

PROPOSED AMENDMENT: UNLAWFUL ENTERING

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 amendment is intended to achieve more proportionate punishment by providing tiered sentencing enhancements based on the period of imprisonment the defendant actually served for the prior aggravated felony. In addition, the amendment contains two options for providing increased punishment for the most serious aggravated felonies. Under Option One, the 16-level enhancement would be triggered by all aggravated felonies involving death, serious bodily injury, the discharge or other use of a firearm or dangerous weapon, or a serious drug trafficking offense, regardless of the period of imprisonment actually served by the defendant. Alternatively, Option Two would encourage an upward departure in such cases, which could result in an increase greater than the 16-level enhancement for these most serious aggravated felonies.

The Commission invites comment as to whether the 16-level enhancement provided by subsection (b)(1) should be graduated on some basis other than period of imprisonment actually served, perhaps by extending the approach taken by Option 1 throughout the other tiers. In addition, the Commission invites comment as to whether aggravated felonies that were committed beyond a certain number of years prior to the instant offense should not count for purposes of triggering subsection (b)(1).

Proposed Amendment:

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

- (a) Base Offense Level: **8**
- (b) Specific Offense Characteristic
 - (1) If the defendant previously was deported after a criminal conviction, or if the defendant unlawfully remained in the United States following a removal order issued after a criminal conviction, increase as follows (if more than one applies, use the greater):
 - (A) ~~If the conviction was for an aggravated felony, increase by 16~~

levels:

Option One:

- (A) If the conviction was for an aggravated felony; and—
- (i) (I) the defendant actually served a period of imprisonment of at least ten years for such conviction; [or
 - (II) the aggravated felony involved death, serious bodily injury, the discharge or other use of a firearm or dangerous weapon, or a serious drug trafficking offense],
- increase by **16** levels;
- (ii) the defendant actually served a period of imprisonment of at least five years but less than ten years, increase by **[10][12]** levels;
 - (iii) the defendant actually served a period of imprisonment of at least two years but less than five years, increase by **[8]** levels; or
 - (iv) the defendant actually served a period of imprisonment of less than two years, or the sentence imposed was only a term of probation or other sentence alternative to a term of imprisonment, or a combination of probation and other sentence alternative to a term of imprisonment, increase by **[6]** levels.
- (B) If the conviction was for (i) any ~~other~~ felony other than an aggravated felony, or (ii) three or more misdemeanors that are crimes of violence or ~~misdemeanor~~ 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. Definitions.—For purposes of this guideline—:

~~"Deported after a conviction," means that the deportation was subsequent to the conviction, whether or not the deportation was in response to such conviction. An alien has previously been "deported" if he or she has been removed or has departed the United States while an order of exclusion, deportation, or removal was outstanding.~~

~~"Remained in the United States following a removal order issued after a conviction," means that the removal order was subsequent to the conviction, whether or not the removal order was in response to such conviction.~~

~~"Aggravated felony," is defined at 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.~~

~~"Crime of violence" and "controlled substance offense" are defined in §4B1.2. For purposes of subsection (b)(1)(B), "crime of violence" includes offenses punishable by imprisonment for a term of one year or less.~~

~~"Controlled substance offense"—~~

- (A) 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
- (B) includes—
 - (i) unlawfully possessing a listed chemical with intent to manufacture a controlled substance (see 21 U.S.C. § 841(d)(1));
 - (ii) unlawfully possessing a prohibited flask or equipment with intent to manufacture a controlled substance (see 21 U.S.C. § 843(a)(6));
 - (iii) maintaining any place for the purpose of facilitating an offense described in subdivision (A)(see 21 U.S.C. § 856);
 - (iv) using a communications facility in committing, causing, or facilitating an offense described in subdivision (A) (see 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), (ii), (iii), or (iv).

~~"Firearms offense" means any offense covered by Chapter Two, Part K, Subpart 2, or any similar offense under state or local law.~~

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

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

~~"Serious bodily injury" has the meaning given that term in §1B1.1 (Application Instructions).~~

~~"Serious drug trafficking offense" has the meaning given that term in §5K2.20 (Aberrant~~

Behavior).

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

- (A) 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.
- (B) A defendant shall be considered to be deported after a conviction if the deportation was subsequent to the conviction, whether or not the deportation was in response to such conviction.
- (C) A defendant shall be considered to have remained in the United States following a removal order issued after a conviction if the removal order was subsequent to the conviction, whether or not the removal order was in response to such conviction.
- (D) The period of imprisonment that the defendant actually served for the aggravated felony includes, in the case of a defendant who escaped from imprisonment, time the defendant would have served if the defendant had not escaped.

~~2. This guideline applies only to felonies. A first offense under 8 U.S.C. § 1325(a) is a Class B misdemeanor for which no guideline has been promulgated. A prior sentence for such offense, however, is to be considered under the provisions of Chapter Four, Part A (Criminal History).~~

~~3. In the case of a defendant with repeated prior instances of deportation, an upward departure may be warranted. See §4A1.3 (Adequacy of Criminal History Category).~~

~~4.3. Computation of Criminal History Points.—An adjustment under subsection (b) for a prior felony conviction applies in addition to any criminal history points added for such conviction in Prior felony and misdemeanor convictions taken into account under subsection (b) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).~~

~~5. Aggravated felonies that trigger the adjustment from subsection (b)(1)(A) vary widely. If subsection (b)(1)(A) applies, and (A) the defendant has previously been convicted of only one felony offense; (B) such offense was not a crime of violence or firearms offense; and (C) the term of imprisonment imposed for such offense did not exceed one year, a downward departure may be warranted based on the seriousness of the aggravated felony.~~

4. Departure Provisions.—

[Option Two:

- (A) Upward Departure Provisions.—There may be cases in which subsection (b)(1) applies but the applicable enhancement understates the seriousness of the aggravated felony taken into account under that subsection. In such cases, an upward departure may be warranted. For example an upward departure may be warranted if the aggravated felony involved any of the following:

- (i) *Serious bodily injury, as defined in §1B1.1 (Application Instructions), or death.*
 - (ii) *The discharge or other use of a firearm or a dangerous weapon.*
 - (iii) *A serious drug trafficking offense, as defined in §5K2.20 (Aberrant Behavior).]*
- (B) *Downward Departure Provision.—A downward departure may be warranted in a case in which the defendant was not advised, at the time the defendant previously was deported or removed, of the criminal consequences of reentry after deportation or removal.*

Issues for Comment: *The Commission invites comment on whether the enhancement in §2L1.2(b)(1) for a previous conviction for an aggravated felony should be graduated based on a factor other than, or in addition to, the period of imprisonment the defendant actually served for the aggravated felony. Should the enhancement be graduated based on the type of aggravated felony involved? For example, should the approach of Option One for subsection (b)(1)(A)(i) be extended to subdivisions (ii) through (iv) of subsection (b)(1)?*

The Commission also invites comment on whether the enhancement in §2L1.2(b)(1) for a previous conviction for an aggravated felony should take into consideration only aggravated felonies that were committed within a specified time period, e.g., fifteen years, or the counting rules provided by §4A1.2 (Definitions and Instructions for Computing Criminal History).