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Basics

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- Aggravated Felony

Basics

I. How Immigration Law Evaluates California Sentences

A. When does the length of an imposed sentence matter for immigration purposes?

See also Chart 3 in Part VII, below, which summarizes how sentences cause immigration penalties.

Aggravated felonies. The most common sentencing issue involves “aggravated felonies” (AFs), as defined under immigration law. Generally, AFs have the worst immigration consequences. Certain offenses only become an AF if a sentence of one year or more is imposed.¹ The criminal defense strategy is to get a sentence of no more than 364 days on any single count, or to plead to a different offense that does not become an AF with a year’s sentence.

CIMTs: The petty offense exception, and avoiding the bar to non-LPR cancellation. In two contexts, a noncitizen convicted of a single crime involving moral turpitude (CIMT) needs to have a sentence imposed of no more than six months. This is required in order to qualify for the petty offense exception to the CIMT inadmissibility ground, and to avoid a bar to eligibility for cancellation of removal for non-permanent residents. (In each of these cases there are additional requirements, including limits on the potential sentence for the offense. See Part IV, below.)

Five-year total sentences for two or more convictions. A person is inadmissible if in their lifetime they were convicted of two or more offenses of any type, with an aggregate sentence imposed of five or more years.

B. What is the immigration definition of an imposed sentence?

Federal immigration law has its own statutory definition of sentence: “Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include 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.”³ Under this definition:

- ✓ The sentence is the period of incarceration that a judge ordered -- not the potential sentence, or the time actually served. Early release from custody based on good behavior or jail overcrowding does not reduce the sentence for immigration purposes.
- ✓ For a felony “split sentence” pursuant to PC § 1170(h)(5), where the sentence is split into custodial and supervisory components, the aggregate is considered the sentence for immigration purposes.

Example: The judge imposes five years but “splits” it into six months in custody, followed by four years, six months on “mandatory supervision”. For immigration purposes, the sentence is five years.

- ✓ Suspending the execution of a sentence offers no immigration advantage. Immigration law includes the entire sentence ordered, even if all or part has been suspended.⁴ But when imposition of sentence is suspended, the only sentence for immigration purposes is the period of jail time ordered by a judge as a condition of probation (if any).

Example: The judge imposes a sentence of two years but suspends execution of all but 13 months. For immigration purposes, the sentence is two years.

Example: The judge imposes a sentence of two years but suspends execution. She orders 180 days’ custody as a condition of probation. For immigration purposes, the sentence is two years. Example: The judge suspends imposition of sentence and orders three years’ probation, with eight months of custody ordered as a condition of probation. For immigration purposes, the sentence is eight months.

Example: The judge suspends imposition of sentence and orders three years' probation, with no custody time required. For immigration purposes, no sentence is imposed.

✓ For most immigration provisions, including the definition of an aggravated felony, the measure is the sentence that was imposed on an individual offense. Multiple consecutive or concurrent sentences on different offenses are not added together.

Example: Sections 273.5 and 496 both become an aggravated felony if a year is imposed. If the defendant is sentenced to seven months on each of these offenses, to run consecutively, there is no aggravated felony conviction: while the total sentences equal 14 months, a sentence of a year or more is not imposed on a single count. In contrast, a sentence of a year on both, to run concurrently, would create two aggravated felony convictions.

Aggravated Felony

The following is a list of the aggravated felony offenses listed in INA § 101(a)(43), arranged in alphabetical order. The capital letter following the offense refers to the subsection of § 101(a)(43) where the offense appears. See [Practice Advisory on Aggravated Felonies](#).

Aggravated Felonies under INA §101(a)(43) (displayed alphabetically; statute subsection noted after category)

- alien smuggling- smuggling, harboring, or transporting of aliens except for a first offense in which the person smuggled was the parent, spouse or child. (N)
- attempt to commit an aggravated felony (U)
- bribery of a witness- if the term of imprisonment is at least one year. (S)
- burglary- if the term of imprisonment is at least one year. (G)
- child pornography- (I)
- commercial bribery- if the term of imprisonment is at least one year. (R)
- conspiracy to commit an aggravated felony (U)
- counterfeiting- if the term of imprisonment is at least one year. (R)
- crime of violence as defined under 18 USC 16 resulting in a term of at least one year imprisonment, if it was not a “purely political offense.” (F)
- destructive devices- trafficking in destructive devices such as bombs or grenades. (C)
- drug offenses- any offense generally considered to be “drug trafficking,” plus cited federal drug offenses and analogous felony state offenses. (B)
- failure to appear- to serve a sentence if the underlying offense is punishable by a term of 5 years, or to face charges if the underlying sentence is punishable by 2 years.

(Q and T)

- false documents- using or creating false documents, if the term of imprisonment is at least twelve months, except for the first offense which was committed for the purpose of aiding the person's spouse, child or parent. (P)
- firearms- trafficking in firearms, plus several federal crimes relating to firearms and state analogues. (C)
- forgery- if the term of imprisonment is at least one year. (R)
- fraud or deceit offense if the loss to the victim exceeds \$10,000. (M)
- illegal re-entry after deportation or removal for conviction of an aggravated felony (O)
- money laundering- money laundering and monetary transactions from illegally derived funds if the amount of funds exceeds \$10,000, and offenses such as fraud and tax evasion if the amount exceeds \$10,000. (D)
- murder- (A)
- national defense- offenses relating to the national defense, such as gathering or transmitting national defense information or disclosure of classified information. (L)(i)
- obstruction of justice if the term of imprisonment is at least one year. (S)
- perjury or subornation of perjury- if the term of imprisonment is at least one year. (S)
- prostitution- offenses such as running a prostitution business. (K)
- ransom demand- offense relating to the demand for or receipt of ransom. (H)
- rape- (A)
- receipt of stolen property if the term of imprisonment is at least one year (G)
- revealing identity of undercover agent- (L)(ii)

- RICO offenses- if the offense is punishable with a one-year sentence. (J)
- sabotage- (L)(i)
- sexual abuse of a minor- (A)
- slavery- offenses relating to peonage, slavery and involuntary servitude. (K)(iii)
- tax evasion if the loss to the government exceeds \$10,000 (M)
- theft- if the term of imprisonment is at least one year. (G)
- trafficking in vehicles with altered identification numbers if the term of imprisonment is at least one year. (R)
- treason- federal offenses relating to national defense, treason (L)

PRACTICE TIP: An LPR is not “rendered inadmissible” under the controlled substance and CIMT grounds unless they were convicted of, or made a qualifying admission that they committed, the offense. The government’s suspicion, allegation, or evidence that the person committed the offense is not enough to render them inadmissible and stop their clock, without a conviction or admission of conduct.

- If a conviction is vacated based on legal error so that it is eliminated for immigration purposes, then commission of the offense did not stop the clock because the person never was legitimately “rendered inadmissible.” (Of course, where it is possible a more direct option is to vacate the deportable conviction/s that are the bases for removal, and terminate the proceedings.)
- If there was no conviction and an LPR refuses to admit the conduct to DHS, they are not rendered inadmissible and the clock does not stop.