



PRACTICE ADVISORY¹

Understanding and Mitigating the Effect of Suspended Sentences

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This practice advisory discusses the immigration consequences of suspended sentences. The advisory provides background about the governing statutory framework and case law, and suggests strategies for softening the potential impact of suspended sentences.

I. Background

To suspend a sentence is to withhold all or some of a defendant's punishment. However, depending upon the length of the sentence and the nature of the offense, a suspended sentence can — just like other criminal sentences — carry immigration consequences. Under 8 U.S.C. § 1101(a)(43)(F), for example, an aggravated felony is defined as “a crime of violence . . . for which the term of imprisonment [is] at least one year.” Thus, a suspended sentence of one year or more could result in an aggravated felony determination and subsequent deportation.

8 U.S.C. § 1101(a)(48)(B) explains the immigration consequences of a suspended sentence. It provides that: “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.” The statute, however, does not define what constitutes suspending the *imposition* of a sentence and suspending a sentence's *execution*, and states do not use those terms uniformly. The Supreme Court in *Roberts v. United States*, 320 U.S. 264 (1943), explained the distinction between suspension of a sentence's execution and imposition, respectively:

In the first instance the defendant would be sentenced in open court to imprisonment for a definite period; in the second, he would be informed in open court that the imposition of sentence was being postponed. In both instances he then would be informed of his release on probation upon conditions fixed by the court. The difference in the alternative methods is plain. Under the first, where execution of sentence is suspended, the

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defendant leaves the court with knowledge that a fixed sentence for a definite term of imprisonment hangs over him; under the second, he is made aware that no definite sentence has been imposed and that if his probation is revoked the court will at that time fix the term of his imprisonment.

Id. at 268.

In *Roberts*, however, the Court was interpreting the Probation Act, not the Immigration and Nationality Act; the meanings of these terms in the present context is therefore unclear. For the purposes of this advisory, it is assumed that under 8 U.S.C. § 1101(a)(48)(B), a definite term of imprisonment could be (but is not necessarily) attached to a sentence whose imposition is suspended. It is also assumed that the meaning of suspended execution of a sentence within section 1101(a)(48)(B) tracks the definition of the term in the *Roberts* opinion.

II. The Board's Treatment of Imposition and Execution of a Sentence

Prior to 1996, the immigration statute treated the practices of suspending a sentence's execution and suspending its imposition differently for immigration purposes; however, a 1996 amendment to the INA sought to eliminate the distinction and to treat suspension of imposition and execution as identical in the immigration context.

In a pre-1996 case, *Matter of Castro*, 19 I. & N. 692 (BIA 1988), the BIA explained the differing impacts of suspending a sentence's execution and suspending its imposition. At issue in *Castro* was whether the respondent's conviction fell within the petty offense exception of the INA; that exception provided that: "An alien who would be excludable because of the conviction of an offense for which the *sentence actually imposed* did not exceed a term of imprisonment in excess of six months . . . may be granted a visa and admitted to the United States." *Id.* at 694 (quoting INA § 212(a)(9) (2006)) (emphasis added). The BIA clarified that "[u]nder the United States criminal law system, courts may either impose a sentence or suspend imposition of the sentence." *Id.* If a court chose to do the former, it could then suspend the execution of a sentence. The distinction mattered: where the *imposition* of a sentence is suspended (and probation is often subsequently granted), no sentence has actually been imposed. However, if the *execution* of a sentence is suspended, the BIA continued, "a sentence has actually been imposed, even though probation may also be granted." *Id.*

The BIA changed its position after 1996, when an amendment to the INA sought to erase the difference between the suspension of imposition and execution for immigration purposes. The amendment, created by section 322(a)(1) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) and codified at 8 U.S.C. § 1101(a)(48)(B), provides that: "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.” The BIA explained the impact of the amendment in *Matter of S-S-*, 21 I. & N. Dec. 900 (BIA 1997), in which the respondent challenged the determination that his suspended sentence for an indeterminate term not to exceed five years rendered him deportable. Citing legislative history,³ the Board contended that the fact that the respondent’s sentence was suspended “is irrelevant to the analysis, as is the length of time actually served, if any.” *Id.* at 902. Indeed, this would be the case “even if the ‘imposition’ of that sentence was suspended”; the “only relevant inquiry is the term to which respondent was sentenced by the court.” *Id.*

However, the simple language of the statute belies the real complexity of the issue, which emerges from states’ various procedures for suspending sentences. For example, some states require that courts sentence defendants to specific terms of confinement before suspending the imposition of a sentence; other states prohibit courts from doing so. As discussed *infra*, defendants in this latter category of states arguably fall outside the scope of section 1101(a)(48)(B) — if the court does not refer to a specific term of imprisonment, the requisite “period of incarceration or confinement ordered by a court of law” is absent.

