NOT FOR PUBLICATION

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

MATTER OF:

[redacted]

Respondent

FILED
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ON BEHALF OF RESPONDENT: Stephen Yale-Loehr, Esquire

ON BEHALF OF DHS: [redacted] Assistant Chief Counsel

IN REMOVAL PROCEEDINGS
On Appeal from a Decision of the Immigration Court, Van Nuys, CA

Before: Saenz, Appellate Immigration Judge; O'Connor, Appellate Immigration Judge; Crossett, Temporary Appellate Immigration Judge[1]

Opinion by Appellate Immigration Judge Saenz

SAENZ, Appellate Immigration Judge

The respondent, a native and citizen of Mexico, appeals from the Immigration Judge's decision dated [redacted], 2022, denying his applications for withholding of removal pursuant to section 241(b)(3)(A) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1231(b)(3)(A), as well as for protection under the regulations implementing the Convention Against Torture ("CAT").[2] The Department of Homeland Security has filed a motion for summary affirmance. The appeal will be sustained, and the record will be remanded.

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).

On [redacted], 2005, the respondent was convicted under section 11379(a) of the California Health and Safety Code, which involves the transportation or sale of a controlled substance, namely methamphetamine in the respondent's case, for which he was sentenced to 4 years' imprisonment (IJ at 11; Exh. 3, Tab B). The Immigration Judge concluded that the respondent

[1] Temporary Appellate Immigration Judges sit pursuant to appointment by the Attorney General.*See* 8 C.F.R. § 1003.1(a)(1), (4).

[2] The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100–20, 1465 U.N.T.S. 85 (entered into force for United States Nov. 20, 1994). 8 C.F.R. §§ 1208.16(c)-1208.18.

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was ineligible for withholding of removal under the INA and the CAT because his conviction under section 11379(a) of the California Health and Safety Code constitutes a particularly serious crime ("PSC") and the respondent did not carry his burden to show by a preponderance of the evidence that this offense did not qualify as a PSC (IJ at 13). The Immigration Judge also denied the respondent's application for deferral of removal under the CAT after finding that the respondent failed to establish that it is more likely than not that he will be tortured if removed to Mexico (IJ at 14-20).

Upon review, we agree with the respondent that the Immigration Judge erred by failing to admit and thoroughly consider relevant and probative country conditions evidence (Respondent's Br. at 27-29). The record reflects that the respondent submitted numerous articles and reports detailing country conditions in Mexico (Exh. 4, Tabs A-NN, Exh. 6, Exh. 11). However, the Immigration Judge identified Exhibit 4 as only consisting of tabs A through Q and it is unclear from the record if the Immigration Judge considered the remaining twenty-three tabs from R through NN (IJ at 3; Tr. at 50-51). In his brief, the respondent provides details about the information included in these omitted tabs and how this evidence could have impacted his claims for withholding of removal and protection under the CAT (*see* Respondent's Br. at 28). The Immigration Judge's decision did not expressly discuss this evidence from the respondent. Such analysis requires fact finding, which we cannot conduct at our appellate level. As such, we conclude that remand is necessary for the Immigration Judge to reconsider the respondent's claims for withholding of removal and protection under the CAT. In particular, the Immigration Judge should expressly consider all of the evidence submitted by the respondent regarding country conditions in Mexico (Exh. 4, Tabs R-NN, Exh. 6, Exh. 11).

We also agree with the respondent that the portion of the Immigration Judge's decision finding that the respondent's conviction is particularly serious does not set forth sufficient findings of fact or legal analysis to provide us with a meaningful basis for appellate review (Respondent's Br. at 14-18). *See Matter of S-H-*, 23 I&N Dec. 462, 463 (BIA 2002) (remanding to the Immigration Judge because of insufficient factual findings and legal analysis); *Matter of A-P-*, 22 I&N Dec. 468, 477 (BIA 1999) (stating that the Immigration Judge is "responsible for the substantive completeness of the decision").

