

§ N.4 Sentence

(For more information, see *Defending Immigrants in the Ninth Circuit, Chapter 5*, www.ilrc.org/publications)

- A. **The Immigration Definition of an Imposed Sentence**
- B. **How to Obtain a Sentence of 364 Days or Less**
- C. **Offenses that become Aggravated Felonies Based on a Sentence Imposed of One Year**
- D. **Crimes Involving Moral Turpitude: Imposed *and* Potential Sentence**
- E. **180 Actual Days in Custody as a Bar to Good Moral Character**

In many cases, not only the type of conviction but the amount of potential or imposed sentence causes immigration penalties. The good news is that an informed defender often can structure sentence that gives the prosecution what they require, including prison time if needed, while still avoiding immigration penalties based on sentence. This guide discusses three aspects of sentences that can affect immigrants.

- Sections A-C discuss the impact of an *imposed* sentence and defense strategies. For example, certain offenses will become an aggravated felony only if a sentence of a year or more is imposed.
- Section D discusses rules that apply to crimes involving moral turpitude, which can involve both imposed sentences and maximum *potential* sentence. It discusses the effect of Penal Code § 18.5(a).
- Section E discusses establishing “good moral character,” a requirement that applies to a few key immigration applications. This is barred if the person spent 180 *actual days in custody* as a result of a conviction, during the prescribed time period.

A. The Immigration Definition of an Imposed “Sentence”

When does the amount of sentence imposed matter? This is important in a few contexts:

- **Aggravated felonies.** Some offenses only become an aggravated felony if a sentence of one year or more is imposed.¹ In that case, the goal is to get a sentence of no more than 364 days imposed on any single count. This is a common issue faced by defenders. See Sections B and C, below.
- **Petty offense exception.** A single conviction of a crime involving moral turpitude makes one inadmissible, unless the conviction qualifies for an exception such as the petty offense exception. To do that, the conviction must have a maximum *potential* sentence of a year or less, and the judge must *impose* a sentence of six months or less.² See Section D, below.
- **Five-year sentence for two or more convictions.** A person is inadmissible if in their lifetime they have been convicted of two or more offenses of any type, where the total of all sentences imposed is at least five years.³

Definition of sentence imposed. The immigration statute defines an imposed “sentence” or “term of imprisonment” as the “period of incarceration or confinement *ordered* by a court of law regardless of any suspension of the imposition or execution of that imprisonment in whole or in part.”⁴ (emphasis supplied) Immigration practitioners refer to this as the sentence imposed. The following are the characteristics of an imposed sentence, as defined under immigration law.

¹ INA § 1101(a)(43), 8 USC 1101(a)(43).

² INA § 212(a)(2)(A)(ii)(II), 8 USC 1182(a)(2)(A)(ii)(II).

³ INA § 212(a)(2)(B), 8 USC § 1182(a)(2)(B).

⁴ See definition of “a term of imprisonment or a sentence” at INA § 101(a)(48)(B), 8 USC § 1101(a)(48)(B).

- ✓ The imposed sentence is the period of incarceration that a judge ordered -- not the potential sentence or the time actually served as a result of conviction. Early release from custody based on good behavior or jail overcrowding does not reduce the imposed sentence for immigration purposes.
- ✓ Suspending the *execution* of a sentence offers no immigration advantage. Immigration law includes the entire sentence ordered, even if all or part of the execution has been suspended. When *imposition* of sentence is suspended, the only sentence imposed 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 imposed is eight months.
- ✓ For most immigration provisions, "sentence" refers to the term of imprisonment ordered on each individual count, and does not refer to the term of multiple, consecutive counts added together.

