

REVISED PROPOSED AMENDMENT: IMMIGRATION
(Proposed Amendment 18 of User Friendly, Volume Two)

Synopsis of Proposed Amendment: *This amendment modifies §2L1.2(b)(1) (Unlawful Entering or Remaining in the United States) to provide more graduated sentencing enhancements based on the seriousness of the prior aggravated felony conviction. Subsection (b)(1)(A) currently provides a 16-level enhancement if the defendant was previously deported after a criminal conviction, and the conviction was for an aggravated felony.*

The Commission has received comment that §2L1.2 often results in offense levels that are disproportionate to the seriousness of the prior aggravated felony conviction. This occurs for two primary reasons. First, 8 U.S.C. § 1101(a)(43) and, by reference, §2L1.2, defines aggravated felony very broadly. Second, subsection (b)(1) neither distinguishes among the many types of aggravated felonies for purposes of triggering the 16-level enhancement, nor provides for smaller increases for less serious aggravated felonies.

The proposed amendment is intended to achieve more proportionate punishment by providing tiered sentencing enhancements based on the type of the prior aggravated felony. The amendment provides increased punishment for the most serious felonies: (A) crimes of violence and serious drug trafficking offenses [for which the sentence imposed was not less than [13 months]]; (B) child pornography offenses; and (C) firearms offenses. The definition of crime of violence tracks the definition of crime of violence used in 8 U.S.C. § 1101(a)(43) (see 18 U.S.C. 16), which includes crimes of violence against a person or property. The amendment's proposed definition of crime of violence is limited to the more serious crimes of violence against a person. Second, the definition of serious drug trafficking offenses (see 18 U.S.C. 924(e)) is limited to federal or state drug trafficking offenses for which the statutory maximum term of imprisonment is at least 10 years. The use of this definition is intended to limit the 16-level enhancement to more serious drug traffickers. [Third, application of the 16-level enhancement for both crimes of violence and serious drug trafficking offenses is limited to prior convictions for which the sentence imposed was not less than [13 months]. This is a further attempt to limit application of the enhancement to the most serious offenders.]

The proposed amendment restructures the current 4-level enhancement for other felonies and three or more misdemeanor convictions for crimes of violence or controlled substance offenses to address confusion in application of these provisions.

The proposed amendment provides that if the 16-level enhancement applies and the resulting offense level substantially overstates the seriousness of the prior conviction, a departure may be warranted. However, in such a case the court shall not impose a sentence at a level below that required for aggravated felonies under subsection (b)(1)(B).

The proposed amendment also makes conforming changes to the commentary of this guideline.

Proposed Amendment:

§2L1.2. Unlawfully Entering or Remaining in the United States

(a) Base Offense Level: **8**

(b) Specific Offense Characteristic

(1) Apply the greatest:

If the defendant previously was deported, or unlawfully remained in the United States, after—

- (A) a conviction for (i) a serious drug offense [for which the sentence imposed was not less than 13 months]; (ii) a crime of violence [for which the sentence imposed was not less than 13 months]; (iii) a felony that is a child pornography offense, or (iv) a felony that is a firearms offense, increase by **16** levels;
- (B) a conviction for an aggravated felony, increase by **6** levels;
- (C) a conviction for any other felony, increase by **4** levels; or
- (D) three or more convictions for misdemeanors that are crimes of violence or controlled substance offenses, increase by **4** levels.

Commentary

Statutory Provisions: 8 U.S.C. § 1325(a) (second or subsequent offense only), 8 U.S.C. § 1326. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Application of Subsection (b)(1).—For purposes of subsection (b)(1):

A defendant shall be considered to be deported if the defendant has been removed or has departed the United States while an order of exclusion, deportation, or removal was

outstanding.

A defendant shall be considered to be deported after a conviction regardless of whether the deportation was in response to the conviction.

A defendant shall be considered to have unlawfully remained in the United States if the defendant remained in the United States following a removal order issued after a conviction regardless of whether the removal order was in response to the conviction.

2. Application of Subsection (b)(1)(A).—For purposes of subsection (b)(1)(A):

"Serious drug offense" has the meaning given that term in 18 U.S.C. § 924(e)(2)(A).

