

PRIMER



# IMMIGRATION GUIDELINES

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TABLE OF CONTENTS

TABLE OF CONTENTS .....	ii
INTRODUCTION .....	1
ALIEN SMUGGLING, TRANSPORTING, AND HARBORING – §2L1.1 .....	1
I. STATUTORY SCHEME.....	1
II. GUIDELINE OVERVIEW: §2L1.1 .....	5
A. Base Offense Level .....	5
B. Specific Offense Characteristics.....	5
C. Cross Reference.....	6
III. SPECIFIC GUIDELINE APPLICATION ISSUES .....	6
A. Lack of Profit Motive – §2L1.1(b)(1) .....	6
B. Number of Aliens – §2L1.1(b)(2).....	7
C. Prior Felony Convictions – §2L1.1(b)(3).....	8
D. Unaccompanied Minors – §2L1.1(b)(4) .....	9
E. Dangerous Weapons – §2L1.1(b)(5) .....	9
F. Creating Risk of Injury – §2L1.1(b)(6).....	10
G. Bodily Injury – §2L1.1(b)(7).....	13
H. Involuntary Detention (Coercion or Threats) – §2L1.1(b)(8)(A).....	15
I. Involuntary Detention (Prostitution) – §2L1.1(b)(8)(B).....	15
IV. CHAPTER THREE ADJUSTMENTS .....	16
A. Vulnerable Victim – §3A1.1(b)(1).....	16
B. Role in the Offense – §§3B1.1, 3B1.2.....	17
C. Special Skill – §3B1.3 .....	17
D. Reckless Flight – §3C1.2.....	17
V. DEPARTURES AND VARIANCES .....	18
A. Multiple Deaths .....	18
B. Duration of Harboring .....	18
C. Extent of Detention.....	18
ILLEGAL ENTRY OR REENTRY – §2L1.2.....	19
I. STATUTORY SCHEME.....	19
II. GUIDELINE OVERVIEW: §2L1.2 .....	21
A. Background .....	21
B. <i>Ex Post Facto</i> Considerations.....	22
C. Base Offense Level.....	23
D. Specific Offense Characteristics .....	23
III. PRIOR CONVICTIONS.....	24
A. General Principles .....	24
B. Misdemeanors – Crime of Violence or Drug Trafficking Offense .....	28
IV. CRIMINAL HISTORY .....	29
V. DEPARTURES.....	30
A. Early Disposition Programs – §5K3.1: “Fast Track” .....	30
B. Collateral Consequences.....	30

C.	Motive and Cultural Assimilation .....	32
D.	Seriousness of Prior Offense .....	33
<b>IMMIGRATION FRAUD OR MISCONDUCT .....</b>		<b>34</b>
I.	STATUTORY SCHEME.....	34
II.	GUIDELINE OVERVIEW.....	34
A.	Immigration Fraud – §2L2.1 .....	35
B.	Immigration Fraud – §2L2.2 .....	35
C.	Scope of coverage.....	35
III.	SPECIFIC GUIDELINE APPLICATION ISSUES .....	36
A.	Lack of Profit Motive – §2L2.1(b)(1) .....	36
B.	Number of Documents Involved – §2L2.1(b)(2).....	37
C.	Use of Passport or Visa to Commit a Felony – §2L2.1(b)(3).....	38
D.	Prior Deportation – §2L2.2(b)(1) .....	38
E.	Fraudulently Obtained or Used A Passport – §2L2.2(b)(3).....	38
F.	Departures and Variances .....	39

## INTRODUCTION

This primer is intended to provide an overview of sentencing-related criminal immigration topics. It is not a comprehensive compilation of cases and issues, or a substitute for reading and interpreting the cases, statutes, and *Guidelines Manual*.

Effective November 1, 2016, the Sentencing Commission promulgated a multi-part amendment following its multi-year study of immigration offenses and related guidelines (hereinafter the “2016 amendment”).<sup>1</sup> The first part of the amendment made several discrete changes to the alien smuggling guideline, §2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien), while the second part significantly revised the illegal reentry guideline, §2L1.2 (Unlawfully Entering or Remaining in the United States). This primer discusses the 2016 amendment as well as the relevant case law that both pre-dates and post-dates the amendment.

## ALIEN SMUGGLING, TRANSPORTING, AND HARBORING – §2L1.1

This section of the primer discusses the statutes, sentencing guidelines, and case law related to alien smuggling, transporting, and harboring offenses.<sup>2</sup>

### I. STATUTORY SCHEME

Immigration offenses sentenced under §2L1.1 stem from violations of 8 U.S.C. §§ 1324 and 1327. Section 1324 prohibits (1) bringing an alien to the United States; (2) transporting or moving an illegal alien within the United States; (3) harboring or concealing an illegal alien within the United States; and (4) encouraging or inducing an illegal alien to enter or reside in the United States (or engaging in conspiracy to commit any of these acts), and (5) hiring at least ten aliens for employment.<sup>3</sup> Section 1327 makes it a crime to knowingly aid or assist an inadmissible alien to enter the United States where that defendant has been convicted of an aggravated felony.<sup>4</sup>

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<sup>1</sup> See United States Sentencing Commission, *Guidelines Manual*, App. C, amend. 802 (effective Nov. 1, 2016) [hereinafter “USSG”].

<sup>2</sup> The 2016 amendment increased the specific offense characteristic at §2L1.1(b)(4) for smuggling, transporting, or harboring an unaccompanied minor from two levels to four levels. The amendment addresses offenses in which an alien (whether or not a minor) is sexually abused and ensures that a 4-level “serious bodily injury” enhancement will apply in such a case. See *id.*

<sup>3</sup> 8 U.S.C. § 1324(a)(1)–(3).

<sup>4</sup> *Id.* § 1327.

## 8 U.S.C. § 1324(a)(1)(A) – BRINGING IN, TRANSPORTING, AND HARBORING ALIENS

This subsection prohibits (i) bringing aliens to the United States without official permission; (ii) transporting undocumented aliens within the United States; (iii) harboring undocumented aliens; (iv) encouraging or inducing aliens to enter or reside in the United States without official permission; and (v) conspiracy to commit, and aiding and abetting the commission of, any of these acts.<sup>5</sup>

Transporting, harboring, or encouraging entry without financial gain has a 5-year statutory maximum penalty.<sup>6</sup> The statutory maximum increases to ten years for conspiring to commit any of these crimes or committing any of these crimes for financial gain.<sup>7</sup> Where a defendant causes serious bodily injury or places another person in jeopardy, the statutory maximum increases to 20 years.<sup>8</sup> And where the crime causes the death of another, the defendant is subject to a statutory maximum of life in prison.<sup>9</sup> All of these maximum penalties may be enhanced an additional ten years in cases of commercial transportation of large groups in a life-threatening manner.<sup>10</sup> Furthermore, a defendant who aids and abets another in the commission of one of these offenses is subject to a 5-year statutory maximum.<sup>11</sup> Because these statutory enhancements are based on facts other than the defendant's criminal record, they must be charged in the indictment and either pleaded to or found beyond a reasonable doubt by a jury.<sup>12</sup>

In *United States v. Sineneng-Smith*,<sup>13</sup> the Ninth Circuit recently held that section 1324(a)(1)(A)(iv), which prohibits “encourag[ing] or induc[ing] an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law”<sup>14</sup> violates the First Amendment's

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<sup>5</sup> *Id.* § 1324(a)(1)(A).

<sup>6</sup> *Id.* § 1324(a)(1)(B)(ii).

<sup>7</sup> *Id.* § 1324(a)(1)(B)(i).

<sup>8</sup> *Id.* § 1324(a)(1)(B)(iii).

<sup>9</sup> *Id.* § 1324(a)(1)(B)(iv).

<sup>10</sup> *Id.* § 1324(a)(4).

<sup>11</sup> *Id.* § 1324(a)(1)(A)(v)(II); *see also* *United States v. Hilario-Hilario*, 529 F.3d 65, 69 (1st Cir. 2008) (“One who aids and abets is normally liable as a principal, 18 U.S.C. § 2 (2000), but the smuggling statute prescribes in certain cases a lower sentence for mere aiders and abettors.”).

<sup>12</sup> *See Hilario-Hilario*, 529 F.3d at 69 (citing *Apprendi v. New Jersey*, 530 U.S. 466 (2000)) (“Each one of these characteristics raises the maximum sentence available. 8 U.S.C. §§ 1324(a)(1)(B)(i), (iii), (iv). Although pertinent only to sentencing, a jury determination typically is required to invoke the higher sentences under familiar precedent.”). *See also* *United States v. Williams*, 449 F.3d 635, 644 (5th Cir. 2006) (“It is plain that, following *Apprendi*, the ‘injury factors’ in 8 U.S.C. §§ 1324(a)(1)(B)(iii) and (iv) are ‘elements’ of greater aggravated offenses . . .”).

<sup>13</sup> 910 F.3d 461 (9th Cir. 2018).

<sup>14</sup> 8 U.S.C. § 1324(a)(1)(A)(iv).

protection of free speech. In *Sineneng-Smith*, the defendant performed immigration consultancy work for citizens of the Philippines who were working in the United States illegally. The defendant argued that section 1324(a)(1)(A)(iv) “criminalizes speech through its use of the term ‘encourages or induces,’ and that the speech restriction is content-based and viewpoint-discriminatory, because it criminalizes only speech *in support* of aliens coming to or remaining in the country.”<sup>15</sup> The Ninth Circuit agreed, holding that the only reasonable construction of section 1324(a)(1)(A)(iv) restricts a substantial amount of protected speech in relation to the narrow band of conduct and unprotected expression that the statute legitimately prohibits.<sup>16</sup> The court explained that section 1324(a)(1)(A)(iv) is susceptible to regular application in a manner that would infringe on recognized First Amendment protections, and thus was overbroad under the First Amendment.<sup>17</sup> The court rejected arguments that section 1324(a)(1)(A)(iv) could be upheld under the “incitement” exception<sup>18</sup> or the “speech integral to criminal conduct” exception<sup>19</sup> to the First Amendment.

Although not ruling on constitutional grounds, “other circuits have rejected arguments that a conviction under section 1324(a)(1)(A)(iv) cannot be sustained where the illegal aliens in question already resided in the United States at the time of the alleged wrongful encouragement or inducement occurred.”<sup>20</sup>

## 8 U.S.C. § 1324(a)(2) – BRINGING IN ALIENS

Section 1324(a)(2)(A) is a misdemeanor offense that prohibits bringing aliens to the United States without “prior authorization” despite their presentation to immigration officials or ultimate admission. Pursuant to section 1324(a)(2)(B), where the alien is brought into the United States but is not presented to immigration officials, a first or second offense is a felony and carries a 10-year maximum.<sup>21</sup> Where this crime is

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<sup>15</sup> *Sineneng-Smith*, 910 F.3d at 470 (emphasis in original).

<sup>16</sup> *Id.* at 471.

<sup>17</sup> *Id.* at 483–84.

<sup>18</sup> *Id.* at 480 (“Under the incitement exception to the First Amendment, the government may not ‘proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.’” (quoting *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969))).

<sup>19</sup> *Id.* (“[S]peech or writing used as an integral part of conduct in violation of a valid criminal statute’ does not enjoy First Amendment protection.” (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949))).

<sup>20</sup> *United States v. Martinez*, 900 F.3d 721, 731 n.8 (5th Cir. 2018) (citing *Edwards v. Prime, Inc.*, 602 F.3d 1276, 1295–96 (11th Cir. 2010); *United States v. Oloyede*, 982 F.2d 133, 136–38 (4th Cir. 1993)).

<sup>21</sup> See 8 U.S.C. § 1324(a)(2)(B)(iii).

committed for profit or with reason to believe that the alien will commit a felony, the defendant is subject to a 3-year mandatory minimum and a 10-year statutory maximum.<sup>22</sup>

Multiple violations of section 1324(a)(2) committed for profit or with reason to believe that the alien will commit a felony invoke a mandatory minimum 3- or 5-year penalty.<sup>23</sup> Note that “the sentence is calculated ‘for each alien with respect to whom a violation . . . occurs.’”<sup>24</sup> Thus, courts have treated each alien as a separate violation and have applied the enhanced penalty based on the number of aliens.<sup>25</sup> Although this recidivist provision raises the statutory maximum, because the increase is based on criminal history, it need neither be charged in the indictment nor found beyond a reasonable doubt by a jury.<sup>26</sup>

Finally, as with section 1324(a)(1), the statutory maximums may also be enhanced an additional ten years for commercial transportation of large groups in a life-threatening manner.<sup>27</sup>

### **8 U.S.C. § 1324(a)(3) – EMPLOYING ALIENS, AND BRINGING IN ALIENS FOR EMPLOYMENT**

Section 1324(a)(3), punishable by a maximum of five years in prison, prohibits hiring at least ten aliens during any 12-month period with actual knowledge that they are aliens.