Example: A sentence imposed of eight months on each of two counts, to be served consecutively, does not result in a sentence imposed of a year or more for immigration purposes on either count.
- ✓ Time imposed pursuant to an enhancing provision (recidivist and/or conduct enhancement or alternative sentencing scheme, e.g., petty with a prior) is part of the total sentence imposed.⁵
- ✓ Time imposed on the original offense after a probation or parole violation will be added to the original time for that count.⁶ Sentence bargaining at probation is a crucial part of defending immigrants. See Subsection B for suggestions for how to avoid conviction of an aggravated felony after a violation, for example by taking the time on a new offense rather than the original.
- ✓ The sentence must be imposed as a penalty for a conviction. A good immigration strategy is to waive credit for custody time accrued *before sentencing*, as part of a bargain to obtain a shorter sentence. Because a judge did not order the pre-hearing time, it does not count as part of the sentence unless the defendant accepts credit for time served.

Example: Juana pleads guilty to Pen C § 425(a)(1). By the time of her sentencing hearing, she has served 90 days in custody. She asks to waive credit for the pre-hearing custody in order to obtain a sentence of 364 days as a condition of probation. Juana's sentence for immigration purposes is 364 days. The 90 days are not added to the 364 days, because a judge never ordered that time in custody as punishment for a conviction. (Assume that this benefit does *not* apply to waiving credit for time served after a probation violation. See Part B, below.)
- ✓ If the court vacates a sentence and imposes a revised sentence (e.g., of less than 365 days), the new sentence controls for immigration purposes. The change does not have to be based on legal error in the original proceedings.⁷

B. How to Obtain an Imposed Sentence of 364 Days or Less

Obtaining a sentence of 364 days or less, rather than a sentence of one year or more, will prevent certain offenses from becoming an aggravated felony for immigration purposes. See discussion of these offenses

⁵ See *United States v. Rodriguez*, 128 S. Ct. 1783 (2008), overruling in part *United States v. Corona-Sanchez*, 291 F.3d 1201 (9th Cir. 2002) (*en banc*).

⁶ See, e.g., *United States v. Jimenez*, 258 F.3d 1120 (9th Cir. 2001).

⁷ *Matter of Song*, 23 I&N Dec. 173 (BIA 2001).

at subsection C, below. This is important to consider at three junctures: at initial sentencing, when there is a probation violation, and after sentencing as part of post-conviction relief.

This discussion refers to a “364-day misdemeanor” rather than “one-year misdemeanor,” because under Pen C § 18.5(a) the maximum possible sentence for California misdemeanors was changed from one year to 364 days. But see discussion at Section D, below, about issues surrounding convictions from before January 1, 2015.

1. Get 364 Days or Less at the Time of Initial Sentencing

The goal is to avoid a sentence imposed of one year or more on any one single count, if one year will make the particular offense become an aggravated felony. Informed counsel can negotiate for more than a year in custody, while structuring an immigration “sentence” of less than a year. Also, remember that some offenses *can* take a sentence of a year or more without becoming an aggravated felony. Taking the time on one of these alternative offenses is an important strategy, discussed below.

Assume your client Felipe must plead guilty to criminal threat, Pen C § 422. That is an offense that will become an aggravated felony if a year or more is imposed. To get to a sentence of 364 days or less for immigration purposes, counsel could do one or more of the following:

- Bargain for 364 days or less on a single count/conviction.
 - a) Plead to a 364-day misdemeanor.
 - b) Plead to a 364-day misdemeanor for actual time (by waiving the accrual of goodtime/work time credits).
 - c) Plead to a felony for a felony probationary sentence of 364 days or less (not “one year”).
 - d) Plead to a felony for a felony probationary sentence of 364 days of actual time (waiving the accrual of goodtime/work time credits)
 - e) Take two or more of any of the above and run them consecutively.
- Waive pre-hearing credit for time served and get imposition of sentence suspended with 364 days ordered as a condition of probation.

Example: The DA wants a sentence of two years for the § 422. Bargain to plead guilty but to continue the sentencing hearing while Felipe spends time in custody. In six months, hold the sentencing hearing and waive credit for the time already served. This will eliminate that time, which never was ordered by a judge, as part of the sentence imposed. Accept an order of 364 days’ custody as a condition of probation. To get even more time in actual custody, waive the accrual of any goodtime/worktime credits on the time served as a condition of probation. (Some DA’s might not agree to do all that is necessary to reach a two-year sentence in this manner – but they might agree in the case of a 16-month sentence.)