Unless an offense is a *per se* particularly serious crime (an aggravated felony with a sentence to at least 5 years imprisonment for withholding of removal), the Immigration Judge must engage in a "case-by-case analysis" to determine whether it is a particularly serious crime. *Flores-Vega v. Barr*, 932 F.3d 878, 885 (9th Cir. 2019); *see, e.g., Afridi v. Gonzales*, 442 F.3d 1212, 1221 (9th Cir. 2006) (finding that BIA erred in determining that "unlawful sexual intercourse with a minor" was particularly serious without performing case-by-case analysis). Under the case-by-case analysis, the Immigration Judge must consider: (1) the circumstances and underlying facts of the conviction; (2) the nature of the conviction; (3) the type of sentence imposed; and (4) whether the type and circumstances of the crime indicate that the individual will be a danger to the community. *Matter of Frentescu*, 18 I&N Dec. 244, 247 (BIA 1982); *see also Matter of N-A-M-*, 24 I&N Dec. 336, 342 (BIA 2007) (*Frentescu* no longer requires a separate analysis of the fourth factor); *but see Alphonsus v. Holder*, 705 F.3d 1031, 1046-47 (9th Cir. 2013) (dangerousness is still the "essential key" to the particularly serious crime determination). Finally, the Immigration Judge's

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particularly serious crime analysis cannot "rest solely on the elements of conviction." *Flores-Vega*, 932 F.3d at 885. Rather, the Immigration Judge must rely on "real-world facts" to determine what the respondent "actually did." *Guerrero v. Whitaker*, 908 F.3d 541, 545 (9th Cir. 2018). Where the record fails to establish what the applicant actually did, the offense cannot be classified as particularly serious. *Id.*; *see Flores-Vega*, 932 F.3d at 885 (finding that an Oregon conviction for strangulation was not particularly serious where the record did not reveal what the applicant actually did). Accordingly, the Immigration Judge cannot rely on boilerplate charging documents that merely "restat[e] the statutory definition of the crime with the victim's name inserted." *Flores-Vega*, 932 F.3d at 885.

Here, the Immigration Judge found that the respondent's offense was not a *per se* particularly serious crime (IJ at 11). Accordingly, the Immigration Judge was required to engage in a "case-by-case analysis" to determine whether it qualified as a particularly serious crime. However, the Immigration Judge only performed a cursory analysis of the *Frentescu* factors. The record lacks detailed findings about the underlying facts and circumstances of the offense that are necessary to reach a conclusion as to whether the respondent's offense is a particularly serious crime. Accordingly, under *Flores-Vega*, the Immigration Judge erred by relying solely on the elements of the conviction to hold that the offense was particularly serious. We therefore will remand the record for the Immigration Judge to further consider the respondent's eligibility for withholding of removal, to include whether the "particularly serious crime" bar applies to his application for this relief.

We further agree with the respondent that remand is warranted for the Immigration Judge to reconsider the respondent's aggregate risk of future torture (Respondent's Br. at 21-25). The regulations implementing protection under the CAT require the Immigration Judge to consider "all evidence relevant to the possibility of future torture." 8 C.F.R. § 1208.16(c)(3). The Ninth Circuit has recently emphasized that an Immigration Judge must consider whether the "*total* probability that the applicant will be tortured - considering all potential sources of and reasons for torture - exceeds 50 percent." *Velasquez-Samayoa v. Garland*, 38 F.4th 734, 738 (9th Cir 2022); *see also Guerra v. Barr*, 951 F.3d 1128, 1137 (9th Cir. 2020). Although the Immigration Judge stated the legal standard regarding aggregation (IJ at 20), we cannot conclude that he in fact analyzed the respondent's risk in the aggregate. Thus, we will remand the record for the Immigration Judge to clearly assess whether aggregating the risks posed by the respondent's multiple theories results in a probability of greater than fifty percent that he will be tortured in Mexico, and whether the evidence indicates that the risk will be sufficiently particularized.

On remand, both parties should have an opportunity to present updated evidence and arguments and the Immigration Judge should cite to and apply current applicable precedent in his analysis. We express no opinion as to the ultimate resolution of the respondent's case. *Matter of L-O-G-*, 21 I&N Dec. 413, 422 (BIA 1996).

Accordingly, the following orders will be entered.

ORDER: The appeal is sustained.

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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.