

APPENDIX F

“Particularly Serious Crime” Bars on Asylum and Withholding of Removal: Case Law Standards and Sample Determinations

[For information on the “particularly serious crime” (“PSC”) bars to the immigration relief of asylum or withholding of removal, see Chapter 3, section 3.4(c)(1).]

Offense	PSC?	Case Law/Notes
<p>Felony/Misdemeanor constituting an “aggravated felony”</p> <p><i>(For sample “aggravated felony” determinations, see Appendix C.)</i></p>	<p>Yes, for asylum, regardless of sentence.</p> <hr/> <p>Yes, for withholding of removal, if sentenced to 5 or more years in prison; presumptively yes, if involved <i>unlawful trafficking in controlled substances</i>; maybe, if sentenced to less than 5 years and not involving unlawful trafficking in controlled substances.</p>	<p>For asylum purposes, an aggravated felony is deemed to be a PSC by statute. <i>See</i> 8 U.S.C. 1158(b)(2)(B)(i).</p> <hr/> <p>For withholding of removal purposes, an aggravated felony is (1) statutorily deemed to be a PSC if the individual has been sentenced to an aggregate term of imprisonment of at least 5 years for any aggravated felony conviction(s), <i>see</i> 8 U.S.C. 1231(b)(3)(B), and (2) under Attorney General opinion, presumptively deemed to be a PSC if involving unlawful trafficking in controlled substances, regardless of sentence imposed. <i>See Matter of Y-L, A-G, R-S-R</i>, 23 I&N Dec. 270 (A.G. 2002). [See below.] A determination of whether a noncitizen convicted of any other aggravated felony and sentenced to less than five years imprisonment has been convicted of a PSC requires an individual examination of the nature of the conviction, the sentence imposed, and the circumstances and underlying facts of the conviction. <i>Matter of L-S</i>, 22 I&N Dec. 645 (BIA 1999), overruled in part, <i>Matter of Y-L, supra</i>; <i>Matter of S-S-</i>, 22 I&N Dec. 458 (BIA 1999), overruled in part, <i>Matter of Y-L, supra</i>; <i>Matter of Frentescu</i>, 18 I&N Dec. 244 (BIA 1982), modified, <i>Matter of C-</i>, 20 I&N Dec. 529 (BIA 1992), <i>Matter of Gonzalez</i>, 19 I&N Dec. 682 (BIA 1988) [See below.]</p>
<p>Misdemeanor (single) that is not an “aggravated felony”</p>	<p>Usually not.</p>	<p>Without unusual circumstances, a single conviction of a misdemeanor offense is not a “particularly serious crime.” <i>See Matter of Juarez</i>, 19 I&N Dec. 664 (BIA 1988).</p> <p>Note: If the misdemeanor offense is one which may be deemed an “aggravated felony” (e.g., NY misdemeanor sale of marijuana), it may nevertheless be deemed a PSC.</p>