- Plead to another offense that does *not* become an aggravated felony if a sentence of a year or more is imposed. This could be instead of, or in addition to, the original offense.

Practice Tip: Check the *California Quick Reference Chart* to find felonies that can take a sentence of a year or more without becoming an aggravated felony, such as residential or commercial burglary (Pen C § 459/460), vandalism (§ 594), theft (§ 487), fraud offenses that do not have forgery or counterfeiting as an element, possession of a weapon, and probably false imprisonment (§ 236/237) and battery with injury (§ 243(d)). For example, if Felipe could accept a two-year sentence for §§ 459/460(a) instead of pleading directly to § 422, the conviction would have few or no immigration consequences.

- Work with consecutive sentencing. If one third of the middle term⁸ on a potential aggravated felony is less than one year, arrange for that offense to become the consecutive, subordinate, term rather than the principle term.

Example: The prosecution demands that Felipe plead guilty to a strike and that he be sentenced to state prison. In this case, Felipe also destroyed property during the incident. Offer an additional felony: try to negotiate to designate Pen C § 594 (vandalism) as the principle term and the § 422 as the subordinate term. Felipe could be sentenced to the low, middle or high term on the § 594 and would be sentenced to eight months on the § 422. If that is not possible, offer felony §§ 236/237 as the principle term with § 422 as the subordinate. A different option, if the incident took place in the victim's home, is to have Felipe to plead to §§ 459/460(a) as the principle term and § 236/237 as the subordinate term.

Extra credit: Where possible, try to get a disposition that not only avoids an aggravated felony, but also avoids other immigration consequences. For example, Pen C §§ 136.1(b)(1) or 236/237 are better choices than § 422 for the subordinate term, because while § 422 is a crime involving moral turpitude and a crime of violence for immigration purposes, the other offenses don't carry those penalties. The *California Chart* will provide this information about each offense.

2. *Stay at 364 Days or Less After a Probation Violation*

If more time will be imposed due to a probation violation, bargain to avoid getting to a year on the original conviction, if that sentence will cause the offense to become an aggravated felony. Or, take a new conviction that hopefully is immigration neutral, and put the time on that.

Example: Kathy was convicted of Pen C § 496 and received a sentence of 8 months as a condition of probation. Section 496 is an aggravated felony if a sentence of one year or more is imposed. Kathy is arrested for Pen C § 487. The prosecutor is willing to violate Kathy's probation and suggests adding 4 months to her § 496 probationary sentence to fill out the year.

Instead, bargain for a probation violation where the additional sentence on the § 496 is three months and 25 days rather than four months. Or, suggest taking a new conviction for the 4 months. the sentence for her new conviction can be run consecutively to her § 496 sentence and it will not turn the § 496 into an aggravated felony.

Do not agree to waive credit for time served and take a new sentence at a probation violation hearing, as a way to remain on felony probation. Assume that immigration law will add the original sentence to the new sentence, because a judge ordered both sentences. (Compare this to waiving credit for time served before the initial sentencing hearing, which is a good immigration strategy.)

Example: Let's say that when Kathy violated probation on the § 496 by committing theft, the DA wanted an additional seven months rather than additional four months in custody. They offered to let her waive credit for time served on the § 496 and take a new seven-month sentence on the offense, so that she could avoid exceeding one year and thus remain on felony probation. This is not a good immigration strategy. If immigration authorities add the original sentence of eight months to the new P.V. sentence of seven months, it will be a total of 15 months imposed on the § 496. Instead, bargain to take the time on a new offense.

