

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

MAY 28 2024

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

ULISSES NOVOA-GALICIA,

Petitioner,

v.

MERRICK B. GARLAND, Attorney
General,

Respondent.

No. 21-809

Agency No.
A215-857-757

MEMORANDUM*

On Petition for Review of an Order of the
Board of Immigration Appeals

Argued and Submitted May 13, 2024
San Francisco, California

Before: LEE and BRESS, Circuit Judges, and TUNHEIM, District Judge.**

Ulisses Novoa-Galicia petitions for review of a Board of Immigration Appeals (BIA) decision affirming an Immigration Judge's (IJ) denial of his motions to suppress evidence, for withholding of removal, and for deferral of removal under the Convention Against Torture (CAT). We review questions of law de novo. *See*

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable John R. Tunheim, United States District Judge for the District of Minnesota, sitting by designation.

Sanchez v. Sessions, 904 F.3d 643, 649 (9th Cir. 2018). We review the agency’s determination that Novoa-Galicia committed a particularly serious crime for abuse of discretion. *See Alcaraz-Enriquez v. Garland*, 19 F.4th 1224, 1230 (9th Cir. 2021). And we review the agency’s factual findings for substantial evidence. *Sharma v. Garland*, 9 F.4th 1052, 1060, 1066 (9th Cir. 2021). “Under this standard, we must uphold the agency determination unless the evidence compels a contrary conclusion.” *Duran-Rodriguez v. Barr*, 918 F.3d 1025, 1028 (9th Cir. 2019). We have jurisdiction under 8 U.S.C. § 1252, and we grant the petition in part, deny it in part, and remand.

1. The shared locus for regulatory and constitutional claims under the Fourth Amendment is a probable cause inquiry. *Cf. Perez Cruz v. Barr*, 926 F.3d 1128, 1137 (9th Cir. 2019) (“[T]he regulatory standards are at least as stringent as those imposed by the Fourth Amendment.”). An immigration officer who acts without “a rational basis for separating out” removable noncitizens from United States citizens and noncitizens with legal status lacks probable cause. *See Orhorhaghe v. I.N.S.*, 38 F.3d 488, 497 (9th Cir. 1994).

In addition to a vague anonymous tip, the BIA concluded that five databases¹ would have supplied officers with probable cause to believe Novoa-Galicia was a removable noncitizen. The government argues on appeal that the databases would

¹ CIS, TECS, CLAIMS, PCQS, and NCIC.

have revealed that Novoa-Galicia was born in Mexico, lacks a Social Security number, and has never applied for immigration benefits.

It may well be that those facts would establish probable cause to believe an individual is present without lawful status. But our review is limited to the administrative record. *See* 8 U.S.C. § 1252(b)(4)(A); *Fisher v. I.N.S.*, 79 F.3d 955, 963 (9th Cir. 1996) (en banc). The I-213 form does not explain what information the officers were able to glean from the databases, and the arresting officers did not testify before the agency. Moreover, the record does not elaborate on the databases' capabilities, including whether they would have reflected Novoa-Galicia's birthplace, lack of a Social Security number, and failure to apply for immigration benefits. There are thus no facts in the record that would establish the officers arrested Novoa-Galicia under probable cause of removability. Accordingly, we remand for the agency to consider Novoa-Galicia's motion to suppress following further factual development.

2. Individuals convicted of particularly serious crimes are barred from withholding of removal. 8 U.S.C. § 1231(b)(3)(B)(ii). Whether a conviction is for a particularly serious crime depends on "such factors as the nature of the conviction, the circumstances and underlying facts of the conviction, the type of sentence imposed, and, most importantly, whether the type and circumstances of the crime indicate that the individual will be a danger to the community." *Gomez-Sanchez v.*

Sessions, 892 F.3d 985, 990–91 (9th Cir. 2018) (internal quotation omitted).

The BIA did not abuse its discretion when it determined that Novoa-Galicia’s 2019 assault conviction constituted a particularly serious crime, notwithstanding his record of mental health difficulties and the California court’s decision to impose the lowest permissible sentence. *See Alcaarez-Enriquez v. Garland*, 19 F.4th 1224, 1230–31 (9th Cir. 2021) (forbidding courts from reweighing evidence where the BIA relied on “appropriate factors and proper evidence to reach its conclusion” (internal quotations omitted)).

3. Substantial evidence also supports the BIA’s denial of CAT relief. Novoa-Galicia must show that, aggregating the risks posed by all potential sources of torture, “he is more likely than not to be tortured.” *Velasquez-Samayoa v. Garland*, 49 F.4th 1149, 1156 (9th Cir. 2022). The record does not compel the conclusion that poor conditions in Mexican mental health facilities are the product of specific intent to torture patients rather than neglect or insufficient resources. *See Villegas v. Mukasey*, 523 F.3d 984, 989 (9th Cir. 2008) (finding CAT relief unavailable absent a record that Mexican officials “created these conditions for the specific purpose of inflicting suffering upon the patients” rather than officials’ “gross negligence and misunderstanding of the nature of psychiatric illness”); 8 C.F.R. § 1208.18(a)(1) (requiring specific intent to torture). Nor did the agency fail to consider the aggregate risk of torture from mental health institutions, police, and

the Sinaloa cartel.

**PETITION GRANTED IN PART AND DENIED IN PART AND
REMANDED.²**

² The parties shall bear their own costs on appeal.