

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

# APPENDIX F

[For additional 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, and Appendix I, sections 4(a) and (b).]

PSC Case Law Standards			
Offense	PSC for Asylum?	PSC for Withholding?	Case Law/Notes
<p><b>Felony/ Misdemeanor constituting an “aggravated felony”</b> <i>(For sample “aggravated felony” determinations, see Appendix C.)</i></p>	<p>Yes, for asylum, regardless of sentence.</p>	<p>Yes, for withholding of removal, if sentenced to 5 or more years in prison; presumptively yes, if involved unlawful trafficking in controlled substances; maybe, if sentenced to less than 5 years and did not involve unlawful trafficking in controlled substances.</p>	<p>For asylum purposes, an aggravated felony is deemed to be a PSC by statute. See 8 U.S.C. 1158(b)(2)(B)(i). 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), see 8 U.S.C. 1231(b)(3)(B), and (2) under Attorney General opinion, presumptively deemed to be a PSC if involved unlawful trafficking in controlled substances, regardless of sentence imposed. See <i>Matter of Y-L-, A-G-, R-S-R-</i>, 23 I&amp;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&amp;N Dec. 645 (BIA 1999), overruled in part, <i>Matter of Y-L-, supra</i>; <i>Matter of S-S-</i>, 22 I&amp;N Dec. 458 (BIA 1999), overruled in part, <i>Matter of Y-L-, supra</i>; <i>Matter of Frentescu</i>, 18 I&amp;N Dec. 244 (BIA 1982), modified, <i>Matter of C-</i>, 20 I&amp;N Dec. 529 (BIA 1992), <i>Matter of Gonzalez</i>, 19 I&amp;N Dec. 682 (BIA 1988).</p>
<p><b>Misdemeanor (single) that is not an “aggravated felony”</b></p>	<p>Usually not.</p>	<p>Usually not.</p>	<p>Without unusual circumstances, a single conviction of a misdemeanor offense is not a “particularly serious crime.” See <i>Matter of Juarez</i>, 19 I&amp;N Dec. 664 (BIA 1988). <b>Note:</b> 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>
<p><b>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) OR Misdemeanor (second or subsequent) that is not an “aggravated felony”</b></p>	<p>Depends.</p>	<p>Depends.</p>	<p>The BIA and most courts have found that an offense that is not an “aggravated felony” may be deemed a PSC. See <i>Matter of N-A-M-</i>, 24 I&amp;N Dec. 336 (BIA 2007), aff’d, <i>N-A-M- v. Holder</i>, 587 F.3d 1052 (10<sup>th</sup> Cir. 2009), holding that Congress did not intend to limit what offenses may be “particularly serious crimes” to those offenses classified as aggravated felonies. See also <i>Ali v. Achim</i>, 468 F.3d 462 (7<sup>th</sup> Cir. 2006), <i>Nethagani v. Mukasey</i>, 532 F.3d 150 (2d Cir. 2008), <i>Delgado v. Holder</i>, 563 F.3d 863 (9<sup>th</sup> Cir. 2009); <i>Zhan Gao v. Holder</i>, 595 F.3d 549 (4<sup>th</sup> Cir. 2010). But see <i>Alaka v. Attorney General of the U.S.</i>, 456 F.3d 88 (3d Cir. 2006) where the court concluded that an offense must be an aggravated felony in order to be classified as a “particularly serious crime.” 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. See <i>Matter of Frentescu</i>, 18 I&amp;N Dec. 244 (BIA 1982), modified, <i>Matter of C-</i>, 20 I&amp;N Dec. 529 (BIA 1992), <i>Matter of Gonzalez</i>, 19 I&amp;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>

**Sample PSC Case Law Determinations**

**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 a PSC for asylum, but not necessarily for withholding of removal. See "Felony/ Misdemeanor constituting an 'aggravated felony'" above.

