

CRIMINAL-IMMIGRATION LAW PRIMER SERIES

CAIR Coalition Virginia Justice Program
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THE IMMIGRATION DEFINITION OF “SENTENCE”

Why does the definition of “sentence” matter?

Understanding the immigration definition of a “sentence” is critical for criminal defense attorneys because many of the most severe immigration consequences from a criminal case hinge on the sentence imposed or, in some cases, the potential sentence that could have been imposed. For example, many “aggravated felonies” require a sentence of at least one year;¹ and, the “petty offense exception” to the “crime involving moral turpitude” (CIMT) ground of inadmissibility requires a sentence of six months or less.² Familiarity with these concepts allows defense attorneys to implement creative defense strategies at the plea bargaining stage of a case.

What is a “sentence” for immigration purposes?

Immigration law defines “sentence” 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 or sentence in whole or part.”³ This definition embodies two very important concepts, among others: (a) the sentence for immigration purposes is based on the length of custody ordered by the court, not the period that a defendant actually serves in custody; and (b) a suspended sentence has the exact same effect as the imposition of actual jail time. Thus, if a defendant receives a sentence of one year with nine months suspended and only serves 30 days of the remaining three months, his sentence for immigration purposes is one year. Additionally, time served will also be considered part of the sentence if it is included in the court’s sentencing order as a component of the sentence.

The rule that a sentence includes suspended time has several exceptions, including one that applies to immigration executive action programs. Under those programs, a misdemeanor with a sentence of 90 days or more of imposed incarceration (*not* including suspended time) will be considered both a government enforcement priority and a bar to deferred action programs.

Is obtaining a sentence under one year a good outcome for an immigrant?

A sentence of less than one year (which means 365 days) is *sometimes* beneficial to an immigrant because certain aggravated felony grounds (*see* footnote 1) require the imposition of a one-year sentence. However, many aggravated felony grounds apply regardless of the length of the sentence. Additionally, the petty offense exception to the CIMT ground of inadmissibility requires a sentence of six months or less, meaning that a sentence under one year but more than six months will have adverse consequences for many immigrants regardless of whether the offense will be considered an aggravated felony.

What is the effect of probation and parole?

Generally, a period of probation or parole does not count as part of a sentence for immigration purposes. Thus, if a defendant’s only punishment is probation, that period of probation will not count as a sentence.⁴ However, if a court sentences a defendant to a term of confinement that is to be served entirely on probation, that probationary period will be deemed a sentence.⁵

Finally, if a defendant violates probation, any additional time ordered by a court as a result of that violation will be combined with the initial period of incarceration for the purposes of calculating the sentence. The same may apply to additional time ordered as a result of a parole violation.

VIRGINIA PRACTICE TIPS – DEFINITION OF SENTENCE

- ✓ Obtain a sentence of under 365 days to avoid aggravated felonies for crimes of violence, theft, burglary, bribery, forgery, obstruction, and perjury.
- ✓ If a conviction with a sentence of one year is unavoidable and offense may be categorized as a “theft aggravated felony,” seek plea to fraud offense and specify loss to victim is \$10,000 or less.
- ✓ When crime is a class 1 misdemeanor and will be considered a CIMT, keep sentence at 6 months or less (if client has no other CIMTs).
- ✓ If possible, seek a sentencing order that does not include time served if time served will lead to adverse consequences (e.g. one year sentence for aggravated felonies).

¹ 8 U.S.C. §§ 1101(a)(43)(F) (crimes of violence); (G) (theft or burglary); (R) (bribery and forgery); (S) (obstruction of justice and perjury).

² 8 U.S.C. § 1182(a)(2)(A)(ii)(II).

³ 8 U.S.C. § 1101(a)(48)(B).

⁴ *United States v. Martinez-Villalva*, 232 F.3d 1329, 1333 (10th Cir. 2000); *United States v. Banda-Zamora*, 178 F.3d 728, 730 (5th Cir. 1999).

⁵ Juan Ignacio Ruela, A077 485 879, 2014 WL 2919255 (BIA May 5, 2014)