Offense	PSC?	Case Law/Notes
<p>Felony that is not an “aggravated felony” (or for withholding of removal purposes, an aggravated felony with a prison sentence of less than 5 years and not involving unlawful trafficking in controlled substances)</p> <p>OR</p> <p>Misdemeanor (second or subsequent) that is not an “aggravated felony”</p>	<p>Depends.</p>	<p>In order to determine whether a crime is a PSC (if it is not deemed or presumed to be so for withholding of removal purposes as an “aggravated felony” with a prison sentence of 5 years or more or as an aggravated felony involving unlawful trafficking in controlled substances, or not deemed to be so for asylum purposes as any “aggravated felony,” regardless of sentence), the BIA considers several factors: (i) the nature of the conviction, (ii) the circumstances and underlying facts for the conviction, (iii) the type of sentence imposed, and (iv) whether the type and circumstances of the crime indicate that the individual will be a danger to the community.</p> <p><i>See Matter of Frentescu</i>, 18 I&N Dec. 244 (BIA 1982), <i>modified</i>, <i>Matter of C-</i>, 20 I&N Dec. 529 (BIA 1992), <i>Matter of Gonzalez</i>, 19 I&N Dec. 682 (BIA 1988). For some specific crimes that have been found to be PSCs, see the specific crimes listed by type of offense in the sample determinations that follow in this chart.</p>
<p>Sample PSC Case Law Determinations</p> <p>NOTE: Many of the crimes listed below that have been found in the past to be PSCs would now be considered aggravated felonies due to the expansion of the definition of aggravated felonies. They would therefore on that basis alone be deemed PSC for asylum, but not necessarily for withholding of removal. See “Felony/Misdemeanor constituting an ‘aggravated felony’” above.</p>		
<p>DRUG OFFENSES</p>		
<p>Drug trafficking offense</p>	<p>Yes.</p>	<p><i>Matter of Y-L, A-G, R-S-R</i>, 23 I&N Dec. 270 (A.G. 2002). An individual convicted of an aggravated felony involving unlawful trafficking in controlled substances will presumptively be deemed to have been convicted of a particularly serious crime for withholding of removal purposes. To overcome that presumption, an individual would have to demonstrate the most extenuating circumstances that are both extraordinary and compelling. Those circumstances must include, at a <i>minimum</i>, all of: (1) a very small quantity of controlled substance; (2) a very modest amount of money paid for the drugs in the offending transaction; (3) merely peripheral involvement by the individual in the criminal activity, transaction, or conspiracy; (4) the absence of any violence or threat of violence, implicit or otherwise, associated with the offense; (5) the absence of any organized crime or terrorist organization involvement, direct or indirect, in relation to the offending activity; and (6) the absence of any adverse or harmful effect of the activity or transaction on juveniles</p> <p><i>Matter of U-M-</i>, 20 I&N Dec. 327 (BIA 1991). Conviction of the sale or transportation of marijuana is a conviction of a PSC. The Board found that “the crime of trafficking in drugs is inherently a particularly serious crime. The harmful effect to</p>

Offense	PSC?	Case Law/Notes
		<p>society from drug offenses has consistently been recognized by Congress in the clear distinctions and disparate statutory treatment it has drawn between drug offenses and other crimes.”</p> <p><i>Matter of Gonzalez</i>, 19 I&N 682 (BIA 1988). Two convictions for possession of a controlled substance with intent to deliver with a three-year prison sentence are convictions of PSCs.</p> <p><i>Mosquera-Perez v. INS</i>, 3 F.3d 553 (1st Cir. 1993). A noncitizen convicted of possessing a half ounce of cocaine with intent to distribute, and who had received a suspended sentence and probation had been convicted of a PSC.</p> <p><i>Chong v. Dist. Dir.</i>, 264 F.3d 378 (3d Cir. 2001). Leaving undisturbed the Board of Immigration Appeals’ determination that conspiracy to distribute heroin and possession of heroin with intent to distribute with aggregate two year sentence were aggravated felonies that, under the facts and circumstances of that case, were also PSCs for withholding of removal purposes.</p> <p><i>Arauz v. Rivkind</i>, 845 F.2d 271 (11th Cir. 1988). Conviction of possession of marijuana with intent to distribute is a PSC.</p> <p><i>Eskite v. INS</i>, 901 F.Supp. 530 (E.D.N.Y. 1995). Notwithstanding a pardon, an alien who was convicted in Florida of the sale of \$30 of crack cocaine and for possession with intent to sell or deliver was convicted of a <i>per se</i> PSC.</p>
One time simple possession of drugs	Maybe not.	May depend on factors such as whether the offense is a felony or misdemeanor, the quantity of drugs involved (which may be viewed as speaking to whether the drugs were for personal use or for distribution), and the sentence imposed by the criminal court. <i>See Matter of Toboso-Alfonso</i> , 20 I&N Dec. 819 (BIA 1990) (Simple possession of cocaine is not a particularly serious crime).
VIOLENT OFFENSES AND SEX OFFENSES		
Crimes against persons, generally	Usually.	Violent and sex offenses at issue in the case law have usually been found to be PSCs, at least where the conviction is of a felony.
Assault with a dangerous weapon (felony)	Yes.	<i>Hamama v. INS</i> , 78 F. 3d 233 (6th Cir. 1996). Note: Misdemeanor assault may not be PSC (see below).
Assault with a dangerous weapon	Maybe.	<i>Yousefi v. INS</i> , 260 F.3d 318 (4th Cir. 2001). Where neither BIA nor Immigration Judge considered the several factors set forth in <i>Matter of Frentescu</i> [see above], the case was remanded for such analysis. Here, the sentence was 15-45 months imprisonment, the ‘dangerous weapon’