**DRUG OFFENSES**

Offense	PSC for Asylum?	PSC for Withholding?	Case Law/Notes
<p><b>Drug trafficking offenses (or offenses that may be deemed drug trafficking offenses), generally</b></p>	<p>Yes, since virtually always will be deemed an AF.</p>	<p>Yes, presumptively, but individualized determination required.</p>	<p><i>Matter of Y-L-, A-G-, R-S-R-</i>, 23 I&amp;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 the following: (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>Tunis v. Gonzales</i>, 447 F.3d 547 (7th Cir. 2006). Though the court determined that not all drug transactions involve an inherent risk of violence, because the individual failed to satisfy all six of the criteria set forth in <i>Matter of Y-L</i> [see above], state conviction of two counts of sale of a small amount (less than a gram) of cocaine constituted a conviction for a PSC thus barring withholding.</p> <p><i>Santos-Melitante v. Gonzales</i>, No. 04-70981, 161 Fed.Appx. 634 (9th Cir. 2005) (unreported). Upheld Immigration Judge's decision that two convictions under Cal. Health and Safety Code § 11378, for "unlawful possession of a controlled substance for sale," constituted a PSC. Court found persuasive the fact that intent to sell was an element of the state crime and concluded that because the individual's crimes were also classified as an aggravated felony, there was an additional presumption that the individual's aggravated felonies were particularly serious crimes. See <i>Matter of Q-T-M-T</i>, 21 I &amp; N. Dec. 639, 1996 WL 784581 (1996).</p> <p><i>Gelaneh v. Ashcroft</i>, No. 04-3071, 153 Fed. Appx. 881 (3d. Cir. 2005) (unreported). It was "highly improbable" that conviction for possession with intent to deliver between 21 and 41 grams of cocaine, with a sentence of 5 years probation, could satisfy the <i>Y-L</i>- six-factor test.</p> <p><i>Perez v. Loy</i>, 356 F.Supp.2d 172 (D. Conn. 2005). Conviction for importing one kilogram of heroin into the United States could not satisfy the test set forth in <i>Matter of Y-L</i> and thus constituted a PSC which would bar withholding.</p> <p><i>Steinhouse v. Ashcroft</i>, 247 F.Supp.2d 201 (D. Conn. 2003). Individual suffering from bi-polar disorder was convicted of racketeering and selling drug samples. She received a three year sentence, a downward departure from the sentencing guidelines due to her "significantly reduced mental capacity." The court remanded the case to the BIA to consider the four <i>Frentescu</i> factors in their totality, not simply "whether the type and circumstance of the crime indicate that the alien will be a danger to the community." By failing to apply the fourth factor in <i>Frentescu</i>, the BIA had neglected to consider whether the individual's mental impairment affected the determination whether she posed a danger to the community. "When a crime is neither per se particularly serious or per se not particularly serious, the IJ and BIA must consider whether the circumstances of the crime indicate that the alien will be a danger to the community."</p>

Offense	PSC for Asylum?	PSC for Withholding?	Case Law/Notes
			<p>CASES DECIDED BEFORE <i>MATTER OF Y-L-</i>:</p> <p><i>Matter of U-M-</i>, 20 I&amp;N Dec. 327 (BIA 1991). Conviction of the sale or transportation of marihuana 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 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&amp;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>Chong v. Dist. Dir.</i>, 264 F.3d 378 (3d Cir. 2001). Left 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>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>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 of possession with intent to sell or deliver was convicted of a <i>per se</i> PSC.</p>
<b>Simple possession of drugs, generally</b>	Maybe.	Maybe.	<p>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&amp;N Dec. 819 (BIA 1990) (Simple possession of cocaine is not a particularly serious crime).</p>
<b>VIOLENT OFFENSES AND SEX OFFENSES</b>			
<b>Crimes against persons, generally</b>	Usually, and always when offense is deemed an AF.	Usually, but individualized determination may be required.	<p>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.</p> <p>CONSIDER: Without unusual circumstances, a single conviction of a misdemeanor offense is not a "particularly serious crime." <i>See Matter of Juarez</i>, 19 I&amp;N Dec. 664 (BIA 1988).</p>
Assault with a dangerous or deadly weapon	Usually, and always when offense is deemed an AF.	Usually, but individualized determination may be required.	<p><i>In re Pjeter Juncaj</i>, 2004 WL 1059706 (BIA 2004) (unpublished). Court looked to record of conviction to determine that using a firearm to shoot another person in the back of the head and purposefully displaying a firearm constituted a PSC.</p> <p><i>Satamian v. Gonzales</i>, No. 04-71228, 2006 WL 986386 (9th Cir. 2006) (unpublished). If a conviction under California provision penalizing assault with deadly weapon or by force likely to produce great bodily injury carries one year or more in prison, it constitutes an aggravated felony and is also a "particularly serious crime," rendering the individual ineligible for withholding of deportation.</p> <p><i>Singh v. Ashcroft</i>, 351 F.3d 435 (9th Cir. 2003). Assault with a weapon or with force likely to produce great bodily injury crime itself, two year sentence, and individual's conduct in kicking the victim in the head, supported the finding that this crime was particularly serious and barred eligibility for withholding.</p> <p><i>(continued on next page)</i></p>

