into the matter.

There being nothing further before this court the following orders are entered:

ORDERS

It is hereby ordered that the respondent's applications for asylum, withholding of removal under Section 241(b)(3) of the Act, withholding and deferral of removal under the United Nations Convention Against Torture and any request for voluntary departure are denied.

It is further ordered that the respondent be removed from the United States to Mexico on the charge contained in the Notice to Appear.

This decision was created extemporaneously and rendered orally at the end of the hearing on June 14, 2017. It should not be confused with a written decision.

***Please see the next page for electronic signature***

HENRY P. IPEMA
Immigration Judge

//s//

Immigration Judge HENRY P. IPEMA

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