

Falls Church, Virginia 22041

File: [REDACTED] – Los Angeles, CA

Date: AUG 07 2013

In re: [REDACTED] LOPEZ-ROQUE a.k.a. [REDACTED] a.k.a. [REDACTED]

IN ASYLUM AND/OR WITHHOLDING PROCEEDINGS

APPEAL

ON BEHALF OF APPLICANT: Keren Zwick, Esquire

APPLICATION: Withholding of removal; Convention Against Torture

The applicant, a native and citizen of Mexico, appeals from the Immigration Judge's March 11, 2013, decision. In that decision, the Immigration Judge denied the applicant's application for withholding of removal under section 241(b)(3)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1231(b)(3)(A), and found him ineligible for protection under the Convention Against Torture, 8 C.F.R. § 1208.16-18. During the pendency of the appeal, the Center for HIV Law and Policy, the National Alliance of State and Territorial AIDS Directors, the HIV Medicine Association, and the Association of Nurses in AIDS Care filed an Amici Curiae brief. The proceedings will be remanded.

On appeal, the applicant argues that the Immigration Judge erred in denying his application for withholding of removal. Specifically, the applicant argues that the Immigration Judge erred in determining that his convictions for prostitution constitute particularly serious crimes rendering him ineligible for withholding of removal. The applicant also argues that the Immigration Judge erred in determining that he is ineligible for protection under the Convention Against Torture. In the brief in support of the applicant's claim, the Amici Curiae argue that the Immigration Judge's decision reflects a misunderstanding of the risk of HIV transmission and furthers discrimination against people infected with HIV. The Amici Curiae also argue that transgender people living with HIV face persecution and torture in Mexico.

Turning first to the respondent's Convention Against Torture claim, we agree with the Immigration Judge's determination that the respondent did not meet his burden of proof (I.J. at 9-11). *See* 8 C.F.R. §§ 1208.16-18; *see also* *Castro-Martinez v. Holder*, 674 F.3d 1073 (9th Cir. 2011) (discussing country conditions evidence in Mexico as to homosexuals living with HIV). To qualify for protection under the Convention Against Torture, the respondent must demonstrate that it is more likely than not that he will be tortured by or at the instigation of or with the consent or acquiescence of authorities in Mexico. 8 C.F.R. § 1208.16(c)(2). Moreover, the Attorney General has emphasized that an alien's eligibility for protection under the Convention Against Torture cannot be established by stringing together a series of suppositions to show that it is more likely than not that torture will result where the evidence does not establish that each step in the hypothetical chain of events is more likely than not to happen. *Matter of J-F-F-*, 23 I&N Dec. 912 (A.G. 2006); *see also* *Matter of M-B-A-*, 23 I&N Dec. 474, 479-80 (BIA 2002). Because the applicant for protection under the Convention Against Torture bears the burden of proof, any lingering inconclusiveness in the evidence must necessarily inure to the detriment of his claim. *Matter of J-F-F-*, *supra*, at 917. In this case, while the evidence

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reveals that transgender people living with HIV are sometimes subjected to violence and discrimination in Mexico, we agree with the Immigration Judge's determination that the respondent did not establish that the government of Mexico acquiesces to such mistreatment (I.J. at 10-11; Exh. 2). In this regard, the background evidence reveals that the government of Mexico has taken steps to prevent mistreatment (I.J. at 10; Exh. 2). *See Villegas v. Mukasey*, 523 F.3d 984 (9th Cir. 2008).

Turning next to the issue of withholding of removal, we find that remand of proceedings is warranted. Section 241(b)(3)(B)(ii) of the Act provides that an alien is ineligible for withholding of removal if "the Attorney General decides that ... the alien, having been convicted by a final judgment of a particularly serious crime, is a danger to the community of the United States." To determine whether the "particularly serious crime" preclusion is applicable, we generally examine the nature of the conviction, the type of sentence imposed, and the circumstances and underlying facts of the conviction. *Matter of N-A-M-*, 24 I&N Dec. 336, 342 (BIA 2007); *see also Delgado v. Holder*, 648 F.3d 1095 (9th Cir. 2011) (upholding the Board's determination that a particularly serious crime need not be an aggravated felony).

In this case, the Immigration Judge found that the applicant's prostitution convictions rendered him statutorily ineligible for relief because they constituted "particularly serious crimes" within the meaning of section 241(b)(3)(B)(ii) of the Act (I.J. at 8-9). Specifically, the Immigration Judge found the fact that the applicant had been diagnosed with HIV prior to the commission of at least some of his offenses rendered his offenses particularly serious crimes (I.J. at 8-9; Tr. at 22). However, the Immigration Judge did not consider any of the other facts surrounding the applicant's offenses. For instance, the Immigration Judge did not evaluate whether the respondent had intentionally tried to spread HIV to his partners. We therefore find it necessary to remand proceedings to the Immigration Judge to make further findings of fact regarding the circumstances surrounding the respondent's offenses, including the conviction records. *See Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002) (holding that because the Board's fact finding ability on appeal is limited, it is important for Immigration Judges to include in their decisions clear and complete findings of fact that are supported by the record and are in compliance with controlling law); 8 C.F.R. § 1003.1(d)(3)(iv) (providing that, subject to certain exceptions not applicable to the present case, "the Board will not engage in fact finding in the course of deciding appeals").

Accordingly, the following order will be entered.

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


FOR THE BOARD