A more recent BIA case, *Matter of Ramirez*, 25 I. & N. Dec. 203 (BIA 2010), is also noteworthy. There, the Board held that where a term of imprisonment is imposed on a defendant after a probation violation, that term is considered part of the penalty for the initial crime rather than for a separate offense. In the underlying criminal case, a California trial court suspended the imposition of the sentence on the respondent and granted 36 months of “summary probation.” *Id.* at 203–04. There was no specific term of imprisonment attached to the suspended imposition of sentence in the respondent’s case. (This is standard practice in California.)⁴ Significantly, the Board found that the one-year term of imprisonment requirement associated with the charged aggravated felony ground had been satisfied (and that the respondent was therefore an aggravated felon) only *after* his probation violation, which resulted in a one-year sentence — meaning that Ramirez’s original suspended imposition of sentence, in and of itself, did not qualify as a sentence of imprisonment for immigration purposes.

III. Arguments and Strategies

³ The Board looked to the Joint Explanatory Statement of the Committee of Conference; that Statement, the BIA explained, indicates that the purpose of section 322(a)(1) of IIRIRA was “to overturn prior administrative precedent holding that a sentence is not ‘actually imposed’ when the court has suspended the ‘imposition’ of the sentence.” *S-S-*, at 902 (quoting H.R. Conf. Rep. No. 104-828).

⁴ California prohibits the imposition of a specific term of imprisonment if the imposition of a sentence is suspended. Cal. Penal Code § 1170(b) (West).

A. The absence of a “period of incarceration or confinement ordered by a court of law”

Recall that 8 U.S.C. § 1101(a)(48)(B) provides that a reference to a term of imprisonment is “deemed to include the period of incarceration or confinement ordered by a court of law.” Two distinct requirements can be discerned from this language: 1) there must be a “period of incarceration or confinement,” and 2) that period must be “ordered by a court of law.”

As to the first requirement, there is a powerful argument that, in states where courts suspend imposition of sentences without specifying any period of confinement — either because they are prohibited from doing so (like California), or simply because they choose not to — there is no “*period* of incarceration or confinement” and therefore no sentence for immigration purposes. These cases are akin to the direct imposition of probation on defendants — a practice that is understood to fall outside the purview of section 1101(a)(48)(B). *See, e.g., United States v. Banda-Zamora*, 178 F.3d 728, 730 (5th Cir. 1999).

Both BIA and federal appeals courts cases lend weight to this view. As noted *supra*, the BIA in *Matter of Ramirez* did not construe the respondent to have a qualifying sentence under section 1101(a)(48)(B) until after his probation violation; this indicates that the trial court’s initial suspension of the imposition of the sentence — which lacked a specific length — did not come within the statute. Similarly, the Ninth Circuit has found that where a court suspends the imposition of sentence and does not specify and pronounce a term of imprisonment, there is no sentence of imprisonment for the purposes of the immigration statute. *Vivar-Flores v. Holder*, 498 Fed. Appx. 716, 717 (9th Cir. Nov. 20, 2012) (explaining that the factfinder cannot look to a potential sentence that may be authorized under the criminal statute, but only to an actual sentence entered, to satisfy the one-year sentence requirement under 8 U.S.C. § 1101(a)(43)(G)). Though the Ninth Circuit remanded to the BIA to determine the proper interpretation in the first instance, there is little room for a reading of the statutory language that treats sentences without specific terms of confinement as being within the scope of section 1101(a)(48)(B). To be sure, this interpretation of the statute does not negate the effect of the 1996 amendment; it simply limits its applicability to instances where specific terms of confinement attach to suspended sentences. If in your case the underlying court did not impose a specific term when suspending the sentence’s imposition, the above argument is available to you.

