

Annual National Seminar

2016 Immigration Amendment: §2L1.2 - Overview, Summary, Calculations, and Application Tips

The Commission voted in 2016 to amend §2L1.2 - the guideline for Unlawfully Entering or Remaining in the United States. §2L1.2 now focuses on three factors: 1) the number of prior illegal reentry convictions, 2) the length of prior felony sentence before first deportation, and 3) the length of felony sentence after reentry.

§2L1.2 Summary

The amendment eliminates the "categorical approach"

Enhancements are based on the length of the prior sentence imposed

Accounts for prior criminal conduct in a broader and more proportionate manner

Reduces the level of the most severe enhancements in the current guideline

Includes a new enhancement for prior illegal reentry convictions

Has separate enhancements for other prior convictions occurring before and after a defendant's first order of deportation or removal

Quick Summary

- Base Offense Level = 8
- (b)(1) Convictions for prior illegal reentries
+4 or +2
- (b)(2) Convictions BEFORE the defendant's first order of deportation
+10, +8, +6, +4, or +2
- (b)(3) Convictions AFTER the defendant's first order of deportation
+10, +8, +6, +4, or +2

For any of these enhancements to apply, the conviction(s) must receive criminal history points.

"Voluntary returns" do NOT count as "Deportations"

The date of the defendant's first order of deportation or removal is an important fact to determine.

§2L1.2 Determinations

(b)(1): Prior Illegal Reentry Offenses

Apply the greatest:

- (b)(1)(A) – One or more felony convictions for an illegal reentry offense. +4
- (b)(1)(B) – Two or more convictions for misdemeanors under 8 USC § 1325(a) (illegal entry). +2

(b)(2): If before the first order of deportation, the defendant sustained:

- *Apply the greatest:*
- Felony sentence 5 years or more. . . +10
- Felony sentence 2 years or more. . . +8
- Felony sentence 13 mths or more. . . +6
- Any other felony conviction. +4
- 3 or more misdemeanor COVs or drug trafficking. +2

DO NOT use illegal reentry convictions for this SOC

(b)(3): If after the first order of deportation, the defendant engaged in criminal conduct resulting in:

- *Apply the greatest:*
- Felony sentence 5 years or more. . . +10
- Felony sentence 2 years or more. . . +8
- Felony sentence 13 mths or more. . . +6
- Any other felony conviction. +4
- 3 or more misdemeanor COVs or drug trafficking. +2

DO NOT use illegal reentry convictions for this SOC

Application Tips

"Illegal reentry offense" means 8 USC § 1253 (failure to depart), or 8 USC § 1326 (illegal reentry), or a second/-subsequent offense under 8 USC § 1325(a) (illegal entry)

For offenses committed prior to age 18, the conviction must be an adult conviction under that jurisdiction

Priors have to be countable under criminal history §4A1.1(a), (b), or (c), and are also used for criminal history points

Prior sentence length includes imprisonment given upon revocation of probation, parole or supervised release

If a prior "single sentence" includes both an illegal reentry offense and another felony offense, the respective offenses are used in the application of SOC (b)(1) and (b)(3), if independently the prior would have received criminal history points

There are DEPARTURE provisions addressing:

- Seriousness of a prior offense;
- Time served in state custody; and
- Cultural assimilation.

Of note, in ALIEN SMUGGLING offenses, we amended the definition of minor to include person under 18, and now direct you to apply the minor SOC if "the offense involved" smuggling a minor who was not accompanied by "a parent, adult relative or legal guardian." Finally, we clarified that sexual abuse of an undocumented person warrants the 4-level enhancement for "serious bodily injury."



2016 Immigration Amendment:

§2L1.2 - Frequently Asked Questions

1. Currently, §2L1.2 (Unlawfully Entering or Remaining in the United States) looks to the physical removal (deportation of the defendant). The amendment to §2L1.2, however, looks to something different: the “order of removal or order of deportation.” Is it true that the amendment no longer considers the actual physical removal of the defendant?

Yes, the guideline looks to the order of deportation or removal, not the physical removal of the defendant.

2. Is an “order of expedited removal” (an administrative order of removal done by an immigration officer that is NOT conducted by an immigration judge) an “order of removal” as described in the amendment?

Yes. Even though an “order of expedited removal” is not conducted by an immigration judge, it is still considered an “order of removal” for the amendment.

3. Sometimes, the order of removal or order of deportation predates the physical removal or deportation of the defendant by several months or even a year. If the defendant commits another felony offense and is convicted of that offense after the order of deportation or order of removal but before his physical removal or deportation, can that conviction be considered under the §2L1.2(b)(3)?

Yes, a felony conviction that occurs during this time frame can be considered under the SOC (b)(3) so long as it is a felony that receives criminal history points.

4. Sometimes, the defendant is ordered removed in absentia, and is not physically deported until months after he is removed. If the defendant commits a felony offense during this time frame and is convicted of that crime before he is physically removed or deported, can this conviction be considered under the §2L1.2(b)(3)? Yes, a felony conviction that occurs during this time frame can be considered under the SOC (b)(3) so long as it is a felony that receives criminal history points.

5. Is it true that all prior convictions considered under this amendment – prior illegal reentry offenses, offenses committed before the first order of deportation, and offenses committed after the earliest order of deportation – must receive criminal history points?

Yes. Only convictions that receive criminal history points under §4A1.1(a), (b), or (c) are to be used under the amendment.

6. When you have multiple prior convictions that are treated as a “single sentence,” can the prior convictions that are NOT assigned criminal history points still be considered for the SOC?

When multiple prior convictions are treated as a “single sentence” per §4A1.2(a)(2), they all (as a group) receive criminal history points. Therefore, even though the PSR might assign zero criminal history points to a prior conviction that is treated as a “single sentence” with another prior conviction, both prior convictions are, in fact, counted under §4A1.1(a), (b), or (c).

7. Currently, §2L1.2 only allows revocation time to be added to the length of sentence for a prior drug trafficking conviction if the revocation occurred prior to the deportation of the defendant. Is this same rule contained in the amendment?

No. In the amendment, consistent with the rules at §4A1.2, revocation time will be added to the original sentence regardless of when the revocation occurred. In other words, if a defendant commits an offense prior to his earliest date of deportation, then illegally reenters the United States and is revoked on that prior offense, the revocation time will be added to the original sentence even though the revocation occurred after the deportation.

8. Why does the amendment change the definition of “crime of violence”?

The definition was changed to the adopted definition of “crime of violence” to the career offender guideline (§4B1.2) effective August 1, 2016, to provide a consistent definition of “crime of violence” throughout the manual.

*For more information or to ask the Commission a question,
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The United States Sentencing Commission, an independent agency in the judicial branch of the federal government, was organized in 1985 to develop a national sentencing policy for the federal courts. The resulting sentencing guidelines provide structure for the courts' sentencing discretion to help ensure that similar offenders who commit similar offenses receive similar sentences.