

# A.G. Decision Ends Recognition of Sentence Modifications

*Author Susan Schreiber*

For several grounds of crime-based inadmissibility and deportability, the sentence imposed is part of the determination of whether the ground applies. For example, to be deportable for an aggravated felony theft offense, the noncitizen must have been sentenced to a term of imprisonment of at least one year. And to be eligible for the petty offense exception to inadmissibility for a crime involving moral turpitude, the crime must be punishable by no more than one year and any sentence imposed cannot exceed six months of incarceration. In situations where the sentence imposed is a component of inadmissibility or deportability, can you escape the consequences by a sentence modification?

For a long time, the answer to that question was yes. In *Matter of Cota-Vargas*, 23 I&N Dec. 849 (BIA 2005) and *Matter of Song*, 23 I&N Dec. 173 (BIA 2001), the Board of Immigration Appeals said that court orders modifying or reducing a sentence are valid for immigration purpose regardless of the court's reason for taking this action. As a result, sentence modification was a useful strategy for those noncitizens who could eliminate the immigration consequences of a crime by pursuing a change in the original sentence imposed.

Those days are now over and that strategy is no longer available. In *Matter of Thomas and Thompson*, 27 I&N Dec. 674 (A.G. 2019), issued on October 25, 2019, the Attorney General overruled the *Song* and *Cota-Vargas* decisions, holding that these decisions will no longer govern the effect of state-court orders that modify or otherwise alter a noncitizen's criminal sentence. Instead, such state court orders will only be recognized for immigration purposes if they are related to a procedural or substantive defect in the underlying criminal proceeding. Where such orders have been issued for rehabilitative reasons or to avoid the immigration consequences of the offense, the sentence modification will not be recognized.

Where does this leave those noncitizens who already successfully pursued a sentence modification in anticipation of avoiding future immigration consequences? Does the Attorney General's decision impact on sentence modifications to avoid immigration consequences obtained while *Cota-Vargas* and *Song* were still in effect? This question is not addressed in the decision, leaving the issue of retroactivity open for argument and future litigation.