The statutory maximum in section 1324(a)(3) may be increased to ten years for an offense that was part of an ongoing commercial organization in which aliens were transported in groups of ten or more and the manner of transportation endangered the aliens’ lives.<sup>28</sup> The enhanced penalty also applies where the aliens in question presented a life-threatening health risk to people in the United States.<sup>29</sup>

### **8 U.S.C. § 1327 – AIDING OR ASSISTING CERTAIN ALIENS TO ENTER**

Knowingly aiding certain aliens who were previously convicted of aggravated felonies to enter the United States is punishable by a maximum of ten years in prison pursuant to 8 U.S.C. § 1327. To be convicted, a defendant need not know that the alien in question had a prior felony conviction. As the Eleventh Circuit has observed: “the district court properly instructed the jury that section 1327 did not require [defendant] to know that the alien . . .

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<sup>22</sup> 8 U.S.C. § 1324(a)(2)(B)(i), (ii).

<sup>23</sup> *Id.* § 1324(a)(2)(B).

<sup>24</sup> *United States v. Tsai*, 282 F.3d 690, 697 (9th Cir. 2002) (quoting § 1324(a)(2)).

<sup>25</sup> *See, e.g., id.*

<sup>26</sup> *See Apprendi*, 530 U.S. at 490; *Almendarez-Torres v. United States*, 523 U.S. 224 (1998).

<sup>27</sup> 8 U.S.C. § 1324(a)(4).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

had a prior felony conviction but only that the alien he aided or assisted in entering the United States was inadmissible . . . [section] 1327 requires only that [a defendant] knew the alien he aided or assisted was inadmissible at some point before the alien sought to enter the United States.”<sup>30</sup>

## II. GUIDELINE OVERVIEW: §2L1.1

The guidelines instruct users to determine the applicable Chapter Two offense by referring to Appendix A (Statutory Index) for the offense of conviction (*i.e.*, the offense conduct charged in the indictment or information of which the defendant was convicted).<sup>31</sup> For violations of the alien smuggling, transporting, or harboring statutes, Appendix A specifies the offense guideline at §2L1.1.

### A. BASE OFFENSE LEVEL

The base offense level for alien smuggling offenses depends on the statute of conviction. Violations of section 1324 have a base offense level of 12.<sup>32</sup> Violations of section 1327 have a base offense level of 23 or 25 depending on the immigration status and criminal history of the alien being smuggled.<sup>33</sup>

### B. SPECIFIC OFFENSE CHARACTERISTICS

Section 2L1.1 has several specific offense characteristics that may increase or decrease the base offense level:

- (1) whether the offense lacked a profit motive or involved only the defendant’s spouse or child;
- (2) the number of aliens smuggled, harbored, or transported;
- (3) the defendant’s prior record of immigration crimes;
- (4) transportation of an unaccompanied minor;
- (5) the discharge, use, or possession of a firearm or other dangerous weapon;
- (6) intentionally or recklessly creating a substantial risk of death or serious bodily injury;
- (7) death or bodily injury of any person;

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<sup>30</sup> United States v. Lopez, 590 F.3d 1238, 1254 (11th Cir. 2009) (internal citations omitted).

<sup>31</sup> USSG §1B1.2 (Nov. 2018).

<sup>32</sup> USSG §2L1.1(a)(3) (Nov. 2018).

<sup>33</sup> USSG §2L1.1(a)(1) (Nov. 2018) (base offense level of 25 if alien was inadmissible under 18 U.S.C. § 1182(a)(3)); §2L1.1(a)(2) (base offense level of 23 if alien was previously deported after aggravated felony conviction).



- (8) involuntary detention of an alien through coercion or threat in connection with a demand for payment;
- (9) harboring an alien for the purpose of prostitution; and
- (10) commercial transportation of large groups in a life-threatening manner.<sup>34</sup>

### C. CROSS REFERENCE

If the conduct resulted in the death of another, the appropriate homicide guideline should be applied.<sup>35</sup>

## III. SPECIFIC GUIDELINE APPLICATION ISSUES

### A. LACK OF PROFIT MOTIVE – §2L1.1(B)(1)

*If (a) the offense was committed other than for profit, or the offense involved the smuggling, transporting, or harboring only of the defendant’s spouse or child . . . , and (b) the base offense level is determined under subsection (a)(2), decrease by 3 levels.*

The defendant has the burden of establishing that he is entitled to this reduction.<sup>36</sup> Courts have declined to apply the 3-level reduction even when there is no evidence of a monetary payment from the alien. For example, the reduction may not apply where the defendant did not receive payment from the alien, but received government benefits based on representations that the illegal alien was her child and the alien performed household work in defendant’s home.<sup>37</sup> Likewise, the reduction may not apply where the defendant’s only compensation was free transportation: “a defendant who commits the relevant offense ‘solely in return for his own entry’ may nevertheless be found to have committed the offense ‘for profit.’”<sup>38</sup>

<sup>34</sup> USSG §2L1.1(b) (Nov. 2018).

<sup>35</sup> USSG §2L1.1(c)(1) (Nov. 2018).

<sup>36</sup> See, e.g., *United States v. Al Nasser*, 555 F.3d 722 (9th Cir. 2009) (holding that reduction did not apply even though defendant did not personally profit because he was part of scheme to transport aliens for money and knew aliens had paid someone to transport them); *United States v. Li*, 206 F.3d 78 (1st Cir. 2000) (affirming district court finding that defendants failed to establish lack of profit motive); *United States v. Kim*, 193 F.3d 567 (2d Cir. 1999) (rejecting reduction where defendant harbored undocumented aliens by employing them in his business and relied on one to assist him in running his business); *United States v. Krcic*, 186 F.3d 178 (2d Cir. 1999) (holding that district court permissibly inferred a profit motive where defendant made repeated trips and long distance calls between Montreal and the United States, did not have any other job, and conspired with others whose prior smuggling operations were for compensation).

<sup>37</sup> *United States v. McClure-Potts*, 908 F.3d 30, 36 (3d Cir. 2018).

<sup>38</sup> *United States v. Juan-Manuel*, 222 F.3d 480, 485 (8th Cir. 2000) (affirming denial of reduction where defendant drove van carrying aliens to pay off debt to coyote who brought him to the United States); see also

**B. NUMBER OF ALIENS – §2L1.1(B)(2)**

*If the offense involved the smuggling, transporting, or harboring of six or more unlawful aliens, increase . . . .*

Section 2L1.1(b)(2) provides increases of three, six, or nine levels based on the number of aliens smuggled, harbored, or transported. Consistent with this graduated scheme, Application Note 7 provides that an upward departure may be warranted where the offense involved substantially more than 100 aliens.<sup>39</sup> The Second Circuit has upheld an upward departure where nearly 300 aliens were packed into 800 square feet of cargo space for a voyage lasting more than three months.<sup>40</sup> Conversely, the Ninth Circuit has held that an upward departure was unreasonable based on 180 aliens because it was not “substantially more than 100 aliens.”<sup>41</sup>

Because §2L1.1 is listed in §3D1.2(d), the relevant conduct for this guideline includes “all acts and omissions . . . that were part of the same course of conduct or common scheme or plan as the offense of conviction.”<sup>42</sup> Thus, a court may determine the number of aliens based on all acts. For example, the Fifth Circuit upheld a 9-level enhancement (for transporting 100 or more aliens) in a case in which a commercial truck driver smuggled 134 aliens in his tractor-trailer during separate trips, even though only one trip with 74 aliens was alleged in the indictment.<sup>43</sup> The district court applied the 9-level §2L1.1(b)(2) enhancement (for transporting 100 or more aliens) because it also accounted for the defendant’s earlier transportation of approximately 60 additional aliens.<sup>44</sup> Noting the numerous ways that conduct can be considered “relevant conduct” for sentencing and the specific relationship between §3D1.2(d) and §2L1.1,<sup>45</sup> the Fifth Circuit concluded that the

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United States v. Perez-Ruiz, 169 F.3d 1075, 1076 (7th Cir. 1999) (affirming denial of reduction where defendant “received in-kind compensation—transportation from Arizona to Chicago—for his role in the offense”).

<sup>39</sup> USSG §2L1.1, comment. (n.7(C)) (Nov. 2018).

<sup>40</sup> United States v. Moe, 65 F.3d 245, 251 (2d Cir. 1995); *see also* United States v. Shan Wei Yu, 484 F.3d 979 (8th Cir. 2007) (affirming upward departure based on transporting 1,000 aliens).

<sup>41</sup> United States v. Nagra, 147 F.3d 875, 886 (9th Cir. 1998). Section 2L1.1(b)(2) provided a 2-, 4-, or 6-level increase in the *Guidelines Manual* applied at sentencing in *Nagra*. *See, e.g.*, USSG §2L1.1(b)(2) (Nov. 1994). The court reasoned that the guideline’s stated 6-level enhancement for more than 100 aliens would apply to 100-399 aliens based on its observation that the guideline’s incremental enhancements relied on a geometric exponential of four. The specific offense characteristic was amended to its current structure in 1997 to provide a 3-, 6-, or 9-level increase based on the number of aliens. USSG, App. C, amend. 543 (effective May 1, 1997).

<sup>42</sup> USSG §1B1.3(a)(2) (Nov. 2018).

<sup>43</sup> United States v. Williams, 610 F.3d 271, 274–75 (5th Cir. 2010).

<sup>44</sup> *Id.* at 292.

<sup>45</sup> *Id.* (“[Section] 3D1.2(d) includes offenses covered by §2L1.1.”).

district court did not clearly err when including the earlier transportation of approximately 60 aliens as relevant conduct as part of a “common scheme or plan”:

It was not clear error for the district court to include [the defendant’s] first trip, during which he transported approximately 60 unlawful aliens, as part of the relevant conduct for applying §2L1.1(b)(2). Ample evidence supports a conclusion that the two trips were part of a common scheme or plan. The same accomplices . . . were involved in both trips, and . . . testimony established the number of aliens transported during the first trip. Both trips were for the purpose of transporting aliens and were undertaken with the same modus operandi—unlawful aliens were loaded into [the defendant’s] trailer . . . . The Guidelines['] requirement to establish a common scheme or plan is satisfied here because the offenses are substantially connected to each other by at least one common factor. Accordingly, the district court did not commit clear error in enhancing [the defendant’s] sentences by nine levels under §2L1.1(b)(2)(C).<sup>46</sup>

Courts have occasionally addressed the quantum of evidence needed to apply the enhancement. In one case, the Fifth Circuit affirmed the district court’s application of the enhancement based on a list of names in a ledger found in a “stash house.”<sup>47</sup> In another case, the court affirmed the application of the enhancement based on an estimate of the total number of aliens smuggled based on the assumption that, on each of 15 trips, defendants used children to smuggle in two aliens posing as the children’s parents.<sup>48</sup>

### C. PRIOR FELONY CONVICTIONS – §2L1.1(B)(3)

*If the defendant committed any part of the instant offense after sustaining (A) a conviction for a felony immigration and naturalization offense, increase by 2 levels; or (B) two (or more) convictions for felony immigration and naturalization offenses, each such conviction arising out of a separate prosecution, increase by 4 levels.*

Application Note 2 instructs that “[p]rior felony conviction(s) resulting in an adjustment under subsection (b)(3) are also counted for purposes of determining criminal history points pursuant to Chapter Four” of the *Guidelines Manual*.<sup>49</sup>

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<sup>46</sup> *Id.* at 293–94 (internal citations and quotation omitted).

<sup>47</sup> *United States v. Angeles-Mendoza*, 407 F.3d 742, 750 (5th Cir. 2005) (applying enhancement for transporting over 100 aliens where ledger found at stash house had 114 unique names, some of which were names of illegal aliens found at the residence).

<sup>48</sup> *United States v. Cabrera*, 288 F.3d 163 (5th Cir. 2002).

<sup>49</sup> USSG §2L1.1, comment. (n.2) (Nov. 2018).

#### D. UNACCOMPANIED MINORS – §2L1.1(B)(4)

*If the offense involved the smuggling, transporting, or harboring of a minor who was unaccompanied by the minor’s parent, adult relative, or legal guardian, increase by 4 levels. . . .*

The 2016 amendment increased the enhancement at §2L1.1(b)(4) for smuggling, transporting, or harboring an unaccompanied minor from two levels to four levels.<sup>50</sup> The definition of “minor” includes an individual under the age of 18.<sup>51</sup>

Because the specific offense characteristic was amended effective November 1, 2016,<sup>52</sup> it may raise *ex post facto* issues.<sup>53</sup> In general, “[t]he court shall use the *Guidelines Manual* in effect on the date that the defendant is sentenced” unless doing so would violate the *Ex Post Facto* Clause of the Constitution, in which case, “the court shall use the *Guidelines Manual* in effect on the date that the offense of conviction was committed.”<sup>54</sup>

#### E. DANGEROUS WEAPONS – §2L1.1(B)(5)

*If a firearm was discharged, increase by 6 levels, . . . if a dangerous weapon was brandished or otherwise used, increase by 4 levels, . . . if a dangerous weapon was possessed, increase by 2 levels.*

Section 2L1.1(b)(5) provides an enhancement if a firearm was discharged or a dangerous weapon (including a firearm) was brandished or possessed during the offense.<sup>55</sup> The guidelines define “dangerous weapon” as (i) an instrument capable of inflicting death or serious bodily injury, or (ii) an object that is not an instrument that is capable of inflicting death or serious bodily injury but that closely resembles such an instrument or was used in a manner that created the impression that the object was such an instrument (*e.g.*, the defendant, while committing a bank robbery, wrapped his hand in a towel to create the appearance of a gun).<sup>56</sup>

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<sup>50</sup> USSG §2L1.1(b)(4) (Nov. 2018).

