Immigration Consequences For Criminal Matters

What are the immigration consequences of criminality, generally.

Basics

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.

Basics

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.

Relief Available With An Aggravated Felony Conviction

What relief is available to a person in removal proceedings who has been convicted of an aggravated felony.

INA 212(h) Waiver -- No AF Bar for Refugees

Aggravated Felony Bar

Normally an Aggravated Felony will disqualify someone from eligibility for an INA 212(h) waiver.

> AF is NOT a bar to INA 212(h) for a Refugee Who Adjusted to an LPR. *See* *Matter of N-V-G-,* 28 I&N Dec. 380 (BIA 2021).
>
> ➡ The Fifth, Ninth and Eleventh Circuit Courts of Appeal have held that the LPR bar to § 212(h) based on an aggravated felony conviction will only apply to a noncitizen who was admitted to the United States as a lawful permanent resident at the border or its equivalent (e.g., an airport). Merely adjusting status to permanent residency does not trigger the bar. *Martinez v. Mukasey,* 519 F.3d 532, 544-45 (5th Cir. 2008); *Sum v. Holder*, 602 F.3d 1092, 1096 (9th Cir. 2010); *Lanier v. United States AG,* 631 F.3d 1361, 1366-67 (11th Cir. 2011). The same rule should apply to the LPR bar based on lack of seven years lawful continuous residence.

You Can Apply for a § 212(h) waiver of inadmissibility if ….

> **A. You are applying to become a lawful permanent resident (LPR) under certain categories (e.g., family visa, VAWA self-petitioner, employment), or you are already an LPR.**
>
> **B. Your crime is described in inadmissibility grounds at INA § 212(a)(2) based on:**

• One or more crimes involving moral turpitude (CIMTs),
• Engaging in prostitution,
• Two or more convictions with a total sentence imposed of five or more years, and/or
• A single incident involving possession of 30 grams or less of marijuana or a few related marijuana offenses1--but no other drug offense.

C. You come within one of these four categories, set out in INA § 212(h)(1).

Note *that only the first category requires the difficult "extreme hardship" showing.*

1. You have a USC or LPR parent, spouse, son, or daughter whom you can establish would suffer extreme hardship if you were removed;

2. The inadmissible incident/s occurred at least 15 years ago, and you can show that you are rehabilitated and your admission is not contrary to national interests;

3. You are inadmissible only under the prostitution ground, and you can show that you are rehabilitated and your admission is not contrary to national interests; or

4. You are a VAWA self-petitioner, and you can show that the waiver should be granted as a matter of discretion.

D. Procedurally, you come within one of the following categories:

1. Applicant for immigrant visa (LPR status) through consular processing;

2. Immigrant visa holder, who seeks admission at a port of entry following consular processing;

3. LPR applying for admission into the United States who is deemed to be seeking a new admission upon their return, pursuant to INA § 101(a)(13)(C). No application for adjustment of status is required here;

4. Applicant for adjustment of status affirmatively;

5. Applicant (including an LPR) for adjustment of status as a defense to deportability, in INA § 237 removal proceedings.

6. Question: Can an LPR apply for a § 212(h) waiver as a defense to deportability, in INA § 237 removal proceedings, if they are not also able to file an adjustment application?

a. The Board of Immigration Appeals (BIA) said no. It found that § 212(h) is only available at the border, or with an application for adjustment or consular processing. See Matter of Rivas, 26 I&N Dec. 130 (BIA 2013).

b. Argument: Advocates can explore arguments that an LPR in § 237 removal proceedings can file for § 212(h) as a defense, without an adjustment application, if the inadmissible conduct or conviction/s at issue occurred before Matter of Rivas was published on June 20, 2013 (or arguably, even after), and if the person had traveled outside the United States after the conduct or conviction/s (or arguably, even if not).

E. You must not be an LPR who

(a) is subject to the § 212(h) LPR bars, and

(b) actually comes within an LPR bar. See § 212(h)(2). These bars only affect selected LPRs and conditional permanent residents.7 They do not apply to immigrants in other types of status or to undocumented people.

1. As an LPR, you are subject to the bars only if you:

- previously (in an event before the current application)
- were actually “admitted” into the United States
- as an LPR (not as a tourist, etc.)
- at the border (at a port of entry; not an adjustment of status)

Protections Under the Convention Against Torture

WITHHOLDING OF REMOVAL

A person might not be barred from applying for withholding of removal under INA § 243(b)(3), 8 USC § 1231(b)(3).

An aggravated felony conviction will only act as a bar to withholding if:

(a) it is classed as a “particularly serious crime” (which includes nearly any drug trafficking offense, among other crimes)

or

(b) one or more convictions of an aggravated felony resulted in a total sentence of at least five years. 8 CFR 208.16(d)(3).

42A -- LPR CANCELLATION OF REMOVAL

Form 42A

Cancellation of Removal
for Certain Legal Permanent Residents

You can apply for LPR Cancellation of Removal under INA § 240(A)(a) if…

A. You obtained LPR status lawfully and do not fall within certain categories. You must not have become an LPR through fraud or mistake. You must not come within certain categories, including persecutors and terrorists.

B. You have not been convicted of an aggravated felony. The immigration statute designates certain types of crimes as “aggravated felonies.” If the person was convicted of an aggravated felony at any time, it is a bar to LPR cancellation of removal.5 If the aggravated felony does not involve drugs, check to see if the person might be eligible for relief under INA § 212(h).6 If the aggravated felony conviction occurred in the 1990’s or earlier, check for eligibility for a waiver under INA § 212(c), discussed below. For other options, see the ILRC Relief Toolkit at www.ilrc.org/chart.

