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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.

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