<sup>51</sup> USSG §2L1.1, comment. (n.1) (Nov. 2018).

<sup>52</sup> The 2016 amendment also broadened the scope of subsection (b)(4) to offense-based rather than defendant-based. USSG App. C, amend. 802 (effective Nov. 1, 2016).

<sup>53</sup> See *Peugh v. United States*, 569 U.S. 530, 550–51 (2013) (holding that a sentencing court violates the *Ex Post Facto* Clause by using the guidelines in effect at the time of sentencing rather than those in effect at the time of the offense if the later version produces a higher guideline range).

<sup>54</sup> USSG §1B1.11 (Nov. 2018).

<sup>55</sup> USSG §2L1.1(b)(5) (Nov. 2018).

<sup>56</sup> USSG §1B1.1, comment. (n.1(E)) (Nov. 2018).

Courts construe “dangerous weapon” broadly to include “virtually any item that has the capacity, given the manner of its use, to endanger life or inflict great bodily injury.”<sup>57</sup> In *United States v. Olarte-Rojas*, the Fifth Circuit held that caltrops, which were used to puncture tires in a high-speed chase, fit the definition of a “dangerous weapon” under both the case law and the *Guidelines Manual’s* broad interpretation.<sup>58</sup> Although the caltrops did not cause death or serious bodily injury, the court explained that a tire blowout at a high speed *could* cause such harm, which was sufficient to establish the caltrops were a dangerous weapon.<sup>59</sup>

#### F. CREATING RISK OF INJURY – §2L1.1(B)(6)

*If the offense involved intentionally or recklessly creating a substantial risk of death or serious bodily injury to another person, increase by 2 levels.*

Section 2L1.1(b)(6) applies to “a wide variety of conduct” for offenses involving reckless conduct.<sup>60</sup> However, courts have avoided bright-line rules in applying §2L1.1(b)(6) and must engage in a fact-specific inquiry.<sup>61</sup> Application Note 3 lists the following examples of conduct to which the enhancement applies:

transporting persons in the trunk or engine compartment of a motor vehicle; carrying substantially more passengers than the rated capacity of a motor vehicle or vessel; harboring persons in a crowded, dangerous, or inhumane condition; or guiding persons through, or abandoning persons in, a dangerous or remote geographic area without adequate food, water, clothing, or protection from the elements.<sup>62</sup>

Accordingly, courts have applied the enhancement where defendants transported unrestrained aliens in the bed of a pickup truck. In *United States v. Cuyler*, the Fifth Circuit

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<sup>57</sup> *United States v. Olarte-Rojas*, 820 F.3d 798, 801 (5th Cir. 2016) (citations omitted) (“[I]n the proper circumstances, almost anything can count as a dangerous weapon, including walking sticks, leather straps, rakes, tennis shoes, rubber boots, dogs, rings, concrete curbs, clothes irons, and stink bombs.”).

<sup>58</sup> *Id.* at 803.

<sup>59</sup> *Id.*

<sup>60</sup> USSG §2L1.1, comment. (n.3) (Nov. 2018).

<sup>61</sup> *See, e.g., United States v. Maldonado-Ochoa*, 844 F.3d 534, 537 (5th Cir. 2016) (citation omitted).

<sup>62</sup> USSG §2L1.1, comment. (n.3) (Nov. 2018). The §2L1.1(b)(6) enhancement, however, “is not limited to the examples provided in the commentary.” *United States v. Zuniga-Amezquita*, 468 F.3d 886, 888 (5th Cir. 2006). *See also United States v. De Jesus-Ojeda*, 515 F.3d 434, 443–44 (5th Cir. 2008) (holding that application of enhancement was proper where defendant led aliens through desert-like brush without adequate water supply); *United States v. Garcia-Guerrero*, 313 F.3d 892, 897 (5th Cir. 2002) (leading aliens on a 3-day trek through desert without adequate food, water, and rest periods qualified for enhancement); *United States v. Rodriguez-Cruz*, 255 F.3d 1054, 1056 (9th Cir. 2001) (enhancement proper where defendants guided through the mountains between Mexico and San Diego a group of “aliens who were obviously woefully under-equipped for the potential hazards that were known prior to departure”). *But see United States v.*

held that transporting aliens in the bed of a pickup is inherently dangerous because in the event of an accident aliens “easily could [be] thrown from the truck and almost certainly would [be] injured.”<sup>63</sup> Likewise, in *United States v. Maldonado-Ochoa*, the Fifth Circuit explained that a vehicle does not need to be driving at high speeds for a long period of time to put those in the bed of a pickup truck at “substantial risk of death or serious injury”<sup>64</sup> However, the Ninth Circuit found the district court erred in applying the enhancement in a situation where the “extended-cab pickup truck defendant was driving had been modified to create additional space for a passenger to hide behind the back seat.”<sup>65</sup> The court explained that in the situations described in Application Note 3, unlike the facts before the court, “the means of travel either exacerbates the *likelihood* of an accident, subjects the passenger to a risk of injury even during an accident-free ride, or both.”<sup>66</sup>

Courts have disagreed as to whether unrestrained passengers lying on the floor of an enclosed van justifies application of this enhancement.<sup>67</sup> Also, to qualify for this enhancement, either the defendant must have *created* the risk of danger,<sup>68</sup> or the risk must have at least been “reasonably foreseeable in connection with that criminal activity.”<sup>69</sup> The enhancement “requires only that *some* risk of death or serious bodily injury be foreseeable, not the specific harm that actually occurred.”<sup>70</sup> It does not matter that an alien faced great risk prior to joining a transporting conspiracy involving the defendant—“only that part of [the alien’s] experience after he joined [the defendant’s] group can properly be assigned to [the defendant] for purposes of sentencing.”<sup>71</sup>

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Garza, 541 F.3d 290 (5th Cir. 2008) (holding that guiding aliens on foot through desert-like brush of South Texas in June, by itself, did not qualify for enhancement in the absence of evidence that the aliens were inadequately prepared).

<sup>63</sup> *United States v. Cuyler*, 298 F.3d 387, 390 (5th Cir. 2002).

<sup>64</sup> *Maldonado-Ochoa*, 844 F.3d at 538.

<sup>65</sup> *United States v. Torres-Flores*, 502 F.3d 885, 889 (9th Cir. 2007) (emphasis in original).

<sup>66</sup> *Id.* at 890 (emphasis in original).

<sup>67</sup> Compare *United States v. Solis-Garcia*, 420 F.3d 511, 516 (5th Cir. 2005) (transporting aliens lying down in cargo area of minivan did not qualify for enhancement), with *United States v. Maldonado-Ramires*, 384 F.3d 1228 (10th Cir. 2004) (transporting six aliens lying on floor of minivan that was altered to remove the seats and seatbelts qualified for enhancement).

<sup>68</sup> *United States v. Rodriguez-Lopez*, 363 F.3d 1134, 1137–39 (11th Cir. 2004) (holding that defendant created the risk where he drove boat in hazardous manner); *United States v. Yeh*, 278 F.3d 9 (D.C. Cir. 2002) (holding that although defendant did not create conditions on boat at the outset, he acted as “enforcer” in keeping order on boat carrying over 200 aliens).

<sup>69</sup> USSG §1B1.3, comment. (n.3(D)) (Nov. 2018); see also *De Jesus-Ojeda*, 515 F.3d at 443–44 (holding that defendant was liable for risk of injury created by co-conspirators who had aliens walk through the brush to avoid detection).

<sup>70</sup> *United States v. Ruiz-Hernandez*, 890 F.3d 202, 212 (5th Cir.) (emphasis in original), *cert. denied*, 139 S. Ct. 278 (2018).

<sup>71</sup> *Garza*, 541 F.3d at 293.



Although “[r]easonable minds could differ as to the severity of the overcrowding in the vans and the resulting degree of risk,”<sup>72</sup> courts have identified factors discussed below to consider when applying this enhancement in vehicle cases.

### 1. Fifth Circuit’s case-specific analysis approach

The Fifth Circuit has made clear that this enhancement creates no *per se* rules; instead, “[d]efining the contours of this enhancement is dependent upon carefully applying the words of the guideline in a case-specific analysis.”<sup>73</sup> As a result, the court has articulated several factors to consider when applying §2L1.1(b)(6) when aliens are transported in vehicles, including “the availability of oxygen, exposure to temperature extremes, the aliens’ ability to communicate with the driver of the vehicle, their ability to exit the vehicle quickly, and the danger to them if an accident occurs.”<sup>74</sup> The court has also held that the risk of injury enhancement does not apply when “[t]he only dangers were the same dangers arising from a passenger not wearing a seatbelt in a moving vehicle.”<sup>75</sup> Additional facts that have supported the enhancement include the severity of vehicle overcrowding, whether the aliens were abandoned, the time of year during which the journey took place, the distance traveled, and whether the aliens were fed, hydrated, and adequately clothed for the journey.<sup>76</sup>

### 2. Ninth Circuit’s factors for increased risk

The Ninth Circuit noted the following:

Every passenger traveling on our highways faces a small, but non-trivial, risk of death or injury. This baseline risk is inherent in all vehicular travel and must therefore be disregarded in determining whether the offense was committed in a manner that involved a “substantial risk of death or serious bodily injury to another person.” We focus on the ways in which the method of transporting the alien increased the risk of death or injury beyond that faced by a normal passenger traveling on our streets and highways.<sup>77</sup>

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<sup>72</sup> *Solis-Garcia*, 420 F.3d at 515 (quoting *United States v. Hernandez-Guardado*, 228 F.3d 1017, 1028 (9th Cir. 2000)).

<sup>73</sup> *Garza*, 541 F.3d at 294 (quoting *Solis-Garcia*, 420 F.3d at 516).

<sup>74</sup> *Zuniga-Amezquita*, 468 F.3d at 889.

<sup>75</sup> *Id.* (citing *Solis-Garcia*, 420 F.3d at 516).

<sup>76</sup> See, e.g., *United States v. Cardona-Lopez*, 602 F. App’x 191, (5th Cir. 2015); *United States v. Chapa*, 362 F. App’x 411 (5th Cir. 2010); *De Jesus-Ojeda*, 515 F.3d at 443; *United States v. Hernandez-Pena*, 267 F. App’x 367 (5th Cir. 2008).

<sup>77</sup> *Torres-Flores*, 502 F.3d at 889.

Following this observation, the Ninth Circuit identified the following factors that increase risk:

(1) Taking a dangerous route (*e.g.*, off-road) or driving in a dangerous manner (*e.g.*, recklessly or drunk); (2) using a method of transportation that increases the likelihood of an accident (*e.g.*, a severely overloaded vehicle); (3) using a method of transportation that increases the risk of an injury even in the absence of an accident (*e.g.*, passengers transported with insufficient ventilation or subject to injury from moving mechanical parts); or (4) using a method of transportation that increases the risk that an accident would cause injury or death (*e.g.*, passengers transported in a manner that makes them more likely to be injured by crumpled metal or shattered glass than if they had been seated normally).<sup>78</sup>

Thus, the Ninth Circuit explained that the enhancement applies “only when the circumstances increased the likelihood of an accident or the chance of injury without an accident.”<sup>79</sup>

### 3. Tenth Circuit’s totality of the circumstances test

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The Tenth Circuit reasoned that determining whether the enhancement applies “essentially equates to a totality of the circumstances test.”<sup>80</sup> Under this analysis, the court “must disregard the ‘baseline risk . . . inherent in all vehicular travel,’ delving instead into whether the defendant’s conduct or his chosen method of transportation ‘increase[d] the risk [of] an accident’ and whether the method of transportation exacerbated the risk of death or injury in the event of an accident.”<sup>81</sup>

## **G. BODILY INJURY – §2L1.1(B)(7)**

*If any person died or sustained bodily injury, increase the offense level according to the seriousness of the injury.*<sup>82</sup>

There is no consensus among the circuits about the type of causal connection, if any, between the defendant’s actions and injury that is necessary to trigger an enhancement

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<sup>78</sup> *Id.* at 889–90.

<sup>79</sup> *Id.* at 890.

<sup>80</sup> *United States v. Munoz-Tello*, 531 F.3d 1174, 1183 (10th Cir. 2008).

<sup>81</sup> *Id.* at 1184 (quoting *Torres-Flores*, 502 F.3d at 889–90).

