

## § N.4 Sentence

(For more information, see *Defending Immigrants in the Ninth Circuit, Chapter 5*, [www.ilrc.org/criminal.php](http://www.ilrc.org/criminal.php))

- A. The Immigration Definition of Sentence
- B. Aggravated Felonies and Sentence
- C. The Petty Offense Exception to the Moral Turpitude Inadmissibility Ground and Sentence

### A. The Immigration Definition of Sentenced to a Term of Imprisonment

The immigration statute defines the term of imprisonment of a sentence as the “period of incarceration or confinement ordered by a court of law, regardless of suspension of the imposition or execution of that imprisonment in whole or in part.”<sup>1</sup>

This concept comes up frequently because *several types of offenses only will become aggravated felonies if a sentence of a year or more has been imposed*. See Part B, *infra*. See also discussion of the moral turpitude inadmissibility ground, at Part C, *infra*.

The good news is that there are many strategies to create a sentence that meets the demands of the prosecution and is an acceptable immigration outcome, especially in avoiding the one-year cut-off for an aggravated felony. The following are characteristics of the immigration definition of a sentence to imprisonment.

- ✓ The definition refers to the sentence that was imposed, not to potential sentence or time actually served as a result of conviction.
- ✓ It does not include the period of probation or parole.
- ✓ It includes the entire sentence imposed even if all or part of the *execution* of the sentence has been suspended. Where *imposition* of suspension is suspended, it includes any period of jail time ordered by a judge as a condition of probation.

**Example:** The judge imposes a sentence of two years but suspends execution of all but 13 months. For immigration purposes the “sentence imposed” was 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. The immigration sentence imposed is eight months.

- ✓ For most immigration provisions the sentence only attaches to each individual count and is not added up through multiple counts. For example, many offenses will become an aggravated felony only if a sentence of a year or more is imposed. A sentence imposed of

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<sup>1</sup> Definition of “term of imprisonment” at INA § 101(a)(48)(B), 8 USC § 1101(a)(48)(B).

less than a year on each of several counts, to be served consecutively, does not result in a single conviction with more than a one-year sentence imposed.

- ✓ Time imposed pursuant to a recidivist sentence enhancement (e.g., petty with a prior) is part of the total sentence imposed.<sup>2</sup>
- ✓ Time that is imposed on the original offense after a probation or parole violation will be added to the original time for that count.<sup>3</sup>

**Example:** The judge suspends imposition of sentence, orders three years probation, and requires jail time of four months as a condition of probation. The defendant is released from jail after three months with time off for good behavior. For immigration purposes the “sentence imposed” was four months. However, if this defendant then violates probation and an additional 10 months is added to the sentence, she will have a total “sentence imposed” of 14 months. If this is the kind of offense that will be made an aggravated felony by a one-year sentence imposed, she would do better to take a new conviction instead of the P.V. and have the time imposed for that.

- ✓ Vacating a sentence *nunc pro tunc* and imposing a revised sentence of less than 365 days will prevent the conviction from being considered an aggravated felony.<sup>4</sup>

**Five ways to get to 364 days or less.** Often counsel can avoid having an offense classed as an aggravated felony by creative plea-bargaining. The key is to *avoid any one count from being punished by a one-year sentence*, if the offense is the type that will be made an aggravated felony by sentence. If needed, counsel can negotiate for significant jail time or even state prison time. It is important to remember that a state prison commitment will not automatically make the conviction an aggravated felony. If immigration concerns are important, counsel might:

1. Bargain for 364 days on a single count/conviction;
2. Plead to two or more counts, with less than a one year sentence imposed for each, to be served consecutively;
3. Plead to an additional or substitute offense that does not become an aggravated felony due to sentence, and take the jail or even *state prison time* on that.

**Example:** Felipe is a longtime permanent resident who is charged with multiple violent crimes. There are also allegations that a knife was used in the commission of the crimes. The prosecution is demanding that Felipe plead guilty to a strike and that he be

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<sup>2</sup> The opposite rule was in force, until the Supreme Court overturned Ninth Circuit precedent. *U.S. v. Rodriguez*, 128 S. Ct. 1783 (2008), overruling in part *United States v. Corona-Sanchez*, 291 F.3d 1201 (9<sup>th</sup> Cir. 2002)(*en banc*).