(continued)

Offense	PSC?	Case Law/Notes
		was a rock, and the crime was committed in the context of a running dispute between two street vendors. <i>Note:</i> Misdemeanor assault may not be PSC (see below).
Assault with a deadly weapon (misdemeanor)	No.	Without unusual circumstances, a single conviction of a misdemeanor offense is not a “particularly serious crime.” See <i>Matter of Juarez</i> , 19 I&N Dec. 664 (BIA 1988).
Battery, aggravated	Yes.	<i>Matter of B-</i> , 20 I&N Dec. 427 (BIA 1991).
Burglary, aggravated (NY Burglary, first degree)	Yes.	<i>Matter of Garcia-Garrocho</i> , 19 I&N Dec. 423 (BIA 1986), modified on other grounds, <i>Matter of Gonzalez</i> , 19 I&N Dec. 682 (BIA 1988). Conviction under New York Penal Law Section 140.30 (Burglary in the first degree) requires a finding that the applicant accomplished his crime with one or more aggravating circumstances that involve “physical injury or potentially life-threatening acts.” Because of the potential for physical harm, the BIA found that the applicant’s crime was a PSC on its face.
Kidnapping and burglary	Yes.	<i>In re Choeum</i> , 129 F.3d 29 (1st Cir. 1997).
Lewd and lascivious act with a child 14-15 years of age	Yes.	<i>Bogle-Martinez v. INS</i> , 52 F.3d 332 (9th Cir. 1995).
Manslaughter (NY Manslaughter, first degree)	Yes.	<i>Ahmetovic v. INS</i> , 62 F.3d 48 (2d Cir. 1995). The Second Circuit affirmed the findings of the Immigration Judge and the BIA that first-degree manslaughter is <i>per se</i> a “particularly serious crime” notwithstanding evidence of mitigating factors (Ms. Ahmetovic shot and killed her husband following a domestic dispute and there was evidence that the killing had been in self-defense).
Manslaughter (NY Manslaughter, second degree)	Maybe; regardless of whether it is a PSC, is a bar to asylum because deemed a “violent and dangerous crime”	<i>Matter of Jean</i> , 23 I&N Dec. 373 (A.G. 2002). Individuals convicted of violent or dangerous crimes will not be granted asylum, even if they are technically eligible, except in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which the individual clearly demonstrates that denial would result in exceptional and extremely unusual hardship. Here, the Attorney General found the alien “manifestly unfit” for a discretionary grant of asylum relief under circumstances that included alien’s confession to beating and shaking a 19-month-old child, and that a coroner corroborated a “wide-ranging collection of extraordinarily severe injuries”
Manslaughter, involuntary	Yes.	<i>Franklin v. INS</i> , 72 F.3d 571 (8th Cir. 1996).
Rape	Yes.	<i>Smith v. USDOJ</i> , 218 F. Supp. 2d 357 (W.D.N.Y. 2002). An alien convicted of rape with a sentence of 2–6 years imprisonment is convicted of an aggravated felony and therefore a particularly serious crime for both asylum and withholding purposes