<sup>82</sup> The 2016 amendment changed the commentary to §2L1.1 to clarify that the term “serious bodily injury” included in subsection (b)(7)(B) has the meaning given to that term in the commentary to §1B1.1 (Application Instructions). See USSG App. C, amend. 802 (effective Nov. 1, 2016); USSG §1B1.1, comment, (n.1(M)) (Nov. 2018).



under §2L1.1(b)(7)(D).<sup>83</sup> At one end of the spectrum, the Eighth and Ninth Circuits require direct or proximate causation to apply the enhancement.<sup>84</sup> At the other end of the spectrum, the Tenth Circuit does not impose any causation requirement.<sup>85</sup> Similarly, the Fifth Circuit held that the enhancement “contains no causation requirement” and “the only causation requirement is that contained in [the relevant conduct provision of the guidelines at] [§]1B1.3.”<sup>86</sup> Thus, the Fifth Circuit concluded that “the defendants['] relevant conduct must be a but-for cause of a harm for that harm to be considered in assigning the guideline range.”<sup>87</sup> The Eleventh Circuit likewise rejected a proximate cause standard, concluding that the enhancement applies where it is “reasonably foreseeable to a defendant that his actions or the actions of any other member of the smuggling operation could create the sort of dangerous circumstances that would be likely to result in serious injury or death.”<sup>88</sup> The First Circuit has not adopted a causation standard, but when reviewing application of the enhancement for clear error, it applied the foreseeability requirement rather than the government preferred but-for causation requirement.<sup>89</sup>

Regardless of the standard of review, the enhancement does not require intent to cause injury or death.<sup>90</sup> For example, it is not necessary for the defendant to be the driver of a vehicle that crashes and injures smuggled aliens.<sup>91</sup>

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<sup>83</sup> See *United States v. De La Cruz-García*, 842 F.3d 1, 2 (1st Cir. 2016) (noting circuit split and collecting cases); *United States v. Zalvidar*, 615 F.3d 1346, 1350 n.2 (11th Cir. 2010).

<sup>84</sup> See *United States v. Flores-Flores*, 356 F.3d 861, 862 (8th Cir. 2004) (holding that “the death or injury . . . must be causally connected to dangerous conditions created by the unlawful conduct” in affirming the enhancement); *United States v. Herrera-Rojas*, 243 F.3d 1139, 1144–45 n.1 (9th Cir. 2001) (“We assume, however, that for [§2L1.1(b)(7)] to apply, the relevant death or injury must be causally connected to dangerous conditions created by the unlawful conduct, as it was in this case.”); see also *United States v. Miguel*, 368 F.3d 1150 (9th Cir. 2004), *overruled on other grounds*, (affirming the enhancement based on the totality of the circumstances, including the number of passengers in a trunk, without restraints, on a hot day).

<sup>85</sup> See *United States v. Cardena-Garcia*, 362 F.3d 663, 666 (10th Cir. 2004) (holding that “[t]he guideline contains no causation requirement and we have no license to impose one” while noting that “a sufficient nexus would exist if the death or injury was reasonably foreseeable and Appellants’ conduct was a contributing factor”).

<sup>86</sup> *United States v. Ramos-Delgado*, 763 F.3d 398, 401 (5th Cir. 2014); see also *De Jesus-Ojeda*, 515 F.3d at 444–45 (holding that death caused by defendant’s coconspirators was reasonably foreseeable and, thus, a proper basis for enhancement).

<sup>87</sup> *Ramos-Delgado*, 763 F.3d at 401.

<sup>88</sup> *Zalvidar*, 615 F.3d at 1350–51.

<sup>89</sup> *De La Cruz-García*, 842 F.3d at 2–3.

<sup>90</sup> *Garcia-Guerrero*, 313 F.3d at 888; *United States v. Herrera-Rojas*, 243 F.3d 1139, 1144 (9th Cir. 2001) (“[N]o intent is necessary for an increase under [§2L1.1(b)(7)].”).

<sup>91</sup> *United States v. Mares-Martinez*, 329 F.3d 1204, 1207 (10th Cir. 2003) (affirming enhancement where defendant was not present when blowout on overcrowded van caused injury and death to passengers); *Flores-Flores*, 356 F.3d at 863 (affirming the enhancement where defendant was not driving the overloaded van at the time it collided with another car because he was tired and had switched with another driver); *Cardena-Garcia*, 362 F.3d at 665–66 (stating that “[a] sufficient nexus would exist [between the defendant’s

Courts have upheld the application of both §2L1.1(b)(6) (Creating Risk of Injury) and §2L1.1(b)(7) (Bodily Injury) in a single case over claims that applying both enhancements constitutes impermissible double counting. The Tenth Circuit stated: “[section] 2L1.1(b)(6) allows for an enhancement based upon ‘the defendant’s intentional or reckless conduct, with no consideration of the outcome;’ whereas §2L1.1(b)(7) provides for an enhancement based upon the ‘outcome . . . with no consideration of the defendant’s intentional or reckless conduct.’”<sup>92</sup>

#### **H. INVOLUNTARY DETENTION (COERCION OR THREATS) – §2L1.1(B)(8)(A)**

*If an alien was involuntarily detained through coercion or threat, or in connection with a demand for payment, (i) after the alien was smuggled into the United States; or (ii) while the alien was transported or harbored in the United States, increase by 2 levels. If the resulting offense level is less than level 18, increase to level 18.*

The Tenth Circuit affirmed the district court’s application of §2L1.1(b)(8)(A) where an armed defendant participated in taking the aliens’ shoes and personal belongings, forcing them to call family members or friends to ask for more money under the threat of dismemberment, and keeping them in a van and making them urinate in a bottle.<sup>93</sup>

#### **I. INVOLUNTARY DETENTION (PROSTITUTION) – §2L1.1(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 the prostitution had not attained the age of 18 years, increase by 6 levels.*

In *United States v. Garcia-Gonzalez*,<sup>94</sup> the Fifth Circuit rejected the argument that applying both a 2-level enhancement pursuant to §2L1.1(b)(6) for creating a substantial risk of serious injury or death and a 6-level enhancement under §2L1.1(b)(8)(B) to the defendant’s alien-harboring offenses based on the same alleged conduct—the prostitution of minor aliens—constitutes impermissible double counting because “the enhancements d[id] not necessarily implicate the same conduct.”<sup>95</sup> The court explained that five of the

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conduct and the resultant injury] if the death or injury was reasonably foreseeable and [his] conduct was a contributing factor” and applying enhancement where defendant’s van was hit from behind, killing the passengers).

<sup>92</sup> *Cardena-Garcia*, 362 F.3d at 667 (emphasis in original) (quoting *United States v. Herrera-Rojas*, 243 F.3d 1139, 1144 (9th Cir. 2001)).

<sup>93</sup> *United States v. Alapizco-Valenzuela*, 546 F.3d 1208, 1218–19 (10th Cir. 2008).

<sup>94</sup> 714 F.3d 306 (5th Cir. 2013).

<sup>95</sup> *Id.* at 315.

harbored illegal female aliens were coerced or otherwise forced into prostitution and four of them were minors.<sup>96</sup> Therefore, the court upheld the §2L1.1(b)(6) enhancement based on the prostitution of the sole adult female and the §2L1.1(b)(8)(B) enhancement based on acts of prostitution involving the four female victims who were minors.<sup>97</sup>

## IV. CHAPTER THREE ADJUSTMENTS

### A. VULNERABLE VICTIM – §3A1.1(B)(1)

An increase under §3A1.1 (Vulnerable Victim) may be appropriate in alien smuggling cases, but courts generally require additional factors beyond the immigration status of the persons smuggled. The Eighth Circuit observed that “the victims of the crime of harboring illegal aliens are, by definition, illegal aliens, and as such, [their] immigration status does not distinguish them from other potential victims of the crime. Thus, [their] immigration status did not alone make them more vulnerable in this case.”<sup>98</sup> In other words, the relevant question is whether a particular victim of the smuggling offense is “more unusually vulnerable” than any other such victim.<sup>99</sup> The Fifth Circuit reasoned that smuggled aliens typically are not “victims” because they “*voluntarily* joined the scheme as willing participants as to its objective—to be brought illegally into the United States.”<sup>100</sup> The “general characteristics commonly held by aliens seeking to be illegally smuggled” do not create a vulnerability that warrants the enhancement.<sup>101</sup> However, smuggled aliens “detained against their will after being transported” can be considered “victims” for purposes of §3A1.1(b)(1).<sup>102</sup> Moreover, “an undocumented alien’s illegal status could be the basis for a ‘vulnerable victim’ finding for offenses that do not necessarily involve illegal aliens.”<sup>103</sup>

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<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *United States v. De Oliveira*, 623 F.3d 593, 598 (8th Cir. 2010) (citing *United States v. Medina-Argueta*, 454 F.3d 479, 482 (5th Cir. 2006)).

<sup>99</sup> *Id.*; see also *Angeles-Mendoza*, 407 F.3d at 748.

<sup>100</sup> *Angeles-Mendoza*, 407 F.3d at 747 (emphasis in original) (citing *United States v. Velasquez-Mercado*, 872 F.2d 632, 636 (5th Cir. 1989)) (noting that smuggled aliens “might be more properly characterized as ‘customers’ than ‘victims’”).

<sup>101</sup> *Id.* at 747–48 (stating that “the *inherent* vulnerability of smuggled aliens” has been “adequately taken into account in establishing the base offense level”).

<sup>102</sup> *Id.* at 747.

<sup>103</sup> *United States v. Cedillo-Narvaez*, 761 F.3d 397, 404 (5th Cir. 2014).

## **B. ROLE IN THE OFFENSE – §§3B1.1, 3B1.2**

Commentary to §2L1.1 invites consideration of a defendant’s aggravating role in the offense, but states that for purposes of §3B1.1 (Aggravating Role), the smuggled aliens are not considered “participants” in the crime “unless they actively assisted in the smuggling, transporting, or harboring of others.”<sup>104</sup> Some courts apply §3B1.1 to increase sentences for defendants with an aggravating role in the offense,<sup>105</sup> and other courts routinely deny reductions for minor participants under §3B1.2.<sup>106</sup>

## **C. SPECIAL SKILL – §3B1.3**

The First Circuit held that piloting a simple wooden boat without benefit of navigation aids on choppy seas under the direction of another does not qualify as a special skill.<sup>107</sup> But the Eleventh Circuit held that piloting an overloaded “Scarab” model high-performance boat at night while evading a Coast Guard vessel did qualify as a special skill.<sup>108</sup>

## **D. RECKLESS FLIGHT – §3C1.2**

The Ninth Circuit explained that a §3C1.2 reckless flight enhancement does not apply where the defendant receives an enhancement under §2L1.1 for creating a risk of injury to others.<sup>109</sup> A defendant, in the course of smuggling two aliens across the border in the back of a hatchback, fled from a checkpoint to avoid inspection and evaded pursuit until stalling

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<sup>104</sup> USSG §2L1.1, comment. (n.6) (Nov. 2018).

<sup>105</sup> See, e.g., *United States v. Caraballo*, 595 F.3d 1214, 1232 (11th Cir. 2010) (affirming enhancement where defendant recruited a co-defendant to participate in the smuggling operation; hosted the other smugglers; specifically instructed co-defendants on how to commit the crime; required co-defendants to sign a contract agreeing to tell a fabricated story to the authorities if they were caught; financed the smuggling trip; and agreed to pay a co-defendant for his role in the venture); *United States v. Villanueva*, 408 F.3d 193, 204 (5th Cir. 2005) (applying adjustment where “[defendant’s] house in El Salvador was the assembly point for many of the aliens; his wife collected the initial payments for the smuggling fees for many of the aliens; the ‘pollo’ list for this and other smuggling trips was found in [his] house in El Salvador; he recruited and hired the driver of the tractor-trailer; and he was in charge of this particular smuggling expedition”).

<sup>106</sup> See, e.g., *Villanueva*, 408 F.3d at 204 (defendant did not qualify for minor role reduction where he “acted as a guide in multiple countries over an extended period of time”); *Angeles-Mendoza*, 407 F.3d at 754 (defendant was not a minor participant where he was an enforcer at the stash house and “had knowledge of the scope and structure of the enterprise”); *Rodriguez-Cruz*, 255 F.3d at 1060 (affirming decision not to award minor role reduction where defendant acted as “guide in training” and had been paid for guiding aliens); *United States v. Pena-Gutierrez*, 222 F.3d 1080, 1091–92 (9th Cir. 2000) (reduction did not apply where defendant was convicted of smuggling aliens twice within 16 days); *United States v. Uresti-Hernandez*, 968 F.2d 1042, 1047 (10th Cir. 1992) (rejecting reduction where defendant left aliens outside checkpoint, drove through, and waited for them on the other side).

<sup>107</sup> *Hilario-Hilario*, 529 F.3d at 78–79.

<sup>108</sup> *United States v. De La Cruz Suarez*, 601 F.3d 1202, 1219 (11th Cir. 2010).

<sup>109</sup> *United States v. Lopez-Garcia*, 316 F.3d 967, 970–72 (9th Cir. 2003).

the car near a highway median. The defendant ran from the car but was arrested after a brief foot chase. The Ninth Circuit reversed the district court’s application of both the §2L1.1 “substantial risk of death or bodily injury” and §3C1.2 “reckless endangerment during flight” enhancements. Both enhancements were based solely on the defendant’s flight. Therefore, the court held, “[w]e are bound to follow the application notes . . . and the directive is clear: ‘If [a substantial risk of serious bodily injury] enhancement] applies solely on the basis of conduct related to fleeing from a law enforcement officer, do not apply an adjustment from §3C1.2.’”<sup>110</sup>

## **V. DEPARTURES AND VARIANCES**

### **A. MULTIPLE DEATHS**

The Tenth Circuit has affirmed upward departures where multiple deaths resulted from the defendant’s conduct.<sup>111</sup>

### **B. DURATION OF HARBORING**

The Fourth Circuit affirmed an upward departure for a harboring conspiracy that lasted for 19 years.<sup>112</sup>

### **C. EXTENT OF DETENTION**

The Tenth Circuit affirmed a variance above the guideline range that included an enhancement under §2L1.1(b)(8) because the defendant created an extreme “four-day-long hostage situation,” rather than “an isolated, minor detention of limited duration.”<sup>113</sup>

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<sup>110</sup> *Id.* at 970 (internal citations omitted).