APPENDIX F: "PARTICULARLY SERIOUS CRIME" BARS ON ASYLUM AND WITHHOLDING OF REMOVAL

Offense	PSC for Asylum?	PSC for Withholding?	Case Law/Notes
(continued) Assault with a dangerous or deadly weapon	(see previous page)	(see previous page)	(continued) <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' was a rock, and the crime was committed in the context of a running dispute between two street vendors.  <i>Ali v. Achim</i> , 468 F.3d 462 (7 <sup>th</sup> Cir. 2006). In finding that the conviction for battery with a dangerous weapon was a "particularly serious crime," the court noted that the "designation of aggravated felonies as per se 'particularly serious' creates no presumption that the Attorney General may not exercise discretion on a case-by-case basis to decide that other nonaggravated-felony crimes are also 'particularly serious.'"
Battery, aggravated	Yes.	Yes.	<i>Matter of B-</i> , 20 I&N Dec. 427 (BIA 1991).
Child molestation	Yes.	Yes.	<i>Lazovic v. Ashcroft</i> , 2004 WL 1157680 (9th Cir. 2004) (unpublished). Conviction of touching the "intimate parts" of a 12-year-old individual constituted a PSC, rendering individual ineligible for asylum and withholding.
Communication with a minor for immoral purposes	No.		<i>Morales v. Gonzales</i> , 478 F.3d 972 (9 <sup>th</sup> Cir. 2007). The Immigration Judge erred in relying on the facts recited in the state appellate court's opinion because those facts were not admitted or established as "the circumstance and underlying facts of conviction." The facts recited in the state appellate court's opinion applied to crimes of which the petitioner was not convicted
Criminal sexual abuse, aggravated (felony, against a minor)		Yes.	<i>Espinoza-Franco v. Ashcroft</i> , 394 F.3d 461 (7 <sup>th</sup> Cir. 2004). BIA concluded, and Seventh Circuit upheld, that aggravated criminal sexual abuse is a PSC because crimes "of sexual abuse against children involve a heightened risk of violence" and in addition individual "violated his daughter's trust." Furthermore, "fondling any part of [the complaining witness's] body with a lewd intent seems particularly serious considering her young age."
Criminal sexual contact		Yes.	<i>Remoi v. Att'y Gen. of U.S.</i> , No. 04-3685, 2006 WL 116877 (3 <sup>rd</sup> Cir. 2006) (unpublished). Conviction of criminal sexual contact, for which initial sentence was 364 days, but, subsequent to a probation violation, individual was re-sentenced for 18 months, constituted a crime of violence aggravated felony and a particularly serious crime barring both asylum and withholding.
Criminal sexual intercourse with a person under 18	Yes.	Maybe.	<i>Afridi v. Gonzales</i> , 442 F.3d 1212 (9 <sup>th</sup> Cir. 2006). Misdemeanor conviction for unlawful sexual intercourse with a seventeen-year-old who was more than three years younger than the perpetrator constituted an aggravated felony. However, the court of appeals concluded that, by failing to engage in a case-specific analysis as directed by <i>Matter of Frentescu</i> [see above], the BIA erred in concluding that individual had committed a PSC and denying withholding of removal.
Kidnapping and burglary	Yes.	Yes.	<i>Choeum v. INS</i> , 129 F.3d 29 (1 <sup>st</sup> Cir. 1997).
Lewd and lascivious act with a child 14-15 years of age	Yes.	Yes.	<i>Bogle-Martinez v. INS</i> , 52 F.3d 332 (9 <sup>th</sup> Cir. 1995).
Manslaughter (NY Manslaughter, first degree)	Yes.	Yes.	<i>Ahmetovic v. INS</i> , 62 F.3d 48 (2 <sup>d</sup> Cir. 1995). The Second Circuit affirmed the findings of the Immigration Judge and the BIA that first-degree manslaughter is a <i>per se</i> "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).

