

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
45100 60TH ST., WEST
LANCASTER, CA 93536

[REDACTED]
VASHISTHA, ANISH, ESQ.
5670 WILSHIRE BLVD. STE. 1730
LOS ANGELES, CA 90036

IN THE MATTER OF

FILE [REDACTED]

DATE: Apr 5, 2010

UNABLE TO FORWARD - NO ADDRESS PROVIDED

ATTACHED IS A COPY OF THE DECISION OF THE IMMIGRATION JUDGE. THIS DECISION IS FINAL UNLESS AN APPEAL IS FILED WITH THE BOARD OF IMMIGRATION APPEALS WITHIN 30 CALENDAR DAYS OF THE DATE OF THE MAILING OF THIS WRITTEN DECISION. SEE THE ENCLOSED FORMS AND INSTRUCTIONS FOR PROPERLY PREPARING YOUR APPEAL. YOUR NOTICE OF APPEAL, ATTACHED DOCUMENTS, AND FEE OR FEE WAIVER REQUEST MUST BE MAILED TO:

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P.O. BOX 8530
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ATTACHED IS A COPY OF THE DECISION OF THE IMMIGRATION JUDGE AS THE RESULT OF YOUR FAILURE TO APPEAR AT YOUR SCHEDULED DEPORTATION OR REMOVAL HEARING. THIS DECISION IS FINAL UNLESS A MOTION TO REOPEN IS FILED IN ACCORDANCE WITH SECTION 242B(c)(3) OF THE IMMIGRATION AND NATIONALITY ACT, 8 U.S.C. SECTION 1252B(c)(3) IN DEPORTATION PROCEEDINGS OR SECTION 240(c)(6), 8 U.S.C. SECTION 1229a(c)(6) IN REMOVAL PROCEEDINGS. IF YOU FILE A MOTION TO REOPEN, YOUR MOTION MUST BE FILED WITH THIS COURT:

IMMIGRATION COURT
45100 60TH ST., WEST
LANCASTER, CA 93536

✓
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IMMIGRATION COURT

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LANCASTER, CA, 93536

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
LOS ANGELES, CALIFORNIA

FILE NO. [REDACTED]

IN THE MATTER OF:)
[REDACTED])
[REDACTED]) IN REMOVAL PROCEEDINGS
RESPONDENT.)

CHARGES: Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act (INA), as amended: in that at any time after admission, you have been convicted of an aggravated felony as defined in Section 101(a)(43)(G) of the INA a law relating to a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment of at least one year was imposed;

Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act (INA), as amended: in that at any time after admission, you have been convicted of an aggravated felony as defined in Section 101(a)(43)(M) of the INA a law relating to a fraud offense involving fraud or deceit in which the loss to the victim or victims exceeds \$10,000;

Section 237(a)(2)(A)(ii) of the INA, as amended, in that at any time after admission you have been convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct.

APPLICATIONS: Asylum; Withholding of Removal; Protection under Article III of the Convention Against Torture

ON BEHALF OF RESPONDENT:

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ON BEHALF OF THE GOVERNMENT:

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45100 60th Street, West
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DECISION AND ORDER OF THE IMMIGRATION JUDGE

I. STATEMENT OF THE CASE

The Respondent is a 23 year old male, native and citizen of Pakistan. The Department of Homeland Security (DHS) commenced these removal proceedings against the Respondent pursuant to its authority under section 240 of the INA, by issuing the Respondent a Notice to Appear (NTA) and filing it with the Immigration Court on or about August 27, 2009. See Exhibit 1.

In the NTA, DHS alleged that Respondent has been a lawful permanent resident since August 2, 2004 but suffered convictions in the Los Angeles County, California Superior Court for the offenses of Grand Theft in violation of Section 487 of the California Penal Code and Identity Theft in violation of Section 530.5 of the California Penal Code. Both convictions occurred on or about September 22, 2008. See Exhibit 2. As a result of these separate counts that resulted in separate convictions, the DHS on the NTA charged the Respondent with removability pursuant to Section 237(a)(2)(A)(ii) and Section 237(a)(2)(A)(iii) of the INA, respectively.

At an initial master calendar hearing on September 22, 2009, the Respondent admitted allegations 1 and 2 on the NTA (alienage) but denied allegations 3 through 7 as well as the two charges of removability. The matter was then rescheduled for contested removability on November 3, 2009. At the contested removability hearing, the DHS lodged an additional allegation and aggravated felony charge—alleging that Respondent's convictions resulted in the loss to victims exceeding \$10,000 and was therefore a fraud offense in violation of Section 101(a)(43)(M) of the INA.