<sup>111</sup> *See Munoz-Tello*, 531 F.3d at 1190; *United States v. Jose-Gonzalez*, 291 F.3d 697 (10th Cir. 2002).

<sup>112</sup> *United States v. Bonetti*, 277 F.3d 441, 451 (4th Cir. 2002).

<sup>113</sup> *Alapizco-Valenzuela*, 546 F.3d at 1220, 1223.

## ILLEGAL ENTRY OR REENTRY – §2L1.2

Federal law prohibits foreign nationals from entering the United States without permission. A conviction for a first illegal entry offense is a misdemeanor that is not covered by the guidelines.<sup>114</sup> Subsequent entries,<sup>115</sup> reentry after removal,<sup>116</sup> and remaining in the United States after being ordered removed<sup>117</sup> are felonies covered by §2L1.2. This guideline provides for enhanced sentences if the defendant engaged in criminal conduct before or after the first order of removal was final. This section of the primer addresses the statutory scheme and application issues arising under §2L1.2.

### I. STATUTORY SCHEME

Illegal reentry offenses refer to failure to depart (8 U.S.C. § 1253), illegal reentry (8 U.S.C. § 1326) or subsequent illegal entry (8 U.S.C. § 1325). Enhancements for illegal entry and reentry—under both the statute and the guidelines—are based on a defendant’s criminal history.

#### 8 U.S.C. § 1325(a) – IMPROPER ENTRY BY ALIEN (ILLEGAL ENTRY)

This statute prohibits entry (1) at an improper time or place, (2) without inspection, or (3) based on a false or misleading statement.

The penalty range for this offense depends on whether it is the defendant’s first violation of section 1325(a). For offenders violating the statute for the first time, the statute carries a 6-month maximum penalty, and the guidelines do not apply. Subsequent violations of section 1325(a) carry a 2-year maximum penalty, and the court should apply §2L1.2. Because the enhanced penalty is based on a defendant’s prior criminal record, it does not need to be indicted or found by a jury.<sup>118</sup>

<sup>114</sup> 8 U.S.C. § 1325(a).

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* § 1326. Changes to the Immigration and Naturalization Act effective April 1, 1997, replaced deportation and exclusion proceedings with a single process, termed “removal.” Unless specifically noted, the terms “deportation” and “removal” are generally used interchangeably in this primer, but practitioners should be aware of the technical differences. 8 U.S.C. § 1229a [INA § 240]; Richard Steel, STEEL ON IMMIGRATION LAW § 13:1 (2d ed. 2012).

<sup>117</sup> 8 U.S.C. § 1253.

<sup>118</sup> See *Almendarez-Torres*, 523 U.S. at 226–27 (holding that the prior felony is not an element of the offense and need not be charged in the indictment); *Apprendi*, 530 U.S. at 490 (stating that the fact of a prior conviction need not be found by a jury).

## 8 U.S.C. § 1326 – REENTRY OF REMOVED ALIENS (ILLEGAL REENTRY)

This statute prohibits an alien’s unauthorized return to the United States after deportation, removal, exclusion, or denial of admission.

The statutory maximum term of imprisonment for illegal reentry depends on the defendant’s prior criminal record. In general, an alien who has no criminal history is subject to a 2-year maximum.<sup>119</sup> A 10-year maximum applies if the defendant’s deportation was (a) preceded by a conviction for “three or more misdemeanors involving, drugs, crimes against the person, or both”; (b) preceded by any felony; or (c) based on certain, specified grounds.<sup>120</sup> If the prior conviction was an “aggravated felony,” as defined by 8 U.S.C. § 1103(a)(43), the statutory maximum is 20 years.<sup>121</sup>

For statutory enhancements based on a defendant’s prior criminal record, the fact of the prior conviction need not be alleged in the indictment or found by a jury.<sup>122</sup> However, sentencing enhancements based on a defendant’s prior deportation must be found by a jury.<sup>123</sup> Under *Apprendi*, for a defendant to be eligible for an enhanced statutory maximum under section 1326, the government’s indictment must allege not only a prior removal and subsequent reentry, but also the date of that removal or the fact that it occurred after a qualifying prior conviction.<sup>124</sup> But an indictment’s failure to do so does not rise to structural error; rather, any such defects are subject to harmless error review.<sup>125</sup>

Thus, the Ninth Circuit has concluded that an indictment will support a section 1326(b) sentencing enhancement if it alleges a removal date because this action will allow a sentencing court “to compare that date to the dates of any qualifying felony convictions to determine whether the sentence-enhancing sequence [whereby that removal must follow the earlier qualifying conviction] is satisfied.”<sup>126</sup> That court also held that the indictment need not include the removal date if the indictment language otherwise alleges facts

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<sup>119</sup> 8 U.S.C. § 1326(a)(2).

<sup>120</sup> *Id.* § 1326(b)(1), (3), (4).

<sup>121</sup> *Id.* § 1326(b)(2).

<sup>122</sup> *See Almendarez-Torres*, 523 U.S. at 226–27; *Apprendi*, 530 U.S. at 490.

<sup>123</sup> *See, e.g., United States v. Rojas-Luna*, 522 F.3d 502, 505–06 (5th Cir. 2008) (“[W]hile a court may use a prior conviction with knowledge that the defendant was given multiple constitutional protections, the same cannot be said for prior removals.”); *United States v. Covian-Sandoval*, 462 F.3d 1090, 1097 (9th Cir. 2006) (citation omitted) (holding that the *Almendarez-Torres* exception is “limited to prior convictions” and does not apply to the fact or date of the prior removal).

<sup>124</sup> *United States v. Calderon-Segura*, 512 F.3d 1104, 1111 (9th Cir. 2008).

<sup>125</sup> *See, e.g., United States v. Salazar-Lopez*, 506 F.3d 748, 753 (9th Cir. 2007) (rejecting a “structural error” analysis and instead concluding that such error “can be adequately handled under the harmless error framework”).

<sup>126</sup> *United States v. Mendoza-Zaragoza*, 567 F.3d 431, 434 (9th Cir. 2009).



establishing that the removal occurred after a qualifying conviction.<sup>127</sup> Furthermore, the Fifth Circuit has concluded that, when an indictment is silent as to a removal date, but a defendant admits facts contained in the PSR establishing the critical sequencing information, the resulting sentencing enhancement survives plain error review.<sup>128</sup>

Courts have held that it does not violate the Equal Protection Clause to enhance an illegal reentry defendant's sentence based on prior convictions.<sup>129</sup>

## 8 U.S.C. § 1253 – FAILURE TO DEPART

This statute makes it a crime for an alien who has been ordered to depart the country to (A) remain in the country after the removal order is entered, (B) fail to arrange for departure, (C) prevent or hamper departure, or (D) fail to appear as required by the departure removal order.

This statute generally imposes a 4-year statutory maximum penalty, although prior convictions under certain specified statutes will invoke a 10-year statutory maximum.<sup>130</sup>

## II. GUIDELINE OVERVIEW: §2L1.2

### A. BACKGROUND

This section of the primer provides background and legal analysis of §2L1.2, as amended, effective November 1, 2016.<sup>131</sup> The Commission amended §2L1.2 to address the “categorical approach” courts used to determine whether a prior offense was a “crime of violence” for purposes of applying enhancements under §2L1.2:

<sup>127</sup> *Calderon-Segura*, 512 F.3d at 1111 (citing *Salazar-Lopez*, 506 F.3d at 752) (“[I]n order for a defendant to be eligible for an enhanced statutory maximum under § 1326(b), the indictment must allege, in addition to the facts of prior removal and subsequent reentry, either the date of the prior removal or that it occurred after a qualifying prior conviction.”).

<sup>128</sup> *See United States v. Ramirez*, 557 F.3d 200, 204 (5th Cir. 2009) (not plain error for court to enhance sentence based on uncharged date of removal acknowledged by defendant in PSR).

<sup>129</sup> *United States v. Ruiz-Chairez*, 493 F.3d 1089, 1090–91 (9th Cir. 2007); *United States v. Adeleke*, 968 F.2d 1159, 1160–61 (11th Cir. 1992).

<sup>130</sup> 8 U.S.C. § 1253(a)(1). The 10-year statutory maximum applies to individuals deported pursuant to 8 U.S.C. § 1227(a)(1)(E) (for helping an alien enter the United States), section 1227(a)(2) (for certain criminal offenses), section 1227(a)(3) (for failure to register and falsification of documents), and section 1227(a)(4) (for security threats). One subsection of this statute, section 1253(b), prohibits a false statement or failure to comply with an investigation during the period following an alien's removal order while he is still in the United States under supervision. This crime is a misdemeanor that is punishable by up to a year in prison.

<sup>131</sup> *See* USSG App. C, amend. 802 (effective Nov. 1, 2016).



[T]he Commission has received significant comment over several years from courts and stakeholders that the ‘categorical approach’ used to determine the particular level of enhancement under the existing guideline is overly complex . . . Instead of the categorical approach, the amendment adopts a much simpler sentence-imposed model for determining the applicability of predicate convictions. The level of the sentencing enhancement for a prior conviction generally will be determined by the length of the sentence imposed for the prior offense, not by the type of offense for which the defendant had been convicted.<sup>132</sup>

Furthermore, only prior convictions that receive criminal history points are counted for purposes of §2L1.2 enhancements after the 2016 amendment.

## **B. *EX POST FACTO* CONSIDERATIONS**

The Commission’s amendment to §2L1.2 may raise *ex post facto* issues.<sup>133</sup> However, due to the substantive, rather than clarifying nature of the amendment, the amendment does not apply retroactively on appeals from sentences imposed using the previous version of the guideline.<sup>134</sup>

Notably, courts have held that illegal reentry is a continuing offense that continues until the alien is “found” in the United States. Therefore, a court can apply the *Guidelines Manual* in effect when the alien is “found,” as opposed to the *Guidelines Manual* in effect when the alien reentered the United States, without violating the *Ex Post Facto* Clause.<sup>135</sup> The Fifth Circuit has held that “a previously deported alien is ‘found in’ the United States when his physical presence is discovered and noted by the immigration authorities, and the knowledge of the illegality of his presence, through the exercise of diligence typical of law enforcement authorities, can reasonably be attributed to the immigration authorities.”<sup>136</sup> An alien can also be “found” in the United States when a law enforcement officer participating in the cross-designation program under 8 U.S.C. § 1357(g) issues an immigration detainer.<sup>137</sup>

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<sup>132</sup> *Id.*

<sup>133</sup> *See* USSG §1B1.11 (Nov. 2018).

<sup>134</sup> *See* United States v. Morales-Alonso, 878 F.3d 1311, 1313 n.2 (11th Cir. 2018).

<sup>135</sup> United States v. Lennon, 372 F.3d 535 (3d Cir. 2004); United States v. Rodriguez, 26 F.3d 4 (1st Cir. 1994); United States v. Whittaker, 999 F.2d 38 (2d Cir. 1993); United States v. Gonzales, 988 F.2d 16 (5th Cir. 1993).

<sup>136</sup> United States v. Santana-Castellano, 74 F.3d 593, 598 (5th Cir. 1996); *see also* United States v. Bencomo-Castillo, 176 F.3d 1300 (10th Cir. 1999); *Whittaker*, 999 F.2d at 42 (2d Cir. 1993) (stating that “found” is synonymous with “discovered in”).

<sup>137</sup> United States v. Sosa-Carabantes, 561 F.3d 256 (4th Cir. 2009).

### **C. BASE OFFENSE LEVEL**

Section 2L1.2 has a base offense level of 8.<sup>138</sup>

### **D. SPECIFIC OFFENSE CHARACTERISTICS**

As amended in 2016, sentencing enhancements under §2L1.2 are based on three factors: (1) defendant's prior illegal entry/reentry convictions, (2) length of any prior sentence before first order of deportation, and (3) length of any prior sentence after the first order of deportation.

#### 1. *Prior Illegal Reentry Offenses – §2L1.2(b)(1)*

The enhancement at subsection (b)(1) provides a tiered increase to the offense level based on prior convictions for illegal reentry offenses under 8 U.S.C. §§ 1253, 1325, and 1326. A defendant who has one or more felony illegal reentry convictions will receive a 4-level increase and a defendant with two or more convictions for a misdemeanor under 8 U.S.C. § 1325(a) will receive a 2-level increase.<sup>139</sup> "Illegal reentry offense" is defined in the commentary to include all convictions under 8 U.S.C. §§ 1253 (failure to depart after an order of removal) and 1326 (illegal reentry), as well as second or subsequent illegal entry convictions under 8 U.S.C. § 1325(a).<sup>140</sup>

#### 2. *Other Prior Convictions – §2L1.2(b)(2) and (b)(3)*

Subsections (b)(2) and (b)(3) of the guideline account for prior convictions (other than illegal entry or reentry convictions) primarily through a sentence-imposed approach. The sentence-imposed approach is similar to how a defendant's criminal history score is calculated in Chapter Four of the *Guidelines Manual* based on the sentence length of his or her prior convictions. The two subsections are intended to divide the defendant's criminal history into two time periods. Subsection (b)(2) provides an enhancement if, before the defendant was ordered deported or ordered removed from the United States for the first time, the defendant engaged in criminal conduct that, at any time, resulted in a conviction. Subsection (b)(3) provides an enhancement if after the defendant was ordered deported or removed from the United States for the first time, the defendant engaged in criminal conduct that, at any time, resulted in a conviction.