⁸ See Pen C § 1170.1

3. Use Post-Conviction Relief to Get to 364 Days or Less

One can seek post-conviction relief to vacate a conviction, or simply to change a sentence. Immigration authorities generally will accept changes made to a state sentence, without requiring there to have been legal error in the original hearing.⁹

California has a form of post-conviction relief that is useful when a sentence of exactly one year was imposed on a misdemeanor, or on a felony that has been reduced to a misdemeanor. Under Pen C § 18.5(b), if before January 1, 2015, a person was sentenced to one year for such an offense, the person may file an application asking the court to reduce the sentence by one day. See also California form CR-181. If the client does qualify for § 18.5(b), consider other vehicles to reduce the sentence such as Pen C § 1473.7. See free online materials on California post-conviction relief at www.ilrc.org/immigrant-post-conviction-relief.

C. Offenses that Become an Aggravated Felony Based on a Sentence Imposed of One Year

The following offenses are aggravated felonies if and only if a sentence to imprisonment of one year is imposed. Obtaining a sentence of 364 days or less will prevent these categories of offenses from being classified as an aggravated felony.¹⁰ Make sure the offense does not also come within another aggravated felony category, or other removal ground.

Remember that in some cases a California offense does not match the federal offense of the same name, and therefore is *not* an aggravated felony. This can be surprising. Check reference materials like the *California Quick Reference Chart* to see the immigration effects of California offenses.¹¹

- Crime of violence, defined under 18 USC § 16(a)
- Theft (not including Pen C §§ 484, 487)
- Receipt of stolen property
- Burglary (not including Pen C § 459/460)
- Bribery of a witness
- Commercial bribery
- Counterfeiting
- Forgery
- Trafficking in vehicles which have had their VIN numbers altered
- Obstruction of justice (which might be held to include Pen C §§ 32, 136.1(b)(1), and similar offenses)
- Perjury, subornation of perjury
- Falsifying immigration documents or trafficking in false documents (with an exception for a first offense that involved helping only the person's spouse, child or parent)

Even a misdemeanor offense with a suspended 365-day sentence imposed can be an aggravated felony. If this is a California offense, consider asking for a one-day reduction in the sentence under Pen C § 18.5. See subsection B, above.

Note that *some other offenses are aggravated felonies regardless of sentence imposed*. Obtaining a sentence of 364 days or less will not prevent these offenses from being classed as aggravated felonies.

⁹ See *Matter of Cota-Vargas*, 23 I&N Dec. 849 (BIA 2005). In contrast, post-conviction relief to eliminate a conviction generally must be based on legal error. See ILRC, *What Qualifies as a Conviction for Immigration Purposes* (2018) at <https://www.ilrc.org/what-qualifies-conviction-immigration-purposes>.

¹⁰ See INA §101(a)(43), 8 USC § 1101(a)(43), subsections (F), (G), (P), (R), and (S).

¹¹ See also, ILRC, *How to Use the Categorical Approach* (2017) at https://www.ilrc.org/sites/default/files/resources/how_to_use_the_categorical_approach_now_april_2017.pdf.

This includes commonly prosecuted offenses such as any drug trafficking plus some other drug offenses (generally not involving possession); certain firearms offenses; sexual abuse of a minor (e.g., Pen C §§ 288(a), 261.5(d)), rape, a crime of deceit where the loss to the victim/s exceeds \$10,000, failure to appear for a felony, and others. Check the *California Quick Reference Chart* at www.ilrc.org/chart or other materials.

D. Crimes Involving Moral Turpitude and the Potential and Actual Sentence

The maximum potential sentence and/or the actual sentence imposed can determine the consequences of an offense that is a crime involving moral turpitude (CIMT).¹² For a discussion of the definition of an *imposed* sentence, see Sections A and B, above. This section will focus on the immigration definition of the maximum *potential* sentence for an offense.

Analyzing a moral turpitude case involves two inquiries. First, one must determine whether the offense at issue actually is a CIMT for immigration purposes. Second, if it is a CIMT, one must look at factors including potential and actual sentence to see whether the particular conviction makes the particular person deportable and/or inadmissible under the CIMT grounds. See generally ILRC, *Note: Crimes Involving Moral Turpitude* (2018) at www.ilrc.org/chart.

