

Immigration Offenses

Unlawfully Entering or Remaining in the United States

§2L1.2

and

8 U.S.C. §§ 1325 and 1326

Use of Prior Convictions

Statutory Penalties for Illegal Reentry

8 U.S.C. § 1326

- With no prior 2 years
- With prior felony 10 years
- With “aggravated felony” 20 years

Note: These determinations are based on statutory definitions

“Aggravated Felony”

- Defined at 8 U.S.C. § 1101(a)(43)
- Only used in guideline for illegal reentry at §2L1.2(b)(1)(C)

“Aggravated Felony” (cont.)

- An offense does not have to meet this statutory definition to be included in guideline application under §2L1.2(b)(1)(A), (B), or (D)

§2L1.2 Unlawfully Entering/Remaining in the U.S.

(a) Base Offense Level

8

(b) Specific Offense Characteristics

(1) Apply the Greatest:

If the Δ previously was deported, or unlawfully remained
in the U.S. after –

(A) a conviction for a felony that was a (i) drug trafficking
offense with sentence imposed > 13 mos., (ii) crime of
violence, (iii) firearms offense, (iv) child porn offense, (v)
national security or terrorism offense, (vi) human
trafficking offense, (vii) alien smuggling offense

+16

Unlawfully Entering/Remaining in the U.S.

(b) Specific Offense Characteristics

- (1) (B) a conviction for a felony drug trafficking offense for which the sentence imposed was 13 months or less +12
- (C) a conviction for an aggravated felony, + 8
- (D) a conviction for any other felony, + 4
- (E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, + 4

Guideline Terms Defined at §2L1.2

“Felony”

§2L1.2, App. Note 2

- Any federal, state, or local offense punishable by imprisonment exceeding one year
- Does not matter that the offense may be classified as a misdemeanor in its respective jurisdiction

“Misdemeanor”

§2L1.2, App. Note 4(A)

Any federal, state, or local offense punishable by imprisonment of one year or less

Guideline Definitions for Prior Offenses Listed at §2L1.2(b)(1)(A)

- Crime of violence
- Drug trafficking offense
- Firearms offense
- Child pornography offense
- National security or terrorism offense
- Human trafficking offense
- Alien smuggling offense

Use of Prior Convictions and the “Categorical Approach”

Categorical Approach

Taylor v. U.S.
495 U.S. 575 (1990)

Shepard v. U.S.
544 U.S. 13 (2005)

“Crime of Violence”

§2L1.2, App. Note 1(B)(iii)

- Means any of the following offenses under federal, state, or local law:
 - murder,
 - manslaughter,
 - kidnapping,
 - aggravated assault,
 - forcible sex offenses
 - statutory rape
 - sex abuse of a minor
 - robbery,
 - arson,
 - extortion,
 - extortionate extension of credit,
 - burglary of a dwelling

OR

“Crime of Violence” (cont.)

- Any **other** offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another.

Conducting a Categorical Approach Analysis

1. Obtain and review statute of prior conviction.

By examining the elements of the conviction, determine if ALL sections under the statute meet the definition in question.

NOTE: Do not rely on title of statute of conviction alone!

Conducting a Categorical Approach Analysis (cont.)

2. If the statute has certain subsections that do not meet the definition in question, the court may look to appropriate court records to determine the subsection of the statute of which the defendant was convicted.

Conducting a Categorical Approach Analysis (cont.)

3. To determine if the subsection of which the defendant was convicted meets the definition in question, the court will look to certain documents.

These documents include: charging instrument, jury instructions, plea agreements, or any judicially ruled documents.

“Forcible Sex Offense”

2008 Amendment

- Includes those where consent to the conduct is not given, or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced.

Crime of Violence

§2L1.2

- **Does not** include “substantial risk of physical force against the person or property”
- No requirement of “imprisonment for at least one year”
- May not be an “aggravated felony”

8 U.S.C. § 1101

- References 18 U.S.C. § 16, which includes “substantial risk of physical force against the person or property”
- “Imprisonment for at least one year”

“Drug Trafficking Offense”

2008 Amendment

- Means an offense under federal, state, or local law that prohibits the:
 - Manufacture, import, export, distribution, dispensing, or offer to sell of a controlled substance (or counterfeit substance) or
 - Possession of a controlled substance (or counterfeit substance) with intent to do any of the above

Drug Trafficking Offense: “Sentence Imposed”

§2L1.2, App. Note 1(B)(vii)

- Does not include any portion of a sentence of imprisonment that was probated, suspended, deferred, or stayed
- Note: This does not affect the statutory definition of “aggravated felony” (8 U.S.C. §1101(a)(43))