At the hearing on November 3, 2009, the Immigration Judge found removability on only one charge: that Respondent had been convicted of an aggravated felony in violation of Section 101(a)(43)(G) of the INA—and was therefore removable by clear, convincing and unequivocal evidence pursuant to Section 237(a)(2)(A)(iii) of the INA. As for the other two charges, the Immigration Judge found that identity theft and grand theft did not contain the element of fraud that would trigger removability as an aggravated felon under Section 101(a)(43)(M) of the INA and that Respondent's separate convictions for identity theft and grand theft were part of a single scheme of criminal misconduct.

After removability was established, the Respondent declined to name a country of removal. The Immigration Court then directed Pakistan as the country of removal based upon the recommendation of the DHS.

On November 3, 2009, Respondent filed an application for asylum, withholding of removal and deferral of removal pursuant to Article III of the Convention Against Torture. The matter was scheduled for a hearing on the merits on January 28, 2010. The parties were not able

to complete the case on January 28, 2010 and the matter was completed on March 17, 2010. Both parties rested on that day.

At the merits hearings, the Immigration Court considered the testimony of Respondent, his mother, [REDACTED], as well as the expert testimony from Charles Kennedy, a professor at Wake Forest University.

The Court also admitted the following exhibits into the record:

- Exhibit 1: Notice to Appear; Exhibit 1A: I-261;
- Exhibit 2: Conviction Records;
- Exhibit 3: Record of Deportable Alien, Form I-213;
- Exhibit 4: DHS Pre-hearing Brief and Evidence Submission that included Form I-181;
- Exhibit 5: Respondent's Brief and Motion to Terminate;
- Exhibit 6: DHS Opposition to Motion to Terminate and Evidence submission;
- Exhibit 7: Form I-589 Application for Asylum and Withholding of removal and supplemental documents;
- Exhibit 8: Frivolous Warning;
- Exhibit 9: Motion to Present Telephonic Testimony of Dr. Kennedy and Curriculum Vitae;
- Exhibit 10: Forwarding letter to the Department of State;
- Exhibit 11: Respondent's list of witnesses;
- Exhibit 12: Respondent's Supplemental Documents in Support of Applications;
- Exhibit 13: Respondent's Addendum to Application for Asylum;
- Exhibit 14: 2009 Human Rights Report for Pakistan;
- Exhibit 15: Respondent's Additional Supplemental Documents in Support of Applications for Relief.

Prior to admission of the application, the Immigration Court gave the Respondent an opportunity to review the application to make any necessary changes or corrections. Respondent then swore that the contents of the application and all supporting documentation were true and correct to the best of his knowledge.

II. STATEMENT OF FACTS

A. Testimony of Respondent:

The bulk of the testimonial support relating to the Respondent's claim lies with his mother and the expert witness, Charles Kennedy. However, the following constitutes the summary of Respondent's testimony. Respondent indicated that he is a 23 year old native and citizen of Pakistan who gained admission to the United States in 2002 and then later became a lawful permanent resident in 2004. Respondent was only approximately 14 or 15 years of age

when he admitted to the United States. Respondent stated that he was raised by his single mother since his father passed away when he was a toddler. He never met anyone from his father's side of the family. Respondent stated that he is an "unholy mix" of Sunni and Shia Muslim families. His father was a Shia Muslim and his mother was raised a Sunni Muslim. The marriage between his parents was a source of great consternation and shame on his father's side of the family. Respondent acknowledged that he has a Shia name but the majority of the Pakistani population is Sunni. Despite his Shia name, Respondent is a practicing Sunni Muslim. Respondent was too young to remember the problems his mother had with his father's family. (For facts concerning his mother's problems, please see the below subsection regarding the testimony of ██████████)

Respondent also testified that he had problems with the MQM Party when he was a teenager residing in Pakistan. The MQM party tried to heavily recruit Respondent into its party but he resisted, resulting in threats to his life if he did not join. Party members tried to beat him and hit him with a pistol. They threatened death but he refused to join them as he did not adhere to their political beliefs. Respondent also indicated in his application that due to his mixed religious heritage, he feared retribution or physical harm from extremist groups from both the Shiites and Sunnis. Soon after these threats Respondent and his mother immigrated to the United States and he was able to safely avoid additional problems with the MQM party.

Respondent also testified about how he has changed since immigrating to the United States. He has many tattoos and a Christian girlfriend. He feels that it would not be fair to have to remove his tattoos, change his name or change his lifestyle if he was to return to Pakistan, given the growing problems facing his home country.

Respondent, upon cross-examination, was asked about several Sunni holidays and coming of age rituals. Respondent testified credibly regarding these issues.