To determine whether an offense is a CIMT for immigration purposes, start by checking the *California Quick Reference Chart* (www.ilrc.org/chart) or other resources. Whether an offense is a CIMT is determined by federal, not state, cases. One must compare the elements of the offense with the federal definition of moral turpitude. Under federal law, offenses have been held to involve moral turpitude if they have as an element the intent to defraud, to cause great bodily injury, to commit assault with a deadly weapon, to traffic in drugs, or to commit theft with intent to deprive permanently or “substantially” (but not temporarily). They include offenses with the element of reckless disregard of a known risk of death or serious injury, and some offenses that involve lewd intent.

Once we determine that the offense is a CIMT, we look at various factors, including sentence, to see if the offense renders the particular individual deportable or inadmissible. In some cases, a single CIMT conviction will do neither. Note that when it comes to the CIMT grounds, only CIMTs are counted. A person might also have multiple convictions that are not CIMTs – e.g., Veh C § 23152(a), Pen C § 243(e) – but still qualify for the below defenses, as long as they have only one conviction of a CIMT.

1. Deportable for conviction of one CIMT, if it was committed within five years after admission and it carries a maximum potential sentence of one year

A person is deportable if they are convicted of a CIMT that they committed within five years of their admission into the United States, as long as it carries a maximum potential sentence of one year or more.

Effective January 1, 2015, Pen C § 18.5 reduced the maximum potential sentence for a California misdemeanor from one year to 364 days. What used to be “one-year” misdemeanors now are “364-day” misdemeanors. This change was made partly to protect against this severe deportation ground. Now, no California misdemeanor conviction should trigger this ground, even if it is a CIMT that was committed within five years of admission. (But see below warning regarding pre-January 1, 2015 convictions.) If a felony is reduced to a misdemeanor, for example under Pen C § 17(b), the misdemeanor will have a potential sentence of 364 days and the conviction will no longer trigger this deportation ground.¹³

¹² See ILRC, *All Those Rules About Crimes Involving Moral Turpitude* (2017) at https://www.ilrc.org/sites/default/files/resources/all_those_rules_about_cimt_final2.pdf.

¹³ See ILRC, *Clean Slate for Immigrants: Reducing Felonies to Misdemeanors Using Penal Code § 18.5, Prop 47, Penal Code § 17(b)(3), & Prop 64* (2018) at https://www.ilrc.org/sites/default/files/resources/clean_slate_for_immigrants-rc-20180201.pdf and see, e.g., *Garcia-Lopez*, 334 F.3d 840, 846 (9th Cir. 2003) (giving effect to reduction under Pen C § 17(b)), partially overruled by *Ceron v. Holder*, 747 F.3d 773, 778 (9th Cir. 2014) (en banc).

Warning: Convictions from before January 1, 2015. Section 18.5(a) specifically provides that the 364-day maximum potential sentence for a California misdemeanor applies retroactively to all California convictions, including those from before January 1, 2015. However, in fall 2018 the Board of Immigration Appeals held that it will *not* give effect to the retroactivity provision in Pen C § 18.5(a).¹⁴ Advocates will appeal the Board’s decision to federal court, but the appeal will take time. As of October 2018, defenders must assume that a “one-year” misdemeanor conviction (or a felony conviction, if it was later reduced to a misdemeanor) that occurred before January 1, 2015 will be treated as having a potential sentence of one year and thus could trigger this deportation ground. In contrast, a conviction from on or after January 1, 2015 will have a potential sentence of 364 days. Advocates in removal proceedings should try to vacate a pre-January 1, 2015 conviction if necessary, and should preserve this issue on appeal in order to take advantage of any future good decision.

Practice tip: Plead to a later offense. If one cannot avoid a plea to a felony CIMT (i.e., a CIMT with a potential sentence of a year or more), it might be possible to avoid the deportation ground by pleading to an offense that was committed after the five-year period. For example, if the person was admitted into the United States in January 2011 and committed an ongoing fraud from 2015 to 2017, a plea to felony fraud committed in 2017 would avoid deportability under this ground, because it was committed more than five years after the person’s admission.