The second distinct requirement in section 1101(a)(48)(B) is that the period of incarceration or confinement must be “ordered by a court of law.” It is significant that the statute expressly designates *courts*, to the exclusion of legislatures, as the entities empowered to order the confinement. A basic principle of statutory interpretation is that statutes should be construed “so as to avoid rendering superfluous” any statutory

language, and correspondingly, that courts should not enlarge a statute beyond its text. *See, e.g., Astoria Federal Savings & Loan Ass'n v. Solimino*, 501 U.S. 104, 112 (1991); *Iselin v. United States*, 270 U.S. 245, 250 (1926) (Brandeis, J.) (“To supply omissions [to enlarge a statute] transcends the judicial function.”). Applying that principle here, where a period of incarceration or confinement is not directly ordered by a court — and is instead, for example, merely authorized by the legislature — the sentence is not subject to the requirements of section 1101(a)(48)(B).

The legislative history indicates that the statute indeed requires an order by a court of law. The conference committee report that accompanied the 1996 amendments and was cited by the BIA in *Matter of S-S-*, discussed *supra*, observed that the statutory amendment “clarifies that in cases where immigration consequences attach depending upon the length of a term of sentence, any *court-ordered sentence* is considered to be ‘actually imposed,’ including where the court has suspended the imposition of the sentence.” H.R. Conf. Rep. No. 104-828, at 224 (emphasis added). Only sentences that are court-ordered thus fall within the scope of the statute.

Determining whether a court-ordered period of confinement exists requires careful parsing of the language of a state court’s judgment. For example, the National Immigration Project has access to judgments from Georgia courts that order no confinement. One judgment states, for example, that the defendant is to serve a sentence “consisting of 0 days/months in jail and 24 months on Probation.” The judgment also indicates that there is no accompanying suspended sentence. The Georgia Code, however, requires a judge in any case involving a felony or misdemeanor to impose a determinate sentence, all or some of which may be suspended or probated. O.C.G.A. § 17-10-1 (2010). Arguably, every sentence of probation in Georgia requires a suspended or probated sentence involving a determinate period of confinement. Where the defendant’s state court judgment does not suspend the sentence and order confinement and the sentence of confinement is instead imposed by statute, this line of reasoning could be of some avail.

B. Interpreting “suspension” in section 1101(a)(48)(B)

A second line of argument pertains to defendants who are granted probation. *United States v. Ayala-Gomez*, 255 F.3d 1314 (11th Cir. 2001), held that suspension of a sentence occurs where there is a “step intervening between imposition of a prison term and placing a defendant on probation.” *Id.* at 1318. In that case, the respondent argued that his sentence had been “probated” — not “suspended” — and that he therefore fell outside the scope of section 1101(a)(48)(B). The court disagreed, giving no weight to the names that Georgia attached to its own sentencing mechanisms. Regardless of what states call it, the court argued, suspension under section 1101(a)(48)(B) is just the step between imposing the prison term and placing a defendant on probation.

After *Ayala*, there are arguably two classes of individuals for whom probation is granted. First, there are defendants on whom probation is imposed directly (i.e., without the mention of a suspended sentence). As noted earlier, even after *Ayala*, these individuals are not subject to the requirements of section 1101(a)(48)(B). See, e.g., *United States v. Banda-Zamora*, 178 F.3d 728, 730 (5th Cir. 1999) (“[W]hen a defendant is directly sentenced to probation, with no mention of suspension of a term of imprisonment, there has been no suspension of a term of imprisonment.”); *United States v. Guzman-Bera*, 216 F.3d 1019, 1021 (11th Cir. 2000) (same). Second, there are defendants like *Ayala-Gomez*, whose sentences are probated indirectly (i.e., after the imposition and suspension of a sentence); in a post-*Ayala* world, these individuals will be subject to the requirements of section 1101(a)(48)(B). An individual’s membership in either class hinges on the procedures a state follows in probating the sentences of defendants. For the latter group, the most effective argument may simply be that *Ayala*’s holding is wrong as a legal matter, for the reasons Judge Noonan lays out in his dissent. See *Ayala-Gomez*, 255 F.3d 1319–21 (Noonan, J., dissenting) (arguing that “suspension” in 1101(a)(48)(B) is defined according to state practice, rather than federal meaning). Judge Noonan’s invocation of the rule of lenity — which requires an ambiguous statute to be interpreted in favor of defendants — may supply an especially powerful argument. See, e.g., *Moncrieffe v. Holder*, __U.S. __, 133 S. Ct. 1678, 1693 (2013); *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004); *Lok v. INS*, 548 F.2d 37, 39 (2d Cir. 1977) (noting “the settled doctrine that deportation statutes, if ambiguous, must be construed in favor of the alien”).