B. Testimony of ██████████

██████████ is the mother of the Respondent. She testified at length regarding her life and the life of her son when residing in Pakistan. Raised a Sunni Muslim, she fell in love with Respondent's father, who was a Shia Muslim. Her husband's family did not approve of their marriage and demanded that she become a Shia; otherwise, she was an impure woman who would put a curse on her husband's family. ██████████'s husband was a captain in the military. After a miscarriage in 1985, ██████████ gave birth to the Respondent in 1986. However, when Respondent was about three years old, his father died, leaving ██████████ a single mother. Her husband's family demanded that she turn over the Respondent so her father-in-law could kill the Respondent to lift the "curse" on his family. Of course, she did not allow Respondent to have any contact with his father's family. The father-in-law also sent threatening letters to ██████████. See Exhibit 12. ██████████ had to move in with her family and live in a different city since she could not longer seek protection from the military once her husband passed away.

██████████ also testified about the problems her son had with the MQM party as well as the

changes he has gone through while residing in the United States. She is sure that if he was to return to Pakistan there would be no one to protect him—from his Shiite name, to his tattoos, to his practice of Sunni Islam and to the political and religious problems facing Pakistan today.

C. Testimony of Charles Kennedy, PhD.

Dr. Kennedy is a political science professor at Wake Forest University specializing in courses on Southeast Asia. He has been to Pakistan many times and conducted much research on Pakistan. The DHS attorney appeared, at first, to question his credentials as an expert, but clearly, based upon his curriculum vitae as well as his testimony, he is an expert on modern Pakistan.

Dr. Kennedy testified that regarding the political party structure in Pakistan between the PPP and MQM parties. He verified that the problems Respondent would have faced against the MQM are consistent with his knowledge on the subject. While recruitment is not limited to teenagers, most parties try to heavily recruit teens between the ages of 15 to 19.

Dr. Kennedy also testified concerning the schism between Shiites and Sunnis within Pakistan. Sunni Muslims constitute the majority of the population. Intermarriage can be allowed but it is based upon the whims of family. If the family does not approve of an intermarriage, the marriage could pose a problem for the bride and groom. Dr. Kennedy reviewed Respondent's statement and found that it is consistent with current country and cultural conditions in Pakistan. Between the corruption of the police apparatus in Pakistan and the growing extremist groups, Respondent could easily face significant discrimination and physical harm if returned to Pakistan. In Dr. Kennedy's opinion, neither the Sunni nor Shia communities would accept the Respondent as a result of his mixed religious heritage. Indeed, given the rise of religious extremist groups in Pakistan, Dr. Kennedy concludes that members of his father's family or other extremist groups within the Shia community may try to kill him if they find out he has returned to Pakistan.

Dr. Kennedy also concluded that Respondent's relocation to the United States and his embrace of many cultural aspects of American society could prove problematic for him. According to Dr. Kennedy, Pakistani society has become increasingly anti-American and when coupled with all of his other problems, the Respondent would most likely be seen as a target for anti-American sentiment.

Cross-examination of Dr. Kennedy focused on whether the Pakistani police apparatus is corrupt. Dr. Kennedy, of course, believes that the police can be corrupt and its response to crimes can be varied—depending upon the ethnicity or religion of the complainant.

Finally, Dr. Kennedy also concluded that Respondent's unique religious heritage will isolate him from his family and the community of Pakistan at large. Thus, Dr. Kennedy concludes that Respondent would also face economic isolation that would prove debilitating to

Respondent's well-being. Pakistan's economic situation is currently dire and without family support or a job, Respondent faces a brutal life if returned to his home country.

The DHS opposes all forms of relief from removal filed by the Respondent. In essence, the DHS argues that Respondent failed to comply with the Real ID Act in providing documentation that corroborates his harm. Furthermore, the DHS contends that Respondent failed to show past persecution and any future persecution would be speculative at best.

At the hearing on March 17, 2010, the Immigration Judge tentatively ruled that Respondent's application for asylum would be denied due to statutory eligibility but would grant Respondent's application for withholding of removal finding that, his crime did not rise to the level of a particularly serious crime and that he established a clear probability of persecution should he be returned to Pakistan. The Immigration Judge also ruled that Respondent failed to establish a claim under CAT. Due to the lateness of the day, the Immigration Judge was not able to issue an oral decision and this written decision thereby follows.

III. ANALYSIS

A. Charges of Removability:

Despite three charges of removability lodged against the Respondent, the Immigration Judge finds that the DHS only established by clear, convincing and unequivocal evidence that Respondent is removable as having been convicted of an aggravated felony as defined under Section 101(a)(43)(G) of the INA.