The specific offense characteristics at subsections (b)(2) and (b)(3) each contain a parallel set of enhancements (applying the greatest):

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<sup>138</sup> USSG §2L1.2(a) (Nov. 2018).

<sup>139</sup> USSG §2L1.2(b)(1)(A)–(B) (Nov. 2018).

<sup>140</sup> USSG §2L1.2, comment. (n.2) (Nov. 2018).

- 10 levels for a prior felony conviction that received a sentence of imprisonment of five years or more;
- 8 levels for a prior felony conviction that received a sentence of imprisonment of two years or more
- 6 levels for a prior felony conviction that received a sentence exceeding one year and one month;
- 4 levels for any other prior felony conviction; or
- 2 levels for three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses.<sup>141</sup>

### **III. PRIOR CONVICTIONS**

#### **A. GENERAL PRINCIPLES**

##### *1. Ordered deported or ordered removed from the United States for the first time*

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The guideline looks to the first final order of deportation or removal,<sup>142</sup> not the physical removal of the defendant. A defendant is considered “ordered deported or ordered removed from the United States” if the defendant was ordered deported or ordered removed from the United States based on a final order of exclusion, deportation or removal, regardless of whether the order was in response to a conviction.<sup>143</sup> “For the first time” refers to the first time the defendant was ever the subject of such an order.<sup>144</sup>

Federal law authorizes immigration authorities to reinstate prior removal orders.<sup>145</sup> Although the alien removal statute, 8 U.S.C. § 1231(a)(5), states that a “prior order of removal is reinstated from its original date,” a removal based on the reinstatement is treated as a separate removal for purposes of determining whether a conviction happened

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<sup>141</sup> USSG §2L1.2(B)(2)–(3) (Nov. 2018). The Commission amended §2L1.2 again effective November 1, 2018 to address a scenario in which a felony would not qualify for an upward adjustment under either subsection (b)(2) or (b)(3) even though it received criminal history points. Those scenarios occurred when a defendant committed a crime before being ordered removed for the first time but was not convicted (or sentenced) for that crime until after that first order of removal. The amendment addressed this issue by establishing that application of the §2L1.2(b)(2) enhancement depends on the timing of the underlying “criminal conduct,” and not on the timing of the resulting conviction. See USSG App. C, amend. 809 (effective Nov. 1, 2018).

<sup>142</sup> See Final order of removal at 28 C.F.R. § 1241.

<sup>143</sup> See USSG §2L1.2, comment. (n.1(A)) (Nov. 2018).

<sup>144</sup> *Id.*

<sup>145</sup> 8 U.S.C. § 1231(a)(5).

prior to deportation under section 1326.<sup>146</sup> In addition, for purposes of the guidelines, an order of expedited removal done by an immigration officer<sup>147</sup> is also considered an order of removal. Voluntary returns do not count as an order of removal.

### 2. Count convictions that were final before and after the first order of removal

A conviction is final for purposes of §2L1.2 even if an appeal of the conviction is pending when the defendant is deported.<sup>148</sup>

### 3. Qualifying adult convictions

For all three specific offense characteristics, the amended guideline considers prior convictions only if the convictions receive criminal history points under the rules in Chapter Four.<sup>149</sup> The Commission amended the guideline to “[c]ount only convictions that receive criminal history points [to] address[ ] concerns that the existing guideline sometimes has provided for an unduly severe enhancement based on a single offense so old it did not receive criminal history points.”<sup>150</sup> Accordingly, the First Circuit found plain error when the district court applied the enhancement based on convictions that did not receive criminal history points, explaining that the “Probation Office, prosecution, and defense counsel” all missed the significance of the application note.<sup>151</sup>

An offense committed before the defendant was 18 years of age does not qualify for an enhancement under §2L1.2 “unless such conviction is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted.”<sup>152</sup> The conviction for which the defendant receives an enhancement need not be the most recent conviction,<sup>153</sup> nor must the defendant have been ordered removed as a result of that conviction.<sup>154</sup>

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<sup>146</sup> See, e.g., *United States v. Nava-Perez*, 242 F.3d 277, 279 (5th Cir. 2001) (the court stated “the statute plainly contemplates, *after* the reentry, a *second removal* under the reinstated prior order”) (emphasis in original).

<sup>147</sup> See 8 U.S.C. § 1228.

<sup>148</sup> *United States v. Saenz-Gomez*, 472 F.3d 791, 793–94 (10th Cir. 2007).

<sup>149</sup> See USSG §2L1.2, comment, (n.3) (Nov. 2018) (instructing instructs that “only those convictions that receive criminal history points” should be used when applying any of the specific offense characteristics).

<sup>150</sup> See USSG App. C, amend. 802 (effective Nov. 1, 2016).

<sup>151</sup> *United States v. Romero*, 896 F.3d 90, 93 (1st Cir. 2018).

<sup>152</sup> USSG §2L1.2, comment. (n.1(B)) (Nov. 2018).

<sup>153</sup> See USSG §2L1.2(b)–(c) (Nov. 2018) (noting to “[a]pply the [g]reatest” enhancement based on the defendant’s prior convictions).

<sup>154</sup> USSG §2L1.2, comment. (n.1(A)) (Nov. 2018).

#### 4. Delayed adjudications may qualify as convictions

A deferred adjudication can qualify as a prior conviction under §2L1.2.<sup>155</sup> A guilty plea held in abeyance also can qualify as a “conviction” under §2L1.2.<sup>156</sup>

#### 5. Vacating a conviction may disqualify it from consideration

Section 2L1.2 does not expressly address expunged or vacated convictions. Some courts have held that a conviction that was vacated prior to sentencing on technical grounds should be considered under §2L1.2.<sup>157</sup> An enhancement, however, would not apply if the conviction was vacated on “a showing of actual innocence”<sup>158</sup> or a showing “that the conviction had been improperly obtained.”<sup>159</sup>

#### 6. Prior convictions need not be charged to qualify for enhancement

The fact of a prior conviction need not be pled or proven beyond a reasonable doubt.<sup>160</sup> Thus, a prior conviction that would support an enhanced sentence under either the relevant statutes or the guidelines does not need to be identified until the time of sentencing.<sup>161</sup>

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<sup>155</sup> See, e.g., *United States v. Mondragon-Santiago*, 564 F.3d 357, 368 (5th Cir. 2009) (explaining that “Federal law counts Texas’s deferred adjudication probation as a conviction”); *United States v. Ramirez*, 367 F.3d 274, 277 (5th Cir. 2004) (citation omitted) (explaining that the “term ‘conviction’ is now defined as a formal judgment of guilt entered by the court or, if an adjudication of guilt has been withheld, where the judge has imposed some form of punishment, penalty, or restraint on the alien’s liberty” and that “Congress intentionally broadened the scope of the definition of ‘conviction’ to include cases in which adjudication was deferred”).

<sup>156</sup> See *United States v. Zamudio*, 314 F.3d 517, 521–22 (10th Cir. 2002) (holding a plea in abeyance was a “conviction” under 8 U.S.C. § 1101(a)(48)(A), which includes a situation where “the alien has entered a plea of guilty . . . and the judge has ordered some form of punishment”).

<sup>157</sup> See *United States v. Luna-Diaz*, 222 F.3d 1, 6 (1st Cir. 2000) (holding that the district court abused its discretion in refusing to impose the enhancement where defendant, after pleading guilty to illegal reentry, was successful at having prior aggravated felony conviction vacated); *United States v. Campbell*, 167 F.3d 94, 98 (2d Cir. 1999) (affirming enhancement based on prior conviction that was set aside because terms of probation had been satisfied); *United States v. Garcia-Lopez*, 375 F.3d 586, 588 (7th Cir. 2004) (affirming enhancement where prior conviction was vacated “based upon a technicality”); *United States v. Cisneros-Cabrera*, 110 F.3d 746, 747–48 (10th Cir. 1997) (explaining that the district court did not err in applying the enhancement based on a vacated conviction that was in place at the time of illegal entry).

<sup>158</sup> *Garcia-Lopez*, 375 F.3d at 589.

<sup>159</sup> *Campbell*, 167 F.3d at 98.

<sup>160</sup> See *Almendarez-Torres*, 523 U.S. at 226–27.

<sup>161</sup> Note this rule does not apply to the fact of deportation, so that a statutory enhancement based on a finding that a defendant had been removed on a particular date may violate the Sixth Amendment if the date of deportation was not admitted by the defendant in the plea. See, e.g., *Rojas-Luna*, 522 F.3d at 506; *United*

### 7. Is the prior conviction a felony?

The enhancements called for in §2L1.2 are triggered by a defendant’s previous conviction(s).<sup>162</sup> Because §2L1.2 defines “felony” as “any federal, state, or local offense punishable by imprisonment for a term exceeding one year,”<sup>163</sup> this definition can include qualifying state misdemeanor offenses that are punishable by more than one year. If a state misdemeanor is punishable by more than a year in prison, that conviction may qualify for an enhancement under §2L1.2(b)(2) or (3) depending on the sentence imposed.<sup>164</sup> For the same reasons, a prior state court misdemeanor conviction can trigger section 1326(b)(1)’s 10-year statutory maximum if, under federal law, it is a felony, *i.e.*, “an offense punishable by a maximum term of imprisonment of more than one year.”<sup>165</sup>

In *United States v. Valencia-Mendoza*, the Ninth Circuit vacated and remanded the defendant’s sentence, holding that, in determining whether a crime is “punishable” by more than one year, the court must consider both the elements of the offense *and* sentencing factors that correspond to the crime of conviction.<sup>166</sup> The district court had applied a 4-level increase under §2L1.2, finding that the defendant had been convicted of a Washington state offense *punishable* by imprisonment for a term exceeding one year. Although the defendant’s offense carried a general maximum term of five years, the Washington statutes also prescribed a binding sentencing range under which the defendant could have been sentenced to no more than six months.<sup>167</sup> The Ninth Circuit held that, where the actual maximum term a defendant could receive under state law is less than the general statutory maximum, it was error to look only to the general statutory maximum.<sup>168</sup> It overruled its past precedent to the contrary.<sup>169</sup>

### 8. Determining the length of prior sentence imposed

The length of the sentence imposed for a prior conviction is determined by the rules set forth in Chapter Four for calculating criminal history points. Sentence imposed has the

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*States v. Covian-Sandoval*, 462 F.3d 1090, 1097–98 (9th Cir. 2006) (holding the *Almendarez-Torres* exception is “limited to prior convictions” and does not apply to the fact or date of the prior removal).

<sup>162</sup> USSG §2L1.2(b)(1)–(3) (Nov. 2018).

<sup>163</sup> USSG §2L1.2, comment. (n.2) (Nov. 2018).

<sup>164</sup> *See, e.g.*, *United States v. Hernandez-Garduno*, 460 F.3d 1287, 1293 (10th Cir. 2006) (holding misdemeanor assault conviction under Colo. Rev. Stat. § 18-3-204 was treatable as a felony under an earlier version of §2L1.2).

<sup>165</sup> 18 U.S.C. § 3156(a)(3).

<sup>166</sup> *United States v. Valencia-Mendoza*, 912 F.3d 1215 (9th Cir. 2019).

<sup>167</sup> *See id.* at 1222–24.

<sup>168</sup> *See id.*

<sup>169</sup> *See id.* at 1222.

meaning given to the term “sentence of imprisonment” in Application Note 2 and subsection (b) of §4A1.2, providing that “[t]he length of the sentence imposed includes any term of imprisonment given upon revocation of probation, parole, or supervised release, regardless of when the revocation occurred.”<sup>170</sup>

The Fifth Circuit upheld, on plain error review, application of the (b)(2) enhancement based on the “sentence-aggregation rule” in §4A1.2(a)(2), which instructs courts to “use the aggregate sentence of imprisonment” if a prior sentence is treated as a single sentence and the court imposed the sentences consecutively.<sup>171</sup>

### 9. Simultaneous convictions

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Application Note 4 to §2L1.2 addresses the situation where a defendant was simultaneously sentenced for an illegal reentry offense and another federal felony offense. It clarifies that, in such a case, the illegal reentry offense counts towards subsection (b)(1), while the other felony offense counts towards subsection (b)(2) or (b)(3).<sup>172</sup>

## **B. MISDEMEANORS – CRIME OF VIOLENCE OR DRUG TRAFFICKING OFFENSE**

Subsections (b)(2) and (b)(3) provide for a 2-level enhancement for offenders with three or more prior convictions for misdemeanors that are crimes of violence or drug trafficking offenses. These subsections reflect a congressional directive requiring inclusion of an enhancement for certain types of misdemeanor offenses.<sup>173</sup>

The definition of “crime of violence” in §2L2.1, Application Note 2, mirrors the definition in the career offender guideline, §4B1.2(a), effective August 1, 2016.<sup>174</sup> It provides that a “crime of violence” is one of the enumerated offenses (*e.g.*, murder, robbery, extortion, etc.) or any offense that has as an element “the use, attempted use, or threatened use of physical force against the person of another.”<sup>175</sup>

A “drug trafficking offense” is “any offense under federal, state, or local law that prohibits the manufacture, import, export, distribution, dispensing, or offer to sell of a controlled substance (or a counterfeit substance) or the possession of a controlled

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<sup>170</sup> See USSG §2L1.2, comment. (n.2) (Nov. 2018).