Suspended Sentence

§2L1.2

- Not included in the calculation of “sentence imposed” – Application Note 1(B)(vii)

8 U.S.C. § 1101

- Included at 8 U.S.C. § 1101(a)(48)(B)

Drug Trafficking Offense: Prior Revocation

App. Note 1(B)(vii))

- Prior revocation time added to its original term of imprisonment for “sentence imposed”
- Case law in support
 - *U.S. v. Hidalgo-Macias*, 300 F.3d 281(2d Cir. 2002)
 - *U.S. v. Compian-Torres*, 320 F.3d 514 (5th Cir. 2003)
 - *U.S. v. Marino-Cisneros*, 319 F.3d 456 (9th Cir. 2003)

Drug Trafficking Offense: Indeterminate Sentence

§2L1.2, App. Note 1(B)(vii)

- Length of prior indeterminate sentence is the stated maximum
- Case law in support
 - *U.S. v. Rodriguez-Arreola*, 313 F.3d 1064 (8th Cir. 2002)

Relationship of §2L1.2 and Chapter Four (Criminal History)

§2L1.2, App. Notes 1(A)(vii) & 6

- No requirement that a prior conviction at §2L1.2 must receive criminal history points under §4A1.1
- “Time frames” at §4A1.2(e) not applicable under §2L1.2

Relationship of §2L1.2 and Chapter Four (Criminal History) (cont.)

§2L1.2, App. Notes 1(A)(vii) & 6

- *However*, prior convictions considered under §2L1.2 may also receive criminal history points under §4A1.1
- Juvenile adjudications cannot be used at §2L1.2 but can be used at Chapter Four

Departure Considerations

“Fast Track” Departures

Early Disposition Programs §5K3.1

- Only under a program authorized by the Attorney General and the U.S. Attorney
- Requires a motion from the government
- Departure not more than 4 levels

Departure Consideration

2008 Amendment

There may be cases in which the applicable offense level substantially overstates or understates the seriousness of a prior conviction. In such a case, a departure may be warranted

Departure Consideration (cont.)

2008 Amendment

- Example (A):
 - In a case in which subsection (b)(1)(A) or (b)(1)(B) does not apply and the defendant has a prior conviction for possessing or transporting a quantity of a controlled substance that exceeds a quantity consistent with personal use, an upward departure may be warranted.

Departure Consideration (cont.)

2008 Amendment

- Example (B):
 - In a case in which subsection (b)(1)(A) applies, and the prior conviction does not meet the definition of aggravated felony at 8 U.S.C. § 1101(a)(43), a downward departure may be warranted.

§2L1.1
**Smuggling, Transporting,
or Harboring an
Unlawful Alien**

Guideline for
8 U.S.C. §§ 1324(a) & 1327

§2L1.1(b)(2)

(2) If the offense involved the smuggling, transporting, or harboring of six or more unlawful aliens, increase as follows:

# of Unlawful Aliens Smuggled, Transported, or Harbored	Increase in Level
6 - 24	+ 3
25 - 99	+ 6
100 or more	+ 9

§2L1.1(b)(6)

- 2 level increase (floor of 18) if offense involved intentionally or recklessly creating a substantial risk of death or bodily injury to another
- App. Note 6 provides examples
 - *e.g.*, carrying excess passengers

“Substantial Risk” SOC

§2L1.1(b)(6)

- *U.S. v. Zuniga-Amezquita*, 468 F.3d 886 (5th Cir. 2006)(“5 factors”)
- *U.S. v. Miguel*, 368 F.3d 1150 (9th Cir. 2004)
- *U.S. v. Maldonado-Ramires*, 384 F.3d 1228 (10th Cir. 2004)
- *U.S. v. Rodriguez-Lopez*, 363 F.3d 1134 (11th Cir. 2004)

§2L1.1(b)(7)

If any person died or sustained bodily injury, increase the offense level according to the seriousness of the injury:

Death or Degree of Injury	Increase in Level
Bodily Injury	+ 2
Serious Bodily Injury	+ 4
Permanent or Life-Threatening Bodily Injury	+ 6
Death	+ 10

§2L1.1(b)(7)

- Strict liability: Does not require that the injury or death be intended
 - *U.S. v. Garcia-Guerrero*, 313 F.3d 892 (5th Cir. 2002)
- Can apply both (b)(6) and (b)(7)

Alien Harboring (cont.)

Proposed amendment effective 11/1/09

- New SOC (b)(8)(B)
 - If (i) the defendant was convicted of alien harboring, (ii) the alien harboring was for the purpose of prostitution, and (iii) the defendant receives an adjustment under §3B1.1 (Aggravating Role), increase by **2** levels, but if the alien engaging in prostitution had not attained the age of 18 years, increase by **6** levels

END