With respect to the charge of removability pursuant to Section 237(a)(2)(A)(ii) [two crimes involving moral turpitude that is not part of a single scheme of criminal misconduct], the Immigration Judge finds that Respondent's separate convictions for Grand Theft under Section 487 of the California Penal Code and Identity Theft under Section 530.5 of the California Penal Code are crimes involving moral turpitude. However, the DHS failed to establish why these crimes were not part of a single scheme of criminal misconduct. The crimes occurred at different times but they involved the same victim: [REDACTED] See Exhibit #2. The conviction documents reveal that Respondent was involved in stealing money and credit from an elderly person who conducted business at a bank where Respondent was a teller. Separate crimes can be committed based upon a single scheme of criminal misconduct. In the instant case, Respondent basically stole money from a victim when that victim would conduct business at the bank employing Respondent. There were not multiple schemes of criminal misconduct. Accordingly, the DHS failed to establish removability under Section 237(a)(2)(A)(ii) of the INA.

Likewise, the DHS failed to establish removability under the aggravated felony charge as it relates to Section 101(a)(43)(M) of the INA—fraud with a loss of over \$10,000. Once again, the DHS presented no persuasive legal argument why Respondent's conviction of Identity Theft or Grand Theft is a fraud offense. The conviction documents provided to the court show a loss

of over \$10,000 but there is no element in either Grand Theft or Identity Theft making it a fraud crime. Rather, the DHS argues in its brief at Exhibit #6 that the nature of his crimes committed are fraudulent and cites to the recent United States Supreme Court case of *Nijahawan v. Holder*, 129 S. Ct. 2294 (2009) but fails to show how this case connects theft crimes to fraud crimes.

Finally, as stated above, the DHS did establish that Respondent's conviction for Identity Theft with a 365 day sentence is an aggravated felony under Section 101(a)(43)(G) of the INA. The Immigration Judge finds that Identity Theft under Section 530.5 of the California Penal Code is categorically a theft offense. Section 530.5 of the California Penal Code provides that whenever an individual willfully obtains personal information belonging to another without the owner's consent and uses that information for any unlawful purpose has committed identity theft. These elements conform to the generic definition of a theft offense adopted by the Ninth Circuit Court of Appeals. In *United States v. Corona-Sanchez*, 291 F.3d 1201 ((9th Cir. 2002), a theft offense is a taking of property or an exercise of control over property without consent with the criminal intent to deprive the owner of rights and benefits of ownership whether such deprivation is permanent or temporary. In the instant case, Respondent's conviction for Identity Theft with a 365 day sentence meets the definition of an aggravated felony under Section 101(a)(43)(G).

The Respondent's motion to terminate is denied and the DHS has established by clear, convincing and unequivocal evidence that he is removable pursuant to Section 237(a)(2)(A)(iii) as it relates to Section 101(a)(43)(G) of the INA.

The Court will now turn to Respondent's applications for relief from removal.

B. Asylum:

To qualify for a grant of asylum, an applicant must demonstrate that he is a "refugee" within the meaning of section 101(a)(42)(A) of the Act. See INA § 208(b)(1)(A); 8 C.F.R. § 1208.139(b). To meet this definition, an applicant has the burden of proving that he suffered past persecution or has a well-founded fear of future persecution within the meaning of the Act. Matter of E-P-, 21 I. & N. Dec. 860, 860 (BIA 1997). Further, the past persecution must be "on account of" one of the five grounds enumerated in the statute: race, religion, nationality, membership in a particular social group, or political opinion. See *INS v. Elias-Zacarias*, 502 U.S. 478, 481-82 (1992); *Sangha v. INS*, 103 F.3d 1482, 1486 (9th Cir. 1997). The asylum applicant must also show that the source of the persecution is the government, a quasi-official group, or persons or groups that the government is unable or unwilling to control. See *Avetovo-Elisseva v. INS*, 213 F.3d 1192, 1196 (9th Cir. 2000). Furthermore, the applicant must not be ineligible for asylum because of any bars listed at INA § 208(b)(2).

The burden of proof is on the applicant for asylum to establish that he is a refugee as defined in section 101(a)(42) of the Act. See 8 C.F.R. § 1208.13(a). However, if an applicant can demonstrate past persecution, the burden shifts to the Government to establish by a preponderance of the evidence that there has been a fundamental change in circumstances such

that the applicant no longer has a well-founded fear of persecution or the applicant could avoid future persecution by relocating to another part of the applicant's country of nationality and it would be reasonable to expect the applicant to do so. See 8 C.F.R. §1208.13(b)(1)(ii).