Further, if you reside in a state where a court can choose to grant either “direct” or “indirect” probation, you should opt for the former. Texas, for example, has two distinct mechanisms for granting probation. Under the first, the trial court “assesses” punishment, but does not “impose” punishment unless probation is revoked. In effect, a defendant receives a term of imprisonment, but the sentence is then suspended and probation is imposed. Tex. C.C.P. Art. 42.12 § 2.2(A). Under the second method, a term of imprisonment is neither assessed nor imposed; proceedings are deferred without an adjudication of guilt, and straight probation is imposed. *Id.* at § 2.2(B); see also *United States v. Vasquez-Balandran*, 76 F.3d 648, 650 (5th Cir. 1996) (interpreting federal sentencing statute).⁵ If eligible for probation, therefore, defendants in Texas should seek deferred adjudication of their sentence.

⁵ The court in *Vasquez-Balandran* held that the defendant received a suspended sentence and was therefore an aggravated felon. In its opinion, the court reproduced the relevant parts of the state court judgment:

It is therefore considered and adjudged by the Court that the said Defendant is guilty of the offense of Robbery, Count 2 paragraph “B” as confessed by him in said plea of guilty herein made, and that *he be punished by confinement . . . for ten (10) years and a fine of \$0 . . . The imposition of the above sentence (and*

C. The BIA’s interpretation of section 1101(a)(48)(B) is arbitrary and capricious

Insofar as the BIA is arguing that the statute applies to defendants in states where courts cannot grant probation directly (i.e., they must grant probation “indirectly” by first suspending the imposition of a sentence), one may argue that such an interpretation is “arbitrary or capricious in substance.” *Mayo Foundation for Medical Education and Research v. United States*, 131 S. Ct. 704, 711 (2011). In *Judulang v. Holder*, 132 S. Ct. 476 (2011), the Supreme Court held that the BIA’s policy of hinging an alien’s eligibility for discretionary relief on factors “irrelevant to the alien’s fitness to reside in this country” ran afoul of this principle.⁶ *Id.* at 484. The BIA, the Court explained “failed to exercise its discretion in a reasoned manner.” *Id.*

Here, similarly, the BIA’s interpretation of section 1101(a)(48)(B) is not based on reasoned distinctions and hinges an alien’s deportability on a factor wholly irrelevant to her fitness to remain in the country — to wit, whether she resides in a state where a court has the ability to grant her probation directly. Indeed, at least one federal court has hinted that the availability of a mechanism for granting probation directly may be relevant to a court’s analysis. See *United States v. Vasquez-Balandran*, 76 F.3d 648, 650 (5th Cir. 1996) (“Contrary to [the respondent]’s assertion, Texas did (and still does) have a provision that allowed a defendant to be placed on probation (now ‘community supervision’) without first assessing a term of imprisonment.”). Confining the reach of section 1101(a)(48)(B) to states where there exists a possibility of placing a defendant on probation directly is both reasonable and consistent with the Court’s administrative law jurisprudence.

D. Modification of a sentence

In *Matter of Cota-Vargas*, 23 I. & N. Dec. 849 (BIA 2005), the Board terminated removal proceedings against the respondent, whose sentence was reduced by a state court

fine) is suspended and the Defendant is placed on adult probation under the terms and conditions set out in Exhibit “A” hereto attached.

Vasquez-Balandran, 76 F.3d at 649. However, in *United States v. Herrera-Solorzano*, 114 F.3d 48 (5th Cir. 1997), the court found that “an almost identical” state court judgment did not fulfill the aggravated felony requirement because it “contain[ed] a reference to adult probation next to the term of confinement, . . . suggest[ing] that the state court may have been directly sentencing [the defendant] to ten years of adult probation.” *Id.* at 50. The precise words used in a trial court’s judgment are thus critical.

⁶ While what is at issue here, unlike in *Judulang*, is an agency’s *interpretation* of a statute, rather than agency *action*, the “arbitrary or capricious” analysis is the same. *Judulang*, 132 S. Ct. at 483 n.7.

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from 365 to 240 days. The respondent argued that this new sentence meant that he was no longer an aggravated felon under 8 U.S.C. § 1101(a)(43)(G). The BIA agreed, holding that where a defendant's sentence is modified or reduced, the new sentence is valid for immigration purposes notwithstanding the basis for the reduction. Thus, one strategy to mitigate the harshness of a suspended sentence is to persuade judges to reduce sentences that would otherwise result in adverse immigration consequences.