Offense	PSC?	Case Law/Notes
Rape, attempted	Yes.	<i>Gatalski v. INS</i> , 72 F.3d 135 (9th Cir. 1995).
Robbery	Yes.	<i>Matter of S-V</i> , 22 I&N Dec. 1306 (BIA 2000). Conviction required intent to deprive a person of property through use of force, violence, assault or putting in fear, sentence imposed was 4 years, and record indicated violence against persons.
Robbery with a firearm	Yes.	<i>Matter of S-S-</i> , 22 I&N Dec. 458 (BIA 1999), <i>overruled in part, Matter of Y-L, supra</i> . An alien convicted of first degree robbery of an occupied home while armed with a handgun and sentenced to fifty-five months imprisonment is convicted of a PSC.
Robbery with a deadly weapon	Yes.	<i>Matter of L-S-J</i> , 21 I&N Dec. 973 (BIA 1997). Conviction resulting in 2½ year sentence was an aggravated felony, and the committed offense threatened violence with a handgun and put lives in danger.
Shooting with intent to kill	Yes.	<i>Nguyen v. INS</i> , 991 F.2d 621 (10th Cir. 1993).
Unlawful sexual intercourse with a person under 18	Yes.	<i>Bogle-Martinez v. INS</i> , 52 F.3d 332 (9th Cir. 1995).
PROPERTY OFFENSES		
Crimes against property, generally	Less likely to be found to be a PSC than crimes against persons.	There is little case law dealing with whether offenses against property may be considered PSCs, however the BIA stated in <i>Matter of Frentescu</i> , 18 I&N Dec. 244 (BIA 1982), <i>modified, Matter of C-</i> , 20 I&N Dec. 529 (BIA 1992), <i>Matter of Gonzalez</i> , 19 I&N Dec. 682 (BIA 1988), that crimes against property are less likely to be categorized as PSCs than crimes against persons.
Burglary with intent to commit theft	Not without aggravating circumstances.	<i>Matter of Frentescu</i> , 18 I&N Dec. 244 (BIA 1982), <i>modified, Matter of C-</i> , 20 I&N Dec. 529 (BIA 1992), <i>Matter of Gonzalez</i> , 19 I&N Dec. 682 (BIA 1988). Conviction of burglary with intent to commit theft, where sentence imposed was for 3 months, was not a PSC given the circumstances: "Although the applicant did enter a dwelling, there is no indication that the dwelling was occupied or that the applicant was armed; nor is there any indication of an aggravating circumstance. Further, the applicant received a suspended sentence after spending a relatively short period of time in prison (3 months). Such sentence . . . reflects upon the seriousness of the applicant's danger to the community."
Burglary, aggravated (NY Burglary, first degree)	Yes.	<i>Matter of Garcia-Garrocho</i> , 19 I&N Dec. 423 (BIA 1986), <i>modified on other grounds, Matter of Gonzalez</i> , 19 I&N Dec. 682 (BIA 1988). Conviction under New York Penal Law Section 140.30 (Burglary in the first degree) requires a finding that the applicant accomplished his crime with one or more aggravating circumstances that involve "physical injury or potentially life-

(continued)

Offense	PSC?	Case Law/Notes
		threatening acts.” Because of the potential for physical harm, the BIA found that the applicant’s crime was a PSC on its face.
FIREARM OFFENSES		
Firearm trafficking offenses	Yes.	<i>Matter of Q-T-M-T-</i> , 21 I&N Dec. 639 (BIA 1996).
Robbery with a firearm	Yes.	<i>Matter of S-S-</i> , 22 I&N Dec. 458 (BIA 1999), <i>overruled in part, Matter of Y-L, supra</i> . An alien convicted of first degree robbery of an occupied home while armed with a handgun and sentenced to fifty-five months of imprisonment is convicted of a PSC.
Possession of a firearm during a felony	Yes.	<i>Hamama v. INS</i> , 78 F. 3d 233 (6th Cir. 1996).
Simple possession of a firearm	Maybe not.	May depend on factors such as whether the offense is a felony or misdemeanor, evidence of actual or threatened use of the firearm against another, and the sentence imposed by the criminal court.
OTHER OFFENSES		
Bringing an illegal alien into the U.S.	Yes for asylum because an aggravated felony; No for withholding of removal.	<i>Matter of L-S-</i> , 22 I&N Dec. 645 (BIA 1999), <i>overruled in part, Matter of Y-L, supra</i> . Conviction of bringing an illegal alien into the United States United States in violation of 8 U.S.C. 1324(a)(2) (B)(iii) in light of nature of the offense, the length of the sentence imposed (here, 3½ months), and the circumstances under which this particular crime occurred.