Respondent, however, is not statutorily eligible for asylum due to his conviction that has been defined as an aggravated felony under Section 101(a)(43)(G) of the INA. Specifically, the INA provides at Section 208(a)(2)(A)(ii), an alien that has committed an aggravated felony for purposes of the INA has committed a particularly serious crime rendering Respondent ineligible for asylum. Thus, Respondent is ineligible for asylum pursuant to Section 208 of the INA as a result of his conviction for Identity Theft in violation of Section 530.5 of the California Penal Code.

C. Withholding of Removal:

To qualify for withholding of removal under section 241(b)(3) of the INA, "an alien must establish by a 'clear probability' that his 'life or freedom would be threatened' upon return" to the country of removal because of the alien's race, religion, nationality, membership in a particular social group, or political opinion. *Li v. Ashcroft*, 356 F.3d 1153, 1157 (9th Cir. 2004); *see also INS v. Stevic*, 467 U.S. 407 (1984) (applying withholding under the former § 243(h) standard). The "clear probability" standard required for withholding of removal is more stringent than the "well-founded fear" standard for asylum. *Navas v. INS*, 217 F.3d 646, 655 (9th Cir. 2000); *Fisher v. INS*, 79 F.3d 955(9th Cir.1996). Under the Refugee Act of 1980, withholding of removal is mandatory if an alien establishes eligibility. Before delving into the specifics of Respondent's claim, there is a threshold issue of eligibility to determine whether his crime for Identity Theft, while an aggravated felony, is also a particularly serious crime for purposes of withholding of removal.

1. A particularly serious crime under withholding of removal

Withholding of removal is not available if the applicant, "having been convicted by a final judgment of a particularly serious crime is a danger to the community of the United States." 8 U.S.C. § 1231(b)(3)(B)(ii); *Anaya-Ortiz v. Mukasey*, 553 F.3d 1266, 1273 (9th Cir. 2009); *Singh v. Ashcroft*, 351 F.3d 435, 438-39 (9th Cir. 2003); *Matter of Frentescu*, 18 I&N Dec. 244 (BIA 1982). For cases filed on or after April 1, 1997, an aggravated felony conviction is considered to be a particularly serious crime if the applicant has been sentenced to an aggregate term of imprisonment of at least five years. 8 U.S.C. §1231(b)(3)(B). However, the Immigration Judge has "discretion, pursuant to Section 1231(b)(3)(B)(ii), 'to determine whether an aggravated felony conviction resulting in a sentence of less than 5 years is a particularly serious crime.'" *Matsuk v. INS*, 247 F.3d 999, 1002 (9th Cir. 2001); *Matter of N-A-M-*, 24 I&N Dec. 336, 338-39 (BIA 2007); *see also Villegas v. Mukasey*, 523 F.3d 984, 987 (9th Cir. 2008); *Matter of L-S-*, 22 I&N Dec. 645, 648-49 (BIA 1999). If an alien has been convicted of an aggravated felony, but was sentenced to less than five years, the Immigration Judge is required to look and determine if the conviction is, nevertheless, a particularly serious crime. Additionally, crimes that are not

aggravated felonies can also be particularly serious crimes. *Matter of N-A-M-*, 24 I&N Dec. 336, 341 (BIA 2007).

Matter of Frenescu, 18 I&N Dec. 244 (BIA 1982) is still the controlling decision from the Board of Immigration Appeals (BIA) that lays out the factors an Immigration Judge is to consider when deciding whether or not a crime is particularly serious. The Board indicated that in most cases this will be a fact-based investigation on the part of the Immigration Court. 18 I&N at 247. There are four important factors: (1) the nature of the conviction; (2) the circumstances and underlying facts of the conviction; (3) the type of sentence imposed; and (4) whether the type and circumstances of the crime indicate that the alien will be a danger to the community. *Id.* The Immigration Judge must carefully consider each of the four factors in deciding whether or not a conviction is a particularly serious crime. *Afridi v. Gonzales*, 442 F.3d 1212, 1219 (9th Cir. 2006). The Board, in *Matter of N-A-M-* noted however, “our approach to determining whether a crime is particularly serious has evolved since the issuance of our decision in *Matter of Frenescu...*” 24 I&N at 342. Specifically, *Matter of Carballe*, 19 I&N Dec. 357 (BIA 1986) held that once a crime is found to be particularly serious, there does not need to be a separate finding as to whether or not the alien is a danger to the community. *See also, Anaya-Ortiz v. Mukasey*, 553 F.3d 1266, 1276 (9th Cir. 2009); *Kankamalage, v. INS*, 335 F.3d 858, 861 n. 2 (9th Cir. 2003). Additionally, the Immigration Judge is to focus on the nature of the crime, not the likelihood of future serious misconduct when making the “particularly serious crime” inquiry. *Matter of Carballe*, 19 I&N Dec. 357 (BIA 1986); *See also, Matter of Q-T-M-T-*, 21 I&N Dec. 639, 645-46 (BIA 1996). Finally, *Matter of N-A-M-* stated that the Board no longer focuses on the sentence imposed because it “is not the most accurate or salient factor to consider in determining the seriousness of an offense.” 24 I&N at 343 (BIA 2007). This means the Immigration Judge should consider all four factors laid out in *Frenescu*, but should begin with the nature of the conviction and should not base his decision solely on the sentence imposed.

