

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-40908
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ERNESTO DE LA GARZA-OCHOA,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. B-98-CR-243-1

August 9, 1999

Before SMITH, BARKSDALE, and PARKER, Circuit Judges.

PER CURIAM:*

Ernesto De La Garza-Ochoa (De La Garza) has appealed the district court's determination that he is not eligible for a downward departure under U.S.S.G. § 2L1.2(b)(1)(A), comment.(n.5) because De La Garza's seven-year probated sentence for a prior Texas cocaine offense was for a term of imprisonment which "exceeded one year." It is not possible to tell from the record in this case whether De La Garza received deferred adjudication probation for the Texas cocaine conviction or whether he was

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

sentenced to a term of imprisonment which was suspended. Because this issue must be resolved in order to determine whether De La Garza is eligible for a downward departure under § 2L1.2(b)(1)(A), comment.(n.5), his sentence is VACATED and the case is REMANDED to the district court for further proceedings in light of United States v. Banda-Zamora, ___ F.3d ___, ___ (5th Cir. June 16, 1999, No. 98-40903), 1999 WL 393480.

VACATED AND REMANDED.