Offense	PSC for Asylum?	PSC for Withholding?	Case Law/Notes
Manslaughter (NY Manslaughter, second degree)	Regardless of whether it is a PSC, is a bar to asylum because deemed a "violent and dangerous crime"	Judge did not address this in this case, finding the individual ineligible based on other reasons.	<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).
Menacing	Yes.	Yes.	<i>Matter of N-A-M-</i> , 24 I&N Dec. 336 (BIA 2007), <i>aff'd</i> , <i>N-A-M- v. Holder</i> , 587 F.3d 1052 (10 <sup>th</sup> Cir. 2009). The court found that Congress did not intend to limit what offenses may be particularly serious crimes to those offenses classified as aggravated felonies.  The petitioner's offense is a "particularly serious crime based solely on its elements, i.e., that the offense by its 'nature' is a particularly serious one."
Rape	Yes.	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
Rape, attempted	Yes.	Yes.	<i>Gatalski v. INS</i> , 72 F.3d 135 (9th Cir. 1995).
Reckless endangerment	Yes.	Yes.	<i>Nethagani v. Mukasey</i> , 532 F.3d 150 (2d Cir. 2008). Convictions can be considered "particularly serious crimes" even if they are not designated as aggravated felonies.
Robbery	Yes.	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 or deadly weapon	Yes.	Yes.	<i>Matter of S-S-</i> , 22 I&N Dec. 458 (BIA 1999), <i>overruled in part</i> , <i>Matter of Y-L-</i> , <i>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.  <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.	Yes.	<i>Nguyen v. INS</i> , 991 F.2d 621 (10th Cir. 1993).
Unlawful sexual intercourse with a person under 18	Yes.	Yes.	<i>Bogle-Martinez v. INS</i> , 52 F.3d 332 (9th Cir. 1995).