When conducting a “particularly serious crime” inquiry, the Immigration Judge must first determine, from the elements of the offense, whether or not the crime comes “within the ambit of a particularly serious crime.” *Matter of N-A-M-*, 24 I&N Dec. 336, 342 (BIA 2007). If it does not, then “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.” *Id.* However, if it does, then the Immigration Judge may look at “all reliable information... including the conviction records and sentencing information, as well as other information outside the confines of a record of conviction.” *Anaya-Ortiz v. Mukasey*, 553 F.3d 1266, 1275 (9th Cir. 2009). Additionally, the Immigration Judge may look at the elements of the offense to determine the nature of the crime. *Matter of N-A-M-*, 24 I&N Dec. 336, 342 (BIA 2007); *Matter of Garcia-Garrocho*, 19 I&N Dec. 423 (BIA 1986). However, there are certain factors an Immigration Judge may NOT look at. For example, an Immigration Judge may not consider the respondent’s family or community ties. *Matter of L-S-*, 22 I&N Dec. 645 (BIA 1999); *Ramirez-Ramos v. INS*, 814 F.2d 1394, 1397-98 (9th Cir. 1987); the risk of persecution in the alien’s native country, *Matter of L-S-*, 22 I&N Dec. 645 (BIA 1999); *Ramirez-Ramos v. INS*, 814 F.2d 1394, 1397-98 (9th Cir. 1987); facts such as cooperation with law enforcement or personal characteristics of the offender, *Matter of N-A-M-*,

24 I&N Dec. 336, 342 (BIA 2007); or the rehabilitative potential of the offender, *Matter of K-*, 20 I&N Dec. 418, 425 (BIA 1991). Whether or not a crime is particularly serious is generally a discretionary one, which means the Immigration Judge needs to explicitly lay out the reasoning in his finding, referring to facts in the record.

The following crimes have been found to be particularly serious by the courts:

- Felony menacing under Colorado Revised Statutes 18-3-206(1), *Matter of N-A-M-*, 24 I&N Dec. 336 (BIA 2007);
- Substantial battery with a dangerous weapon, *Ali v. Achim*, 468 F.3d 462, 467-71 (7th Cir. 2006) *cert. dismissed* 128 S.Ct. 828 (2007);
- Burglary of a dwelling with aggravating circumstances, *Matter of Garcia-Garrocho*, 19 I&N Dec. 423 (BIA 1986);
- Shooting with intent to kill, *Nguyen v. INS*, 991 F.2d 621, 626 (10 Cir. 1993);
- Illicit trafficking in firearms, *Matter of Q-T-M-T-*, 21 I&N Dec. 639, 655 (BIA 1996);
- Driving under the influence and causing injury in violation of California Vehicle Code section 23153(b), *Anaya-Ortiz v. Mukasey*, 553 F.3d 1266, 1276-77 (9th Cir. 2009);
- Robbery with a weapon, *Matter of Carballe*, 19 I&N Dec. 357, 360-61 (BIA 1986); *Matter of L-S-J-*, 21 I&N Dec. 973, 975 (BIA 1997); *Matter of S-S-*, 22 I&N Dec. 458, 465-67 (BIA 1999), overturned on unrelated point by *Matter of Y-L-, A-G-, R-S-R-*, 23 I&N Dec. 270 (AG 2002);
- Felony firearm and felonious assault, *Matter of Pjeter Juncaj*, 2004 WL 1059706 (BIA 2004);
- Any drug trafficking offense has a strong presumption that it is particularly serious, *Matter of Y-L-, A-G-, R-S-R-*, 23 I&N Dec. 270 (AG 2002).