<sup>3</sup> See, e.g., *United States v. Jimenez*, 258 F.3d 1120 (9<sup>th</sup> Cir. 2001) (a defendant sentenced to 365 days probation who then violated the terms of his probation and was sentenced to two years imprisonment had been sentenced to more than one year for purposes of the definition of an aggravated felony).

<sup>4</sup> *Matter of Song*, 23 I&N Dec. 173 (BIA 2001).

sentenced to state prison. In this situation you may still be able to negotiate a plea bargain that avoids an aggravated felony conviction.

First, identify an offense that will not become an aggravated felony even if a state prison sentence equal to or greater than 365 days is imposed. Here, P.C. § 12020(a)(1), possession of a deadly weapon, is not an aggravated felony even with such a sentence. The prosecution also is charging P.C. § 422, criminal threat, which will become an aggravated felony as a crime of violence if a sentence of a year or more is imposed. To avoid an aggravated felony, the court would have to designate § 12020(a)(1) as the base term and Felipe could be sentenced to the low, middle or high term. The punishment imposed pursuant to § 422 would have to be the subordinate term of one third the midterm, or eight months.

4. Waive credit for time already served, or if possible for prospective “good time” credits, and persuade the judge to take this into consideration in imposing a shorter official sentence. This “sentence” can result in the same amount of time actually incarcerated as under the originally proposed sentence (for example, waive credit for six months time served and bargain for an official sentence of nine months rather than 14 months);
5. Rather than take a probation violation that adds time to the sentence for the original conviction, ask for a new conviction and take the time on the new count.

#### **B. Which Offenses Become an Aggravated Felony Based on One-Year Sentence?**

The following offenses are aggravated felonies if and only if a sentence to imprisonment of one year was imposed. Obtaining a sentence of 364 days or less will prevent an offense from being classed as an aggravated felony *under these categories*.<sup>5</sup> Counsel always should make sure the offense does not also come within a different aggravated felony category that does not require a sentence.

- Crime of violence, defined under 18 USC § 16
- Theft (including receipt of stolen property)
- Burglary
- Bribery of a witness
- Commercial bribery
- Counterfeiting
- Forgery
- Trafficking in vehicles which have had their VIN numbers altered
- Obstruction of justice
- Perjury, subornation of perjury
- Falsifying documents or trafficking in false documents (with an exception for a first offense for which the alien affirmatively shows that the offense was committed for the purpose of assisting, abetting, or aiding only the alien’s spouse, child or parent)

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<sup>5</sup> See INA §101(a)(43), 8 USC § 1101(a)(43), subsections (F), (G), (P), (R), and (S).

Even a *misdemeanor* offense with a suspended one-year sentence imposed is an aggravated felony.

Note that ***many 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. This includes commonly prosecuted aggravated felony categories such as drug trafficking offenses, firearms offenses (which includes trafficking and felon in possession of a firearm), sexual abuse of a minor, rape, and a crime of fraud or deceit where the loss to the victim/s exceeds \$10,000.

**C. “Sentence Imposed” as Part of the Petty Offense Exception to the Moral Turpitude Ground of Inadmissibility.**

The above definition of “sentence imposed” also applies to persons attempting to qualify for the petty offense exception to the moral turpitude ground of inadmissibility, which holds that a person who has committed only one crime involving moral turpitude is not inadmissible if the offense has a maximum possible one-year sentence and a sentence imposed of *six months or less*.<sup>6</sup> See Note: Crimes Involving Moral Turpitude, *infra*.

**Example:** Michelle is convicted of grand theft, reduced to a misdemeanor. This is her first conviction of a crime involving moral turpitude. She is sentenced to three years probation with 20 days jail as a condition of probation. She comes within the petty offense exception to the inadmissibility (not deportability) ground: the conviction has a potential sentence of not more than one year; her sentence imposed was 20 days, which is less than six months; and she has not committed another crime involving moral turpitude.

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<sup>6</sup> See 8 USC § 1182(a)(2)(A)(ii)(II).