Deportable for two CIMT convictions. A noncitizen also is deportable for conviction of two CIMTs, arising from separate incidents, that took place any time after the person was admitted to the United States, regardless of what the actual or potential sentence was.¹⁵ Two petty theft convictions after admission, not arising from the same incident, can cause deportability.

2. *Petty offense exception to the moral turpitude ground of inadmissibility*

A person who is convicted of, or formally admits to committing, one CIMT is inadmissible unless they come within a statutory exception. One such exception is the so-called “petty offense” exception, which applies when a person has committed only one CIMT; the offense carries a maximum potential sentence of one year or less; and the sentence imposed for the offense is six months or less.¹⁶ See *Note: Crimes Involving Moral Turpitude* (2018) at www.ilrc.org/chart. Here, the potential sentence can be up to one year. The Pen C § 18.5(a) reduction to 364-days is not needed, and there is not a problem with convictions from before January 1, 2015. The only requirement is that the offense be a California misdemeanor and have a sentence imposed of six months or less.

Example: In 2013 Michelle was convicted of felony grand theft. She was sentenced to three years’ probation with 20 days’ jail as a condition of probation. In 2017 it was reduced to a misdemeanor under Pen C § 17(b)(3). This is her only conviction of a CIMT.

She comes within the petty offense exception to the inadmissibility ground: the conviction has a potential sentence of a year or less; the sentence imposed was 20 days; and she has not committed another CIMT. (It does not matter whether her potential sentence is one year or 364 days.)

Remember that this petty offense exception applies to the CIMT inadmissibility ground, not the CIMT deportability ground.

3. *Bar to eligibility for “10-year” cancellation of removal for non-permanent residents*

An undocumented person who has lived in the United States for ten years and meets other strict requirements may be able to apply for 10-year cancellation of removal, as a defense against removal

¹⁴ See *Matter of Velasquez-Rios*, 27 I&N Dec. 470 (BIA Oct. 4, 2018) and see ILRC, *Practice Advisory: Matter of Velasquez-Rios and 364-Day Misdemeanors* at <https://www.ilrc.org/matter-velasquez-rios-and-364-day-misdemeanors>

¹⁵ See INA § 237(a)(2)(A)(i) and (ii), 8 USC § 1227(a)(2)(A)(i) and (ii).

¹⁶ See INA § 212(a)(2)(A)(ii)(II), 8 USC § 1182(a)(2)(A)(ii)(II).

(deportation). The Board of Immigration Appeals has held that a single CIMT conviction is a bar to eligibility for 10-year cancellation if either (a) it has a maximum potential sentence of *a year or more*, or (b) a sentence of more than six months was imposed.¹⁷ This is a unique standard, which the Board created by combining the CIMT petty offense exception and the CIMT deportation ground. It only applies to eligibility for 10-year cancellation of removal.

The one CIMT conviction must have a maximum potential sentence of 364 days or less. As discussed in subsection 1, above, under Pen C § 18.5(a) the maximum potential sentence for any California misdemeanor (or felony reduced to a misdemeanor) is 364 days rather than one year. Section 18.5(a) states that this applies retroactively to all California misdemeanor convictions, regardless of date. However, the Board of Immigration Appeals held that it will not give effect to the retroactivity provision in Pen C § 18.5(a). Instead, authorities will hold that a “one-year” misdemeanor from before January 1, 2015 has a maximum potential sentence of one year (and thus is a bar to this form of cancellation if the offense is a CIMT), while a conviction received on or after January 1, 2015 has a 364-day maximum potential sentence (and thus is not necessarily a bar, even if it is a CIMT).¹⁸ Advocates hope to overturn this ruling on appeal, but it is binding law now. Advocates should consider vacating a pre-January 1, 2015 conviction if needed to ensure eligibility for this relief. In removal proceedings, advocates should preserve this issue on appeal in order to be best able to take advantage of any positive future ruling.