Here are examples of crimes that have NOT to be particularly serious:

- Burglary with intent to commit theft, *Matter of Frentescu*, 18 I&N Dec. 244, 247 (BIA 1982)
- Single misdemeanor offenses such as assault with a deadly weapon, *Matter of Juarez*, 19 I&N Dec. 664 (BIA 1988);
- Maybe felony DUI, *Delgado v. Holder*, 563 F.3d 863 (9th Cir. 2009) (finding that Respondent's 3 felony convictions for DUI did not constitute particularly serious crimes for asylum purposes, but that the Circuit Court lacked jurisdiction to rule on the BIA's affirming of the Immigration Judge's decision that they constituted particularly serious crimes for withholding purposes.)

The trend in the established case law favors that crimes against people, especially where there is violence or the potential for violence is more likely to be considered particularly serious. See, *Matter of Frentescu*, 18 I&N 244, 247 (BIA 1982). However, in recent years the particularly serious crime concept has been expanded to include certain instances of driving under the influence where aggravating factors are involved. See *Anaya-Ortiz v. Mukasey*, 553 F.3d 1266,

1276-77 (9th Cir. 2009). The Courts will often look first at the statute to see whether the elements necessary for a conviction would necessarily constitute a particularly serious crime, *Matter of Garcia-Garrocho*, 19 I&N Dec. 423 (BIA 1986), but they will also look at the specific facts underlying the conviction. See, *Matter of S-S-*, 22 I&N Dec. 458, 466 (BIA 1999) (noting that the respondent robbed a woman in her home, pulling her out the shower and her six-year-old son was witness to the robbery in finding he was convicted of a particularly serious crime) ; *Anaya-Ortiz v. Mukasey*, 553 F.3d 1266, 1276 (9th Cir. 2009) (affirming the BIA's finding that the respondent was convicted of a particularly serious crime based on his testimony at trial in which he described his conviction for driving under the influence with causing injury was based on his driving his car into an elderly woman's house and causing part of the wall to collapse on her, causing her great bodily harm).

In the instant case, Respondent's convictions for grand theft and identity theft with only a 365 day sentence do not constitute particularly serious crimes. The Immigration Judge does not dismiss the vileness of committing an act of theft against an elder but the elements of identity theft fail to meet the *Frentescu* test. The crime is not violent in nature. As such it is unlikely that Respondent is a danger to the community. Further, as the conviction record indicated the Respondent was a teller at a bank who took the money from the victim. As such he was in a position of trust and therefore, the circumstances of the crime show that it was a serious offense. But given the lower sentence and the fact that it was not a violent act, the Immigration Judge concludes that it is not a particularly serious crime under *Frentescu*.

Accordingly, the Immigration Court can now turn to Respondent's actual claim for withholding of removal.

The burden of proof required for withholding of removal is greater than the burden of proof for asylum. *INS v. Stevic*, 467 U.S. 407, 413 (1984). To qualify for withholding of removal, the applicant must show a clear probability of persecution on account of her race, religion, nationality, membership in a particular social group, or political opinion. See INA Section 241(b)(3); *Stevic*, 467 U.S. at 413. In other words, the applicant must show that it is more likely than not that his/her life or freedom would be threatened on account of one of the specified grounds. *Zhang v. Ashcroft*, 388 F.3d 713, 718 (9th Cir. 2004); *Al-Harbi v. INS*, 242 F.3d 882, 888 (9th Cir. 2001).

Past Persecution

While "persecution" is not defined by the INA, it is "an extreme concept, marked by the infliction of suffering or harm...in a way regarded as offensive." *Li v. Ashcroft*, 356 F.3d 1153, 1158 (9th Cir. 2004) (en banc); see also *Li v. Holder*, 559 F.3d 1096, 1107 (9th Cir. 2009); *Matter of Acosta*, 19 I. & N. Dec 211, 223 (BIA 1985) (overruled on other grounds by *Matter of Mogharrabi*, 19 I. & N. Dec 439 (BIA 1987)). Various forms of physical violence, such as, rape, torture and assault, constitute persecution. See *Chand v. INS*, 222 F.3d 1066, 1073-74 (9th Cir. 2000) (holding that "[p]hysical harm has consistently been treated as persecution"). Persecution

may also include mental suffering or economic deprivation that is so severe it constitutes a threat to an individual's life or freedom. See Acosta, 19 I. & N. at 222. "Purely economic harm can rise to the level of persecution where there is 'a probability of deliberate imposition of substantial economic disadvantage' upon the applicant on account of a protected ground." Chand, 222 F.3d at 1074 (quoting Gonzalez v. INS, 82 F.3d 903, 910 (9th Cir.1996)). However, trivial inconveniences do not rise to the level of persecution and persecution does not encompass all treatment that society regards as unfair, unjust, or even unlawful or unconstitutional. See Gu v. Gonzales 454 F.3d 1014, 1019 (9th Cir. 2006).