<sup>171</sup> *United States v. Ponce-Flores*, 900 F.3d 215, 218–19 (5th Cir. 2018).

<sup>172</sup> USSG §2L1.2, comment. (n.4) (Nov. 2018).

<sup>173</sup> See *Illegal Immigration and Immigrant Responsibility Act of 1996*, Pub. L. 104–208, § 344, 110 Stat. 3009.

<sup>174</sup> See USSG App. C, amend. 798 (effective Nov. 1, 2016). Uniformity and ease of application weigh in favor of using a consistent definition for the same term throughout the *Guidelines Manual*.

<sup>175</sup> USSG §2L1.2, comment. (n.2) (Nov. 2018).



substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.”<sup>176</sup>

Courts have interpreted these terms by applying the “categorical approach” mandated by the Supreme Court in *Taylor v. United States*<sup>177</sup> and its progeny.<sup>178</sup> The Commission has published a separate primer that provides a more detailed analysis of the history and case law regarding the categorical approach.<sup>179</sup>

#### IV. CRIMINAL HISTORY

Under §2L1.2, a single prior conviction may increase a defendant’s sentence in three ways: (1) an enhancement under §2L1.2(b)(1); (2) criminal history points under §4A1.1(a), (b), or (c); and (3) “status” points under §4A1.1(d).<sup>180</sup> Courts have consistently rejected the argument that considering a defendant’s prior convictions in calculating both the offense level and criminal history constitutes impermissible double counting.<sup>181</sup> In some cases, courts have relied on §4A1.3 to impose an upward departure based on under-represented criminal history.<sup>182</sup> In contrast, one court held that, to the extent that an upward departure was based on a prior, uncharged, illegal entry, the sentencing court erred because there was nothing “unusual” about the illegal entry.<sup>183</sup>

A related issue deals with the application of “status” points under §4A1.1(d) to defendants who are “found” while serving a jail sentence on an unrelated state matter. Courts have held that illegal reentry is a continuing offense that “tracks the alien ‘wherever he goes,’” including into state custody following conviction for a crime committed after

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<sup>176</sup> *Id.*

<sup>177</sup> 495 U.S. 575 (1990).

<sup>178</sup> See *Mathis v. United States*, 136 S. Ct. 2243 (2016); *Descamps v. United States*, 570 U.S. 254 (2013); *Shepard v. United States*, 544 U.S. 13 (2005).

<sup>179</sup> See U.S. SENTENCING COMM’N, PRIMER – CATEGORICAL APPROACH, <https://www.ussc.gov/guidelines/primers>.

<sup>180</sup> See USSG §4A1.1(d) (“Add 2 points if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, work release, or escape status.”).

<sup>181</sup> See, e.g., *United States v. Garcia-Cardenas*, 555 F.3d 1049, 1050 (9th Cir. 2009); *United States v. Torres-Echavarria*, 129 F.3d 692, 699–700 (2d Cir. 1997); *United States v. Crawford*, 18 F.3d 1173, 1180 (4th Cir. 1994); *United States v. Zapata*, 1 F.3d 46, 49–50 (1st Cir. 1993).

<sup>182</sup> *United States v. Zuniga-Peralta*, 442 F.3d 345 (5th Cir. 2006) (affirming departure under §4A1.3 from Category II to Category VI based on prior uncounted offenses, four deportations, and use of eleven aliases).

<sup>183</sup> *United States v. Figaro*, 935 F.2d 4, 7 (1st Cir. 1991) (holding upward departure could not properly be based on prior uncharged illegal entry but affirming on other grounds).



returning to the United States.<sup>184</sup> Thus, courts have held that an alien who is “found” by immigration officials while in state custody has committed the section 1326 offense “while under a sentence of imprisonment” and thus was subject to a 2-level increase under §4A1.1(d).<sup>185</sup> However, the court may consider a downward departure based on time in state custody.<sup>186</sup>

## **V. DEPARTURES**

Courts have discussed several other grounds for departing from the applicable guideline range established by §2L1.2.

### **A. EARLY DISPOSITION PROGRAMS – §5K3.1: “FAST TRACK”**

The most frequent reason for granting a departure for defendants sentenced pursuant to §2L1.2 is §5K3.1, which permits a reduction pursuant to an early disposition program (commonly known as “fast track”). Section 5K3.1 authorizes the court to depart downward up to four levels based on a government motion “pursuant to an early disposition program authorized by the Attorney General of the United States and the United States Attorney for the district in which the court resides.”<sup>187</sup> However, a plea agreement struck with the government, in which the government agreed to recommend a 2-level downward fast-track adjustment, does not obligate the district court to sentence the defendant in accordance with the government's recommendation.<sup>188</sup>

### **B. COLLATERAL CONSEQUENCES**

Another issue that confronts many reentry defendants is the collateral consequences of a reentry conviction. Because of their immigration status, undocumented aliens are ineligible for placement in minimum security facilities and certain BOP programs, including the ability to finish their sentence in a halfway house. Courts generally have rejected these collateral consequences as grounds for a sentence reduction,<sup>189</sup> although one court has

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<sup>184</sup> See, e.g., *United States v. Cano-Rodriguez*, 552 F.3d 637, 639 (7th Cir. 2009) (quoting *United States v. Rodriguez-Rodriguez*, 453 F.3d 458, 460 (7th Cir. 2006)).

<sup>185</sup> See, e.g., *id.* at 639; *United States v. Hernandez-Noriega*, 544 F.3d 1141, 1143 (10th Cir. 2008); *United States v. Coeur*, 196 F.3d 1344, 1346 (11th Cir. 1999); *Santana-Castellano*, 74 F.3d at 598.

<sup>186</sup> See USSG §2L1.2 comment. (n.7) (Nov. 2018).

<sup>187</sup> USSG §5K1.3 (Nov. 2018).

<sup>188</sup> *United States v. Cueto-Nunez*, 869 F.3d 31, 35–36 (1st Cir. 2017).

<sup>189</sup> See, e.g., *United States v. Vasquez*, 279 F.3d 77, 80–81 (1st Cir. 2002); *United States v. Martinez-Carillo*, 250 F.3d 1101, 1106–07 (7th Cir. 2001).

stated that “a downward departure based on collateral consequences of deportation is justified if the circumstances of the case are extraordinary.”<sup>190</sup>

The *Guidelines Manual* does not specifically address whether or how a sentencing court should consider a defendant-alien’s stipulation to an administrative or judicial order of removal. However, various circuits have considered whether the defendant’s stipulation to removal is a permissible ground for downward departure. These circuits have recognized the possibility that a district court may grant a departure in some circumstances based on the defendant-alien’s stipulation to removal.<sup>191</sup>

In *United States v. Clase-Espinal*, the First Circuit held that a stipulation to deportation is insufficient as a matter of law to support a departure in the absence of a “colorable, nonfrivolous defense to deportation.”<sup>192</sup> The Second, Ninth, and Eleventh Circuits have similarly held that a stipulation to removal may be a permissible ground for departure, but only when the defendant had a “colorable, nonfrivolous” defense to removal.<sup>193</sup>

The Eighth Circuit has focused on whether the defendant surrendered procedural rights and protections in stipulating to the removal rather than looking only to whether the defendant forfeited non-frivolous defenses to removal. In *United States v. Jauregui*, the defendant was a lawful permanent resident who was convicted of possession with intent to distribute methamphetamine.<sup>194</sup> The defendant moved for, and received, a 4-level departure for stipulating to removal.<sup>195</sup> On the government’s appeal, the Eighth Circuit affirmed and explained that the defendant, “as a resident alien, gave up substantial rights in waiving the administrative deportation hearing, and it was within the sound discretion of the district court to conclude that in doing so he has substantially assisted in the administration of justice.”<sup>196</sup>

Although the circuits generally agree that the defendant-alien must sacrifice *something* by stipulating to removal before receiving a departure, they are split on whether the district court may grant a departure over the government’s objection. The Third and Tenth Circuits have held that a district court may not depart based on a stipulation to

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<sup>190</sup> *United States v. Bautista*, 258 F.3d 602, 607 (7th Cir. 2001) (holding separation from family, without more, is not sufficiently extraordinary to warrant a downward departure).

<sup>191</sup> See, e.g., *United States v. Jauregui*, 314 F.3d 961, 963–64 (8th Cir. 2003); *United States v. Galvez-Falconi*, 174 F.3d 255, 260 (2d Cir. 1999); *United States v. Rodriguez-Lopez*, 198 F.3d 773, 777 (9th Cir. 1999); *United States v. Mignott*, 184 F.3d 1288, 1291 (11th Cir. 1999); *United States v. Marin-Castaneda*, 134 F.3d 551, 555 (3d Cir. 1998); *United States v. Clase-Espinal*, 115 F.3d 1054, 1059 (1st Cir. 1997).

<sup>192</sup> *Clase-Espinal*, 115 F.3d at 1059.

<sup>193</sup> See *Rodriguez-Lopez*, 198 F.3d at 777; *Mignott*, 184 F.3d at 1291; *Galvez-Falconi*, 174 F.3d at 260.

<sup>194</sup> *Jauregui*, 314 F.3d at 962.

<sup>195</sup> See *id.*

<sup>196</sup> *Id.* at 964.

removal unless the government agrees to the departure.<sup>197</sup> This requirement flows from the “judiciary’s limited power with regard to deportation.”<sup>198</sup> The Second and Ninth Circuits have reached the opposite conclusion.<sup>199</sup> These courts have reasoned that requiring the government’s agreement would create a condition for departure not required by the *Guidelines Manual*.

### C. MOTIVE AND CULTURAL ASSIMILATION

Courts have generally held that the defendant’s motive for reentry is not a basis for a downward departure.<sup>200</sup> Courts have recognized, however, that the defendant’s motivation to care for a family member could be relevant, although such circumstances must generally be exceptional.<sup>201</sup>

The commentary to §2L1.2 provides that a departure based on the defendant’s cultural assimilation may be appropriate, but only “where (A) the defendant formed cultural ties primarily to the United States from having continuously resided in the United States from childhood, (B) those cultural ties provided the primary motivation for the defendant’s illegal reentry and continued presence in the United States, and (C) such a departure is not likely to increase the risk to the public from further crimes of the defendant.”<sup>202</sup> In *United States v. Lua-Guizar*, the Seventh Circuit affirmed the district court’s refusal to grant this departure where the district court found the defendant was likely to recidivate (*i.e.*, that the departure would likely “increase the risk to the public from further crimes of the

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<sup>197</sup> See *United States v. Gomez-Sotelo*, 18 F. App’x 690, 692 (10th Cir. 2001); *Marin-Castenada*, 134 F.3d at 555.

<sup>198</sup> *Marin-Castenada*, 134 F.3d at 555.

<sup>199</sup> See *Rodriguez-Lopez*, 198 F.3d at 778; *Galvez-Falconi*, 174 F.3d at 260.

<sup>200</sup> See, *e.g.*, *United States v. Saucedo-Patino*, 358 F.3d 790, 794–95 (11th Cir. 2004); see also *United States v. Dyck*, 334 F.3d 736, 741–42 (8th Cir. 2003) (stating purported lack of criminal intent in reentering the country is not basis for downward departure).

<sup>201</sup> See, *e.g.*, *United States v. Montes-Pineda*, 445 F.3d 375, 379 (4th Cir. 2006) (finding motivation to be reunited with family and fact that prior conviction was 14 years old, though relevant, did not require a non-guideline sentence); *United States v. Sierra-Castillo*, 405 F.3d 932, 938 (10th Cir. 2005) (holding departure based on family circumstances was not appropriate where defendant returned to care for his sick wife but did not show that he was the only person capable of caring for his wife); *Saucedo-Patino*, 358 F.3d at 794 (holding defendant did not qualify for a departure under §§5H1.5 and 5H1.6 where none of the specific aspects of his employment history or family responsibilities were so exceptional as to take his case outside the heartland); *United States v. Carrasco*, 313 F.3d 750, 756–57 (2d Cir. 2002) (finding departure not warranted where defendant was separated from his wife and the provision of financial support for three children was not an exceptional circumstance); *United States v. Abreu-Cabrera*, 64 F.3d 67, 77 (2d Cir. 1995) (stating defendant’s motivation to re-enter to visit his family, absent extraordinary circumstances, may not justify downward departure).