The other requirement to avoid the bar to eligibility for non-LPR cancellation is that the sentence imposed on the single CIMT conviction must not exceed six months. For further discussion of this form of cancellation of removal and the CIMT bar, see *Note: Relief Toolkit* and *Note: Crimes Involving Moral Turpitude*, both at www.ilrc.org/chart.

E. 180 Days Actually in Custody as a Bar to Good Moral Character

A few key immigration applications require applicants to demonstrate they have been persons of “good moral character” (GMC) for a certain period of time. For example, people who apply for naturalization to U.S. citizenship, for any form of cancellation of removal for non-permanent residents, or for immigration relief under the Violence Against Women Act must show some period of GMC. See the discussion of GMC at ILRC, *Note: Defenders’ Relief Toolkit* (2018) at www.ilrc.org/chart.

Good moral character is a term of art in immigration law. It is defined in the negative at 8 USC § 1101(f), which sets out a list of factors that prevent an individual from even trying to establish that they have GMC. One of these negative factors is that the person was actually in jail for at least 180 days as a result of a conviction, during the time for which good moral character must be shown. This GMC standard has similarities and differences with “sentence imposed.”

- ✓ In contrast to “sentence imposed,” here the 180 days means time actually spent in custody. Early release from jail for good behavior, jail overcrowding, etc., decreases the time.
- ✓ In contrast to “sentence imposed,” here the 180 days of custody must have occurred within a set time period. For example, with some exceptions, an applicant for naturalization must show GMC for the preceding five years. If during the last five years the person only spent 179 days in custody, they are not barred from at least trying to establish the required GMC.
- ✓ Like “sentence imposed,” the time must be spent as a result of a conviction. If the person waives custody time served before the sentencing hearing, that time does not count toward the 180 days.

¹⁷ See INA § 240A(b)(1)(C), 8 USC § 1229b(b)(1)(C), interpreted by *Matter of Cortez*, 25 I&N Dec. 301 (BIA 2010) and *Matter of Pedroza*, 25 I&N Dec. 312 (BIA 2010), and see ILRC, *All Those Rules About Crimes Involving Moral Turpitude* (2018) at www.ilrc.org/crimes.

¹⁸ See *Matter of Velasquez-Rios*, 27 I&N Dec. 470 (BIA Oct. 4, 2018) and see ILRC, *Practice Advisory: Matter of Velasquez-Rios and 364-Day Misdemeanors* at <https://www.ilrc.org/matter-velasquez-rios-and-364-day-misdemeanors>. Mr. Velasquez-Rios was found ineligible to apply for non-LPR cancellation.

Example: Harry is undocumented. He needs to apply for cancellation of removal for non-permanent residents. To do this he needs to establish that he has been a person of good moral character (GMC) for the preceding ten years.¹⁹ Here are his priors, and their effect on the 180-day requirement:

- Twelve years ago, Harry served 20 days for a Pen C § 243(e). *This does not count toward the 180 days because it occurred outside of the ten years.*
- Nine years ago, he was sentenced to 290 days for Pen C § 496(a), but he was released after 145 days. *This counts as 145 days toward the 180 days.*

Since then Harry has found religion and led a good life, except recently he was charged with petty theft when he tried to steal food for his disabled U.S. citizen children. The DA wants a 120-day sentence and will not budge. Assuming that Harry spends 60 days in custody, that will take him up to 205 days and destroy his ability to demonstrate GMC.

With aggressive defense work, you get the DA to agree that if Harry pleads guilty, you can put off the sentencing hearing for six weeks. At that time Harry will waive credit for time served. (That means that the prior six weeks' custody will not be as a result of a conviction, and will not count toward the 180 days). Imposition of sentence will be suspended and Harry will accept an order of 35 days' custody as a condition of probation. With that sentence, Harry ought to get out of jail well before his 180th day in custody as a result of a conviction, and he will be able to apply for 10-year cancellation of removal for non-permanent residents.

¹⁹ See INA § 240A(b)(1), 8 USC § 1229b(b)(1).