C. You have been an LPR for at least five years. The applicant must have “been an alien lawfully admitted for permanent residence for not less than 5 years.” INA § 240A(a)(1). The five years of LPR status includes time spent as a conditional permanent resident. Children cannot use their parent’s time, for either the five-year LPR or seven-year continuous residence requirement.

The accrual of five years of LPR status is not subject to the "stop-time" rule set out at INA § 240A(d)(1), discussed below. **The five years as an LPR continue to accrue through the removal proceedings until there is an administrative denial (meaning throughout the BIA appeal, if there is one).**

Example: Maritza was admitted on a border crossing card in 2009, fell out of status, and then adjusted to lawful permanent resident status in 2014. She was convicted of an alleged deportable offense and served with a Notice to Appear in 2017. She was not eligible for LPR cancellation because she lacked the five years as an LPR (although she did have the seven years since admission in any status, discussed below). In removal proceedings, she contested deportability, lost, and appealed her case to the BIA. In 2019, while the appeal was still pending, she reached the five years of LPR status. The BIA agreed to her request to remand the case to the immigration judge to enable her to apply for LPR cancellation.

D. You have accrued seven years of continuous residence in the United States since admission in any status. The applicant must have "resided in the United States continuously for 7 years after having been admitted in any status." INA § 240A(a)(2). As discussed below, a complex "stop-time" provision governs when the seven years cease to accrue based on commission of certain offenses, under INA § 240A(d)(1)(B).

SPECIFIC NEW YORK OFFENSES

NY VTL §511(3)(a)(i) Aggravated Unlicensed Operation of Motor Vehicle

Full Decision

SPECIFIC NEW YORK OFFENSES

Second Degree Attempted Assault is a Crime of Violence

The Second Circuit concluded that a conviction for attempted assault in the second degree is a crime of violence and therefore an aggravated felony. *See United States v. Cooper, 23-6911 (2d Cir. March 14, 2025).*

Full text of *United States v. Cooper,* 23-6911*, (2d Cir. March 14, 2025)* can be found here:

https://ww3.ca2.uscourts.gov/decisions/isysquery/9fb1ca2c-a88a-4517-8f92-8c712c43b46f/3/doc/23-6911_opn.pdf

**Must update with citation once available.

For all these reasons, we hold that a violation of N.Y.P.L. § 120.05(7) is categorically a crime of violence as defined by section 2K2.1(a) of the Sentencing Guidelines.

LPR Returning to the US

> “Here, we are presented with the question of whether DHS may parole an LPR at the border who has been charged with – but not yet convicted of – a CIMT. In analyzing this question, we heed *Centurion’*s holding that an LPR becomes an alien applying for admission for purposes of section 1101(a)(13)(C) upon the commission, rather than the conviction, of a crime. But we are also cognizant of the reality that, without a conviction, DHS will be hard pressed to prove by clear and convincing evidence that the LPR actually committed the crime in question at the time of reentry. If DHS fails to sustain its burden of proving otherwise, the default presumption governs that an LPR is not an applicant for admission

> “Critically, the INA does not provide that an LPR may be treated as seeking admission when he has been ‘charged with a crime’ or is ‘believed to have committed a crime;’ it permits such treatment only when an LPR ‘has committed’ a crime. And because DHS bears the burden of proving by clear and convincing evidence that a returning [LPR] is to be regarded as seeking an admission, we do not see how charging documents alone – without more – could

> carry DHS’s burden of demonstrating that a crime had been committed at the time of an LPR’s reentry.

CIMT's

CIMT's and their consequences.

When do two CIMT's arise from the same scheme?

CIMT's

Arise From a Single Scheme

Crimes

Money Laundering

Crimes

Money Laundering & the Circumstance-Specific Approach

The full text of *Matter of Dominguez Reyes* can be found here:

https://www.justice.gov/d9/2024-12/4083.pdf

Crimes

Unlicensed Operation of a Motor Vehicle

> Unlicensed operation of a motor vehicle in the first degree in violation of section 511(3)(a)(i) of the New York Vehicle and Traffic Law, which prohibits a person from driving under the influence of alcohol or drugs while knowing or having reason to know that his or her license is suspended, is categorically a crime involving moral turpitude. Matter of Lopez-Meza, 22 I&N Dec. 1188 (BIA 1999), followed.

under the influence of alcohol or a drug knowing or having reason to know his or her license or privilege of operating such a motor vehicle or privilege of obtaining a license to operate such a vehicle is suspended, revoked, or otherwise withdrawn

https://www.justice.gov/eoir/file/1381766/dl?inline=

Theft

Theft no longer requires an intent to deprive.

The Board of Immigration Appeals has overruled its decision in *Matter of Jurado*, which assumed that retail theft in Pennsylvania inherently includes an intent to permanently deprive, finding it inconsistent with the categorical approach outlined by the Supreme Court in *Mathis v. United States*. The Board then concluded that Pennsylvania retail theft convictions criminalize less than permanent takings, and thus, under pre-*Diaz LIzarraga* precedent, they do not constitute crimes involving moral turpitude.

The full text of *Matter of Thakker* can be found here:

https://www.justice.gov/d9/2024-09/4080.pdf