

Immigration Court: BIA**Case:** *In Re N-A-M-*, 24 I&N Dec. 336 (BIA 2007)**Date:** Oct. 24, 2007**Adjudicated by:** Filppu, Pauley, Grant**Opinion:** Pauley**Tags:** Withholding, deferral, Particularly Serious Crimes, evidence**Question Presented:** If it's not an ag fel, could it be a PSC? What information may be considered in determining a PSC?**Holdings:** Historical precedent for PSCs NOT being ag fels (primarily because the PSC vocab predated the ag fel vocab).

"We see no reason to exclude otherwise reliable information from consideration in an analysis of a particularly serious crime once the nature of the crime, as measured by its elements, brings it within the range of a "particularly serious" offense."344

Facts: Respondent citizen of El Salvador convicted of felony menacing (with a deadly weapon or stating that he had it), sentenced to 4 years' deferred judgment.**Appeals to Statute & Precedent:**

- *In re. Y-L-* (A.G. 2002)
- *Matter of L-S-* (BIA 1999): Okay to examine background information about the crime, including sentencing records and info from others involved.

Relevant U.S. History:

- Traces development of "aggravated felonies" and their relation to PSCs.

Discussion:

- "A plain reading of the Act indicates that the statute does not require an offense to be an aggravated felony in order for it to be considered a particularly serious crime." 2
- "Not all very serious offenses will meet all of the technical requirements that go along with classification as an aggravated felony under the Immigration and Nationality Act. Moreover, there may well be offenses that are particularly serious, yet fall totally outside the aggravated felony enumeration in section 101(a)(43) of the Act.⁶ We do not read the statute, or the history leading up to the current language, as creating a gap or loophole for particularly serious crimes that happen to escape classification as aggravated felonies. To do so would be inconsistent with the goal of protecting the public, which is at the heart of the "particularly serious crime" bar." 341
- "If the elements of the offense do not potentially bring the crime into a category of particularly serious crimes, the individual facts and circumstances of the offense are of no consequence, and the alien would not be barred from a grant of withholding of removal."

- “On the other hand, 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 the conviction records and sentencing information, as well as other information outside the confines of a record of conviction.” 342
- “In Matter of Y-L-, A-G-, & R-S-R-, 23 I&N Dec. 270, 273-74, 277-78 (A.G. 2002), the Attorney General found that the sentence imposed is not a dominant factor in determining whether a conviction is for a particularly serious crime. Factors that are subsequent and unrelated to the commission of the offense, such as cooperation with law enforcement authorities, bear only on sentencing. Similarly, offender characteristics may operate to reduce a sentence but do not diminish the gravity of a crime. Therefore, the sentence imposed is not the most accurate or salient factor to consider in determining the seriousness of an offense. For these reasons, we find no merit to the respondent's argument that the offense is not a particularly serious crime because a sentence to a term of imprisonment was not imposed.” 343
- “We have held that crimes against persons are more likely to be categorized as particularly serious.” 343
- “Furthermore, we point out that neither *Morales v. Gonzales*, *supra*, nor any other decision of which we are aware, has ever suggested that the categorical approach, used primarily in determining removability, is applicable to the inherently discretionary determination of whether a conviction is for a particularly serious crime.” 344

Commentary:

- “The Supreme Court has applied the **categorical approach** in the aggravated felony context, where the determination has both criminal and immigration law application. Furthermore, while both we and the courts of appeals have applied the categorical approach to other convictions having only immigration consequences, e.g., the question whether an offense is a crime involving moral turpitude, such categories of crimes may affect both removability and eligibility for relief. In contrast, the “particularly serious crime” determination affects *solely* eligibility for asylum and withholding of removal, on which the alien has the burden of proof, and represents the sort of inherently judgmental calculus, once the elements of the offense have been found to potentially bring it within the parameters of a particularly serious crime, that the categorical approach is unsuited to the determination.” 344 n.9