PROPERTY OFFENSES			
Offense	PSC for Asylum?	PSC for Withholding?	Case Law/Notes
<b>Crimes against property, generally</b>	Less likely to be found to be a PSC than crimes against persons, but will be considered a PSC for asylum if offense is deemed an AF	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</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), that crimes against property are less likely to be categorized as PSCs than crimes against persons.  CONSIDER: 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).
Attempted burglary	Yes.	No.	<i>Wonlah v. Dep't of Homeland Security</i> , No. Civ.A.04-1832, 2005 WL 19447 (E.D.P.A. 2005) (unpublished). Sentence of 11-1/2 to 23 months in county prison for which individual did not serve any time in prison constituted an aggravated felony and thus rendered individual ineligible for asylum. For withholding purposes, however, conviction did not constitute a particularly serious crime.
Bank Fraud, aiding and abetting		No.	<i>Alaka v. Attorney General of the U.S.</i> , 456 F.3d 88 (3d Cir. 2006). The court concluded that an offense must be an aggravated felony in order to be classified as a "particularly serious crime." In coming to this holding, the court found that the sentence in INA §241(b)(3)(B), authorizing the Attorney General to determine when a conviction is "particularly serious," is clearly tied to the previous sentence which creates the presumption that an aggravated felony is a "particularly serious crime." Accordingly, this statutory construction implies that a "particularly serious crime" is limited to aggravated felonies.
Burglary, aggravated (NY Burglary, first degree)	Yes.	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.
Burglary with intent to commit theft		Not without aggravating circumstances.	<i>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). 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."
Conspiracy to traffic in counterfeit credit cards.	Yes.	No.	<i>Unuakhaulu v. Gonzales</i> , 416 F.3d 931 (9th Cir. 2005). Conviction which carried with it an 18-month sentence was not a particularly serious crime for the purposes of withholding. Conviction was an aggravated felony making individual ineligible for asylum.
Grand larceny in the fourth degree (felony)	Yes.	No.	<i>Bastien v. Dep't of Homeland Security</i> , No. 03-CV-611F, 2005 WL 1140709 (W.D.N.Y. 2005). Where the sentence was 1 1/2 to 3 years incarceration, though case qualified as an aggravated felony, it did not qualify as a particularly serious crime. Individual was eligible for discretionary withholding of removal.

Offense	PSC for Asylum?	PSC for Withholding?	Case Law/Notes
Receipt of stolen property	Yes.		<i>Hernandez-Barrera v. Ashcroft</i> , 373 F.3d 9 (1st Cir. 2004). Conviction for receipt of stolen property for which individual received a suspended sentence of two and a half years constituted an aggravated felony but did not bar individual's eligibility for asylum because the final order of deportation was not based on that offense but was instead based on the non-criminal ground of entering the United States without inspection.
Theft of services, generally	Yes.	Yes.	<i>Ilchuk v. Att'y Gen. of U.S.</i> , 434 F.3d 618 (3d Cir. 2006). Conviction for theft of services, where sentence imposed was six to twenty-three months of house arrest with electronic monitoring, constituted an aggravated felony, and also a PSC deeming individual ineligible for withholding. "Theft of services" charge originated from two days on which the individual, an ambulance driver, had responded to calls which had been diverted from the legally designated emergency service provider to the individual's employer.
<b>FIREARM OFFENSES</b>			
<b>Firearm trafficking offenses, generally</b>	Yes, since virtually always will be deemed an AF.	Usually.	Firearm trafficking offenses are likely to be found to be PSCs. See, e.g., <i>Matter of Q-T-M-T-</i> , 21 I&N Dec. 639 (BIA 1996).
<b>Simple possession of a firearm, generally</b>	Maybe not.	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.  CONSIDER: 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).
Illegal discharge of a firearm	Yes.	Yes.	<i>Granados v. Ashcroft</i> , No. C 03-3704, 2003 WL 22416147 (N.D.Ca. 2003). Because crime involved a substantial risk of harm to persons or property and the use of a firearm, it is "difficult to imagine facts and circumstances that would ameliorate the particularly serious nature of his offense." Derived from <i>Frentescu</i> , "[t]he Ninth Circuit has held that the determination of whether a crime qualifies as particularly serious requires an examination of (1) the nature of the conviction; (2) the type of sentence imposed; and (3) the circumstances and facts underlying the conviction." <i>Ursu v. INS</i> , No. 99-70678, 2001 U.S. App. LEXIS 29383 (9th Cir. 2001).  <i>Note</i> : The Ninth Circuit does not consider <i>Frentescu's</i> fourth factor: whether the type and circumstances of the crime indicate that the individual will be a "danger to the community." See e.g., <i>Ursu v. INS</i> , No. 99-70678, 2001 U.S. App. LEXIS 29383 (9th Cir. 2001); see also <i>Hamama v. INS</i> , 78 F.3d 233 (6th Cir. 1996).
Possession of a firearm during a felony	Yes.	Yes.	<i>In re Pjeter Juncaj</i> , 2004 WL 1059706 (BIA 2004) (unpublished). Court looked to record of conviction to determine that using a firearm to shoot another person in the back of the head and purposefully displaying a firearm constituted a PSC.  <i>Hamama v. INS</i> , 78 F. 3d 233 (6th Cir. 1996).
Robbery with a firearm	Yes.	Yes.	<i>Matter of S-S-</i> , 22 I&N Dec. 458 (BIA 1999), <i>overruled in part</i> , <i>Matter of Y-L-</i> , <i>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.