"Crime of Violence"—

- (A) means an offense under federal or state law that (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or, (ii) by its nature, involves a substantial risk that physical force against the person of another may be used in the course of committing the offense; and
- (B) includes—
 - (i) murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses (including sexual abuse of a minor), robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling;
 - (ii) making threats to kill, injure, or intimidate by means of fire or explosives (*see e.g.*, 18 U.S.C. § 844(e));
 - (iii) using fire to commit a felony; or using or carrying an explosive during the commission of any felony (*see e.g.*, 18 U.S.C. § 844(h));
 - (iv) making threatening communications to kidnap or injure another person (*see e.g.*, 18 U.S.C. §§ 875(b), 875(c), 876, 877);
 - (v) offenses relating to peonage, slavery and involuntary servitude (*see e.g.*, 18 U.S.C. §§ 1581, 1582, 1583, 1584, 1585);
 - (vi) using or carrying a firearm during and in relation to a crime of violence or drug trafficking crime (*see e.g.*, 18 U.S.C. §§ 924(c), 929(a)); and
 - (vii) the offenses of aiding and abetting, conspiring, and attempting to commit any offense described in subdivision (A) or (B)(i) through

(vi); and

(C) does not include the offenses of unlawful possession of a firearm by a felon

"Felony" means any federal, state, or local offense punishable by imprisonment for a term exceeding one year.

"Child pornography offense" means (A) an offense under chapter 110 of title 18, United States Code, not including receipt or possession of child pornography; and (B) an offense under state law that would have been an offense described in subdivision (A) if the conduct had occurred within the special maritime and territorial jurisdiction of the United States.

"Child pornography" has the meaning given that term in 18 U.S.C. § 2256(8).

"Firearms offense" means an offense under state or federal law that prohibits—

(A) the importation, distribution, transportation, or trafficking of (i) a firearm described in 18 U.S.C. § 921; or (ii) an explosive material as defined in 18 U.S.C. § 841(c); or

(B) the possession of (i) a firearm described in 26 U.S.C. § 5845(a); or (ii) an explosive material as defined in 18 U.S.C. § 841(c).

3. Application of Subsection (b)(1)(B).—For purposes of subsection (b)(1)(B), "aggravated felony" has the meaning given that term in 8 U.S.C. § 1101(a)(43) without regard to the date of conviction of the aggravated felony.

4. Application of Subsection (b)(1)(C).—For purposes of subsection (b)(1)(C), "felony" has the meaning given the term in Application Note 2.

5. Application of Subsection (b)(1)(D).—

(A) Definitions.—For purposes of subsection (b)(1)(D):

"Misdemeanor" means any federal, state, or local offense punishable by a term of imprisonment of one year or less.

"Controlled substance offense" —

(i) means an offense under federal or state law that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense; and

(ii) includes—

- (I) unlawfully possessing a listed chemical with intent to manufacture a controlled substance (*see, e.g.*, 21 U.S.C. § 841(d)(1));
- (II) unlawfully possessing a prohibited flask or equipment with intent to manufacture a controlled substance (*see e.g.*, 21 U.S.C. § 843(a)(6));
- (III) maintaining any place for the purpose of facilitating an offense described in subdivision (A) (*see e.g.*, 21 U.S.C. § 856);
- (IV) using a communications facility in committing, causing, or facilitating an offense described in subdivision (A) (*see e.g.*, 21 U.S.C. § 843(b)); and
- (V) the offenses of aiding and abetting, conspiring, and attempting to commit any offense described in subdivision (A) or (B)(i)-(iv).

"Crime of violence" has the meaning given that term in Application Note 2 of this guideline.

- (B) Requirement of Separate Convictions.—For purposes of applying subsection (b)(1)(D), use only those convictions that are counted separately under §4A1.1 (a), (b), or (c). *See* §4A1.2(a)(2); §4A1.2, comment. (n.3).

6. Computation of Criminal History Points.—A conviction referred to in subsection (b) shall be counted for purposes of that subsection without regard to whether the conviction receives criminal history points under Chapter Four (Criminal History and Criminal Livelihood).

A conviction taken into account under subsection (b) is not excluded from consideration of whether that conviction receives criminal history points pursuant to Chapter Four, Part A (Criminal History).

7. Departure Provision.—If (A) subsection (b)(1)(A) applies; and (B) the offense level substantially overstates the seriousness of the prior conviction, a downward departure may be warranted. However, in the case of a downward departure pursuant to this application note, the court shall not impose a sentence at a level below that required for aggravated felonies under subsection (b)(1)(B).

