

CRIMMIGRATION COMMUNICATION

LONG ISLAND
REGIONAL IMMIGRATION ASSISTANCE CENTER

Sentencing for Advantage in Non-Citizen Cases

We all know that convictions for certain crimes can carry severe immigration consequences, including automatic removal in the case of a crime that qualifies as an Aggravated Felony. The classification of crimes into immigration categories, including some though not all Aggravated Felonies, often turns on the potential or actual sentence imposed. For example:

- Some crimes are Aggravated Felonies only if a sentence of a year or more is actually imposed, INA § 101(a)(43);
- The Petty Offense exception to inadmissibility based on a conviction for a Crime Involving Moral Turpitude (CIMT) applies only if a crime's *potential* sentence is a year or less *and* a judge *actually imposes* a sentence of less than six months, INA §212(a)(2)(A)(ii);
- Inadmissibility is triggered any time a person is convicted of two or more crimes and the aggregate sentence imposed is five years or more, INA §212(a)(B);
- A lack of good moral character is triggered by incarceration of 180 days or more, no matter the offense, INA §101(f)(7).

The complexity of immigration law surrounding sentencing creates opportunities for creative structuring of bargained-for guilty pleas and sentences to protect status or access to immigration benefits like Adjustment of Status or Naturalization.

Definitions

The immigration law deems a “term of imprisonment or sentence” to refer to “the period of incarceration or confinement *ordered by a court of law, regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part,*” at INA §101(a)(48)(B), 8 USC §1101(a)(48)(B) (emphasis added). That means that for most immigration purposes, probation, suspended sentences, time off for good behavior, and early release programs are not taken into consideration in the classification of an offense. All that matters is the amount of time in jail or prison that a judge imposes.

How to Structure a Sentence to Avoid Negative Immigration Consequences

Defenders might structure a bargained-for sentence in many ways to serve a defendant's immigration goals. For example:

- A defendant may elect to waive credit for time accrued in custody before sentencing, as part of a bargain to obtain a shorter imposed sentence. Because a judge did not order the pre-sentencing time, immigration authorities will not count it as part of the sentence.
- Where a defendant is facing multiple convictions, a sentence may be attached to a conviction for an offense that immigration law does not consider carrying negative consequences rather than one that triggers deportation.
- To avoid an Aggravated Felony conviction, a sentence of less than one year might be attached to multiple convictions such that no single conviction reaches the one-year threshold for an aggravated felony finding. Also, remember that some offenses can take a sentence of a year or more without becoming an Aggravated Felony.

Defenders should reach out to the Regional Immigration Assistance Centers to discuss structuring a specific sentence, because understanding a defendant's particular goals requires an understanding of the immigrant's basic immigration history, eligibility for immigration benefits, family ties, travel to and from the US, and the timing of any immigration applications. We will be happy to help you investigate your client's goals and opportunities to protect the right to remain living and working in the United States.

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