APPENDIX F: "PARTICULARLY SERIOUS CRIME" BARS ON ASYLUM AND WITHHOLDING OF REMOVAL

OTHER OFFENSES			
Offense	PSC for Asylum?	PSC for Withholding?	Case Law/Notes
Bringing an illegal alien into the U.S.	Yes, since offense is an AF.	No.	<i>Matter of L-S-</i> , 22 I&N Dec. 645 (BIA 1999), overruled in part, <i>Matter of Y-L</i> , <i>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) is not a PSC 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.
Concealing and harboring	Yes.	No.	<i>Zhen v. Gonzales</i> , 2006 WL 895505 (10th Cir. 2006). Conviction for concealing and harboring illegal aliens, 8 U.S.C. § 1324(a)(1)(A)(iii), for which sentence amounted to 233 days, constituted an aggravated felony and thus a PSC for purposes of asylum but not for the purposes of withholding.
Driving under the influence	No.	No.	<i>Delgado v. Holder</i> , 563 F.3d 863 (9th Cir. 2009).  The petitioner’s conviction for driving under the influence does not exceed the “capital or grave” standard of “serious” nonpolitical crimes, and <i>Frentescu</i> indicates that particularly serious crimes should exceed that standard. The court noted that driving under the influence can be dangerous, but there was no intent to injure. Driving under the influence is careless or even reckless, but requires no intent and is “most nearly comparable to crimes that impose strict liability.”  The court also discussed the relevance of international law when adjudicating whether a conviction is a “particularly serious crime” and concluded that the under the international origins of the “particularly serious crime” exception, the Immigration Judge erred in holding that the petitioner’s conviction was a “particularly serious crime.”
Hostage taking	Yes.	No.	<i>Acero v. INS</i> , No. Civ. A. 04-0223, 2005 WL 615744 (E.D.N.Y. 2005). Not a PSC, though it is an aggravated felony.
Mail fraud	Yes.	Yes.	<i>In re: Maurice Wilson</i> , 2004 WL 1398694 (BIA 2004). Conviction of mail fraud for which individual was sentenced to 15 months’ imprisonment and was fined \$25,000 constituted a PSC.
Racketeering	Maybe not.	Maybe not.	<i>Steinhouse v. Ashcroft</i> , 247 F.Supp.2d 201 (D. Conn. 2003). Individual suffering from bi-polar disorder was convicted of racketeering and selling drug samples. She received a three year sentence, a downward departure from the sentencing guidelines due to her “significantly reduced mental capacity.” The court remanded the case to the BIA to consider the four <i>Frentescu</i> factors in their totality, not simply “whether the type and circumstance of the crime indicate that the alien will be a danger to the community.” By failing to apply the fourth factor in <i>Frentescu</i> , the BIA had neglected to consider whether the individual’s mental impairment affected the determination whether she posed a danger to the community. “When a crime is neither per se particularly serious or per se not particularly serious, the IJ and BIA must consider whether the circumstances of the crime indicate that the alien will be a danger to the community.”
Unlawful export of military technology	Yes.	Yes.	<i>Zhan Gao v. Holder</i> , 595 F.3d 549 (4th Cir. 2010). The court determined that a crime does not have to be an aggravated felony to be a “particularly serious crime.” Even though it wasn’t an aggravated felony, the court affirmed the BIA’s determination that the crime’s “national security implications” rendered it a particularly serious crime. It was “impossible,” the BIA explained, “to quantify the number of lives the petitioner potentially imperiled by exporting military technology that is still presumably extant.”