First and foremost, Respondent and his supporting witnesses testified credibly. In particular, Respondent's mother, [REDACTED] provided compelling and poignant testimony regarding the threats and harms she and Respondent faced after her husband tragically died at the young age of 33. Further, Dr. Kennedy provided detailed and convincing testimony based upon his expertise regarding the harm that Respondent would face if returned to Pakistan.

Following the enactment of the Real ID Act, the testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration, but only if the applicant satisfies the Court that her testimony is credible, persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee. See INA Section 208(b)(2)(B)(ii). The Ninth Circuit Court of Appeals recently held in Shrestha v. Holder, (9th Cir January 5, 2010), that testimony without any evidence may not be enough to establish a claim under the Real ID Act. Respondent, though, has provided detailed documentation that establishes and corroborates his claim. Coupled with the credible testimony of the witnesses, Respondent easily meets his burden under the Real ID Act.

Respondent's mother faced serious threats from her husband's family who wanted to kill Respondent since he was of a mixed religious heritage. Further, Respondent, as a teenager, faced threats of harm and physical violence from political parties in Pakistan. Finally, as Dr. Kennedy detailed during his testimony, the kind of harm, discrimination and ostracism Respondent would face if returned constitutes a clear probability of future persecution. The Board in Matter of Acosta found that economic harm can constitute persecution if it is so severe that it causes a threat to one's life or freedom. In the instant case, the Immigration Judge concludes that Respondent's religious, political and cultural background will result in severe cultural and economic isolation if he is returned to Pakistan as it faces growing religious, economic and political tensions that place it at the brink of total collapse. See Exhibits 12-15. Accordingly, it clear that Respondent's isolation, as also described by Dr. Kennedy, will result in a potential loss of life or freedom for Respondent.

Respondent merits a grant of his application for withholding of removal pursuant to Section 241(b)(3) of the INA—with an underlying order of removal to Pakistan.

D. Protection Under Article III of the Convention Against Torture

Pursuant to the Convention Against Torture, the United States may not remove an alien to a country where it is more likely than not that she would be tortured. 8 C.F.R. § 1208.16(a), (c)(2). The applicant bears the burden of establishing that it is more likely than not that he or she would be tortured if removed to the proposed country of removal. 8 C.F.R. § 1208.16(c)(2); Ali v. Ashcroft, 394 F.3d 780, 791 (9th Cir. 2005). Torture is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining a confession, punishment, intimidation, or coercion. 8 C.F.R. § 1208.18(a)(1).

An applicant is not required to demonstrate that she would be tortured on account of a particular belief or immutable characteristic. Matter of S-V-, 22 I&N Dec. 1306 (BIA 2000). However, the torture must be inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. Id. Acquiescence requires an applicant to show that public officials demonstrate willful blindness to the torture of their citizens by third parties. Zheng v. Ashcroft, 332 F.3d 1186, 1196 (9th Cir. 2003).

The Court finds the Respondent did not meet his burden of showing, through credible evidence, that it is more likely than not that he would face torture at the hands of the Pakistani authorities if returned to Pakistan. There is no evidence that he was tortured in the past—in fact, for a time after his father died, the Pakistani government (the military) actually protected he and his mother from his father's family.

Accordingly, the Court will enter the following orders:

IV. ORDERS

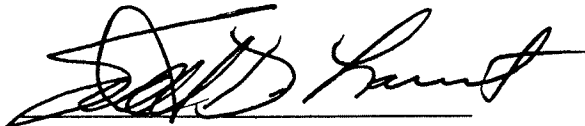
IT IS HEREBY ORDERED that the Respondent's application for asylum under section 208 of the INA is **DENIED**;

IT IS FURTHER ORDERED that the Respondent's application for withholding of removal under section 241(b)(3) of the INA is hereby **GRANTED**;

IT IS FURTHER ORDERED that the Respondent's application for withholding of removal under the Convention of Torture is hereby **DENIED**;

IT IS FURTHER ORDERED that the Respondent shall be removed from the United States to Pakistan.

DATED: April 5, 2010



Scott D. Laurent
IMMIGRATION JUDGE



RE: [REDACTED]

File: A [REDACTED]

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY: MAIL (M) PERSONAL SERVICE (P)
TO: ALIEN ALIEN c/o Custodial Officer ALIEN's ATT/REP DHS
DATE: 4/5/10 BY: COURT STAFF BA
Attachments: EOIR-33 EOIR-28 Legal Services List Other