File: (b) (6) Date: SEP 13 2012

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Elizabeth A. Henneke, Esquire

ON BEHALF OF DHS: Catherine E. Halliday-Roberts
Deputy Chief Counsel

CHARGE:

Notice: Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(1)(B)] -
In the United States in violation of law

APPLICATION: Asylum, withholding of removal, Convention Against Torture

The respondent, a native and citizen of El Salvador, entered the United States in 1980[1] as a nonimmigrant visitor. He stayed beyond the authorized period of admission and initially applied for asylum in 1993 with the former Immigration and Naturalization Service. He filed an amended application for asylum in 2003, after being placed in removal proceedings in 2001. On June 10, 2003, the Immigration Judge found the respondent removable as charged and found that his three convictions for driving under the influence (DUI) were "particularly serious crimes" rendering him ineligible for asylum and withholding of removal. The Immigration Judge did not address the merits of the respondent's claims for asylum or withholding of removal but did hold an evidentiary hearing on his application for deferral of removal under the Convention Against Torture, and denied that application on the merits.

On November 4, 2003, we dismissed the respondent's appeal and affirmed the Immigration Judge's decision that the respondent's three DUI convictions were particularly serious crimes barring him from asylum and withholding of removal. The United States Court of Appeals for the (b) (6) has now granted the respondent's petition for review, in part, and remanded to the Board to further address whether one or more of the respondent's three DUI convictions were "particularly serious crime[s]" that would bar him from eligibility for asylum and withholding of removal. *See* (b) (6) *v. Holder*, (b) (6) (en banc).[2]

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[1] The respondent was 10 years old at the time of admission.

[2] The court denied the petition for review as to deferral of removal under the Convention Against Torture, finding that the respondent did not demonstrate a likelihood of torture by the Salvadoran government. *Id.* at 1108.

We first briefly review the respondent's three DUI convictions. The respondent's first conviction was in 1992 for DUI causing bodily injury for which he received a one-year jail sentence. The respondent suffered a fractured leg while a passenger in his car, his girlfriend at the time, suffered a fractured leg and a fractured hip. The second and third DUI convictions, in 2000 and 2002, were for simple DUI not involving injury to others. For the second offense, the respondent was stopped for driving 85 miles per hour and weaving on a highway. For the third offense, the respondent was stopped for unsafe driving at 2:30 a.m. after being observed weaving between lanes on an interstate highway. He had a blood alcohol level of 0.12% and was driving on a suspended license and while on parole from his second offense. The respondent received a sentence of 16 months for the 2000 offense and a sentence of 2 years for the 2002 conviction.

The court has asked that we clarify which of the respondent's offenses the Board considered to be particularly serious and how we reached that conclusion. In particular, the court has asked that we explain whether "one or more of [the respondent's] three DUI convictions *individually* rises to the level of a particularly serious crime," or alternatively, whether the three convictions, "when viewed *cumulatively*, rise to the level of a particularly serious crime," or whether "one of the [DUI] convictions – presumably the third – rises to the level of a particularly serious crime *in light of* [the respondent's] two earlier [DUI] convictions." *Id.* at 1108 (emphasis in original).

In considering whether and when a DUI offense is sufficiently serious to bar asylum and withholding of removal, we face a wide range of situations. At one end of the spectrum, a conviction for a first-time simple DUI conviction most likely will not, standing alone, meet the requirements for a particularly serious crime. At the other end of the spectrum, a single DUI offense involving serious bodily injury or death would generally qualify as a particularly serious crime. *See Anaya-Ortiz v. Holder,* 594 F.3d 673 (9th Cir. 2010) (affirming the Board's determination that a DUI conviction under California Vehicle Code § 23153(b) was a particularly serious crime when the intoxicated offender drove his vehicle into a home causing serious injury to the occupant and her property). As the United States Supreme Court has observed, "drunk driving is an extremely dangerous crime. In the United States in 2006, alcohol-related motor vehicle crashes claimed the lives of more than 17,000 individuals and harmed untold amounts of property." *Begay v. United States*, 553 U.S. 137, 141 (2008).

The first issue in this case is whether multiple offenses may be considered cumulatively in applying the particularly serious crime bar. We find that, given the plain language of the governing statutes, separate crimes should be addressed individually rather than cumulatively. *See* 8 U.S.C. § 1158(b)(2)(A)(ii) (asylum) and 8 U.S.C. § 1231(b)(3)(B)(ii) (withholding of removal), referring to persons convicted of "*a* particularly serious crime" (emphasis added).

Although each offense should be individually assessed in making the particularly serious crime determination, prior DUI convictions may be relevant in assessing the seriousness of subsequent DUI offenses. *See, e.g., Matter of L-S-*, 22 I&N Dec. 645, 656 (BIA 1999) (a conviction for alien smuggling was not a particularly serious crime based, in part, on the fact that "the record demonstrated that this was his first offense"); *see also, Arbid v. Holder*, 674 F.3d 1138 (9th Cir. 2012) (basing the particularly serious crime determination, in part, on facts and circumstances indicating a likelihood that the "crime could happen again"). Repeated DUI convictions, even absent

bodily injury or death, may cause a subsequent DUI conviction to qualify as a particularly serious crime.

In *Matter of N-A-M-*, 24 I&N Dec. 336, 342 (2007), we addressed the approach to be applied in making the particularly serious crime determination where, as in the instant case, the conviction is not for an aggravated felony. We confirmed that "we examine the nature of the conviction, the type of sentence imposed, and the circumstances and underlying facts of the conviction." *Id.* We also held that "once the elements of the offense are examined and found to potentially bring the offense within the ambit of a particularly serious crime, all reliable information may be considered in making a particularly serious crime determination, including but not limited to the record of conviction and sentencing information." *Id.* at 337-8.

Under the totality of circumstances, we find that a remand is appropriate for the Immigration Judge to reevaluate the particularly serious crime determination and issue a new decision, taking into account the significant developments in the law since this case was decided nearly 10 years ago, including *Matter of N-A-M, supra*, and *Arbid v. Holder, supra*, and the guidance we have provided in this decision.[3] We note that the criminal documents in the record referencing the 2002 offense include only the arresting officer's statement and a probation officer's report. Additionally, page 8 of the probation officer's report for the 2000 conviction, referred to in the DHS brief on remand, appears to be missing from the record of conviction. This issue should be addressed on remand. The Immigration Judge on remand should also hold a hearing and permit both parties to update the evidence in the record and may make alternative determinations regarding the merits of the claims for asylum and withholding of removal.[4]

ORDER: The record is remanded for further proceedings and for the entry of a new decision consistent with the foregoing opinion.

FOR THE BOARD

[3] We note that whether the respondent is a danger to the community at the present time is not part of the analysis. *See Matter of N-A-M-*, 24 I&N Dec. at 342.

[4] We note that the respondent was not represented by counsel in his appearances before the Immigration Judge or on appeal to the Board.