<sup>202</sup> See USSG §2L1.2 comment. (n.8) (Nov. 2018). See also USSG App. C, amend. 740 (explaining the reason for amending §2L1.2 to provide that a downward departure may be appropriate in an illegal reentry case on the basis of the defendant’s cultural assimilation to the United States).

defendant”) given his past cocaine use, the seriousness of his criminal history, and his commission of criminal offenses after illegally reentering the United States.<sup>203</sup> In *United States v. Rodriguez*, the Fifth Circuit affirmed the district court’s refusal to depart based on cultural assimilation, concluding that “[a]lthough cultural assimilation can be a mitigating factor and form the basis of a downward departure, nothing requires that a sentencing court must accord it dispositive weight.”<sup>204</sup>

#### **D. SERIOUSNESS OF PRIOR OFFENSE**

The court may depart if the applicable enhancement substantially understates or overstates the seriousness of the prior conviction. The length of the sentence imposed for the prior conviction, the remoteness of prior convictions too old to receive criminal history points, and the actual time served for the prior conviction are factors that may be taken into consideration for purposes of the departure.<sup>205</sup>

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<sup>203</sup> See *United States v. Lua-Guizar*, 656 F.3d 563, 567 (7th Cir. 2011).

<sup>204</sup> *United States v. Rodriguez*, 60 F.3d 231, 234–35 (5th Cir. 2011) (citation and quotation omitted).

<sup>205</sup> USSG §2L1.2 comment. (n.6) (2018).

## **IMMIGRATION FRAUD OR MISCONDUCT**

This section of the primer provides a general overview of the statutes, sentencing guidelines, and case law related to fraud or misconduct during the immigration process.

### **I. STATUTORY SCHEME**

The most common immigration fraud offenses typically carry a 5-year statutory maximum and are sentenced under §§2L2.1 or 2L2.2.

#### **8 U.S.C. § 1160(b)(7)(A) – FALSE STATEMENTS IN APPLICATIONS**

This statute prohibits knowingly and willfully making false statements in applications for adjustment of alien status.

#### **8 U.S.C. § 1255a(c)(6) – FALSE STATEMENTS IN APPLICATIONS**

This statute also prohibits knowingly and willfully making false statements in an application to adjust status.

#### **8 U.S.C. § 1325(c) – MARRIAGE FRAUD**

This statute prohibits marrying a person to evade immigration laws.

#### **8 U.S.C. § 1325(d) – IMMIGRATION-RELATED ENTREPRENEURSHIP FRAUD**

This statute prohibits establishing a commercial enterprise to evade any provision of the immigration laws.

### **II. GUIDELINE OVERVIEW**

Immigration fraud crimes can fall under two guidelines: §2L2.1 (Trafficking in a Document Relating to Naturalization, Citizenship, or Legal Resident Status, or a United States Passport; False Statement in Respect to the Citizenship or Immigration Status of Another; Fraudulent Marriage to Assist Alien to Evade Immigration Law) or §2L2.2 (Fraudulently Acquiring Documents Relating to Naturalization, Citizenship, or Legal Resident Status for Own Use; False Personation or Fraudulent Marriage by Alien to Evade Immigration Law; Fraudulently Acquiring or Improperly Using a United States Passport).

### A. IMMIGRATION FRAUD – §2L2.1

1. **Base Offense Level:** 11.<sup>206</sup>
2. **Specific Offense Characteristics:** As with smuggling offenses, a reduction applies where (1) “the offense was committed other than for profit” or involved only the defendant’s family. The offense level is also increased based on (2) the number of documents, (3) reason to believe the documents would be used to facilitate a felony, (4) prior conviction for a felony immigration offense, and (5) fraudulent use of a passport.<sup>207</sup>

### B. IMMIGRATION FRAUD – §2L2.2

1. **Base Offense Level:** 8.<sup>208</sup>
2. **Specific Offense Characteristics:** Enhancements apply if the defendant was (1) previously deported, (2) has a record of prior immigration offenses, (3) fraudulently obtained or used a passport, or (4) concealed his or her membership in, or authority over, a military organization that was involved in a serious human rights offense; or committed the offense to conceal his or her participation in genocide or any other serious human rights offense.<sup>209</sup>
3. **Cross Reference:** If the passport or visa was used in the commission of another felony (other than a violation of immigration laws), the guideline for attempt, solicitation, or conspiracy (§2X1.1) applies.<sup>210</sup> If death resulted, the homicide guidelines (§2A1.1–1.5) apply.<sup>211</sup>

### C. SCOPE OF COVERAGE

A number of statutes are covered by both §2L2.1 and §2L2.2: 8 U.S.C. §§ 1160(b)(7)(A), 1185(a)(3), 1255a(c)(6), 1325(c), and 1325(d); and 18 U.S.C. §§ 1015(a)–(e), 1028, 1425, 1426, 1542, 1543, 1544, and 1546.

<sup>206</sup> USSG §2L2.1(a) (Nov. 2018).

<sup>207</sup> USSG §2L2.1(b)(1)–(5) (Nov. 2018).

<sup>208</sup> USSG §2L2.2(a) (Nov. 2018).

<sup>209</sup> USSG §2L2.2(b)(1)–(4) (Nov. 2018).

<sup>210</sup> USSG §2L2.2(c) (Nov. 2018).

<sup>211</sup> *Id.*

Other crimes are covered only by §2L2.1: 8 U.S.C. § 1185(a)(4); 18 U.S.C. §§ 1427, and 1541.

Still other crimes are covered only by §2L2.2: 8 U.S.C. § 1185(a)(5) and 18 U.S.C. §§ 1423, and 1424.

Regarding convictions under 18 U.S.C. § 1028, which prohibits fraud in connection with identification documents, §§2L2.1 and 2L2.2 apply, rather than §2B1.1, when “the primary purpose of the offense . . . was to violate . . . the law pertaining to naturalization, citizenship, or legal resident status.”<sup>212</sup> Courts have used this same reasoning to apply §2L2.1, instead of §2B1.1’s predecessor (§2F1.1), to convictions for making a false statement under 18 U.S.C. § 1001 when the false statement is made in the immigration context.<sup>213</sup>

When “a defendant is convicted of the possession of a relatively minor number of false or fraudulent immigration documents,” a court will have to choose whether the conduct reflects trafficking under §2L2.1 or personal use under §2L2.2.<sup>214</sup>

### III. SPECIFIC GUIDELINE APPLICATION ISSUES

#### A. LACK OF PROFIT MOTIVE – §2L2.1(B)(1)

*If the offense was committed other than for profit, or the offense involved . . . only the defendant’s spouse or child . . . decrease by 3 levels.*

One court declined to grant this reduction where defendants’ employment included preparing false asylum applications, even though their compensation was not tied to specific illegal acts.<sup>215</sup> Courts have upheld a denial of this reduction where evidence suggested the defendant was selling documents.<sup>216</sup>

<sup>212</sup> USSG §2B1.1 comment. (n.10(B)) (Nov. 2018); *see also* United States v. Shi, 317 F.3d 715, 718 (7th Cir. 2003) (holding §2L2.1 applied to a conviction under 18 U.S.C. § 1028 where “the immediate purpose of the offense was to violate a law pertaining to legal resident status”).

<sup>213</sup> *See, e.g.*, United States v. Kuku, 129 F.3d 1435, 1439 (11th Cir. 1997) (remanding conviction under 18 U.S.C. § 1001 for resentencing under §2L2.1 where “(1) the descriptive language of §2L2.1 more specifically characterizes [the defendant’s] offense conduct than does §2F1.1; (2) Comment 11 to §2F1.1 suggests that [the defendant’s] offense conduct is more aptly covered by §2L2.1; and (3) the loss-based method of sentence enhancement used by §2F1.1 does not suit the nature of [the defendant’s] offense conduct”).

<sup>214</sup> *See, e.g.*, United States v. Principe, 203 F.3d 849, 854 & n.3 (5th Cir. 2000) (remanding sentence imposed under §2L2.1 for resentencing under §2L2.2 where defendant possessed three identification cards with her picture under different names).

<sup>215</sup> United States v. Torres, 81 F.3d 900, 902 (9th Cir. 1996).

<sup>216</sup> *See, e.g.*, United States v. Buenrostro-Torres, 24 F.3d 1173, 1175 (9th Cir. 1994); United States v. White, 1 F.3d 13, 18 (D.C. Cir. 1993).

Conversely, one court held it was inappropriate to depart upward based on a profit motive “unless there was a finding that the profit involved in the offense of conviction was of such a magnitude that the three-step increase in the offense level already added did not properly reflect the offense level of the offense of conviction.”<sup>217</sup>

#### **B. NUMBER OF DOCUMENTS INVOLVED – §2L2.1(B)(2)**

*If the offense involved six or more documents or passports, increase by 3, 6, or 9 levels depending on the number of documents involved*

The enhancement under this provision increases with the number of documents involved in the offense. Application Note 2 explains that “[w]here it is established that multiple documents are part of a set of documents intended for use by a single person, treat the set as one document.”<sup>218</sup> One court explained that multiple documents that form a set “constitute only one document even if used many times, by one individual, to perpetuate the same identity fraud.”<sup>219</sup> For example, a set might include “a counterfeit passport, phony green card, and forged work papers.”<sup>220</sup> In contrast, some documents are not a set, even though they will be used only one time by the same person.<sup>221</sup>

Application Note 5 provides that an upward departure may be warranted “[i]f the offense involved substantially more than 100 documents.”<sup>222</sup>

The guideline does not define “document,” but courts have relied on the definition in 18 U.S.C. § 1028(d), concluding that the term “documents” includes not only “those documents that relate to naturalization, citizenship, or legal resident status,” but also any “identification document.”<sup>223</sup>

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<sup>217</sup> United States v. Mendoza, 890 F.2d 176, 180 (9th Cir. 1989), *withdrawn by* 902 F.2d 15 (9th Cir. 1990).

<sup>218</sup> USSG §2L2.2, comment. (n.2) (2018); *see also* Torres, 81 F.3d at 903–04 (holding the number of separate documents is not the same as the number of “sets of documents” and remanding for resentencing where the government did not establish how many sets were contained in the many separate documents it discovered).

<sup>219</sup> United States v. Badmus, 325 F.3d 133, 140 (2d Cir. 2003).

<sup>220</sup> *Id.*

<sup>221</sup> *Id.* (holding multiple visa lottery entries constituted individual documents); United States v. Castellanos, 165 F.3d 1129, 1132–33 (7th Cir. 1999) (holding sheet of blank documents was not a set and counting each blank document individually).

<sup>222</sup> USSG §2L2.1, comment. (n.5) (2018).

<sup>223</sup> United States v. Singh, 335 F.3d 1321, 1323–24 (11th Cir. 2003) (holding driver’s licenses, military identification cards, and United States government identification cards were “documents” under §2L1.2); *see also* Castellanos, 165 F.3d at 1131–32.



A final issue is whether certain documents were “involved” in the offense. One court reasoned that “‘involved’ does not mean ‘produced,’” nor does it “refer[] only to completed documents”; rather, it “refer[s] to items ‘draw[n] in,’ ‘implicated’ or ‘entangled.’”<sup>224</sup>

### **C. USE OF PASSPORT OR VISA TO COMMIT A FELONY – §2L2.1(B)(3)**

*If the defendant knew, believed, or had reason to believe that a passport or visa was to be used to facilitate the commission of a felony offense, other than an offense involving violation of the immigration laws, increase by 4 levels.*

In deciding what constitutes “immigration laws” for purposes of this section, the Eleventh Circuit cited the definition in 8 U.S.C. § 1101(a)(17) to conclude that fraudulently obtaining a Social Security card in violation of 42 U.S.C. § 408(a)(6) was not a violation of immigration laws, therefore allowing application of the 4-level enhancement.<sup>225</sup>

### **D. PRIOR DEPORTATION – §2L2.2(B)(1)**

*If the defendant is an unlawful alien who has been deported (voluntarily or involuntarily) on one or more occasions prior to the instant offense, increase by 2 levels.*

A defendant who voluntarily leaves the country while the appeal is pending qualifies for this enhancement.<sup>226</sup>

### **E. FRAUDULENTLY OBTAINED OR USED A PASSPORT – §2L2.2(B)(3)**

*If the defendant fraudulently obtained or used (A) a United States passport, increase by 4 levels; or (B) a foreign passport, increase by 2 levels.*

This enhancement applies to defendants fraudulently obtaining or using “regular passports” and also extends to “passport cards.”<sup>227</sup>

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<sup>224</sup> United States v. Viera, 149 F.3d 7, 8–9 (1st Cir. 1998) (affirming 6-level enhancement where defendants had over 600 blank Social Security cards); *see also* United States v. Salazar, 70 F.3d 351 (5th Cir. 1995) (affirming enhancement based on hundreds of blank I-94 cards where defendant intended to use them to manufacture fake documents); *Castellanos*, 165 F.3d at 1131–32 (holding guideline applies to “blank” documents).

<sup>225</sup> United States v. Polar, 369 F.3d 1248, 1256–57 (11th Cir. 2004) (affirming enhancement where defendant knew or should have known that his counterfeiting operation would facilitate fraudulently obtaining a Social Security card in violation of 42 U.S.C. § 408(a)(6)).

<sup>226</sup> United States v. Blaize, 959 F.2d 850, 851–52 (9th Cir. 1992) (interpreting same language in former §2L2.4).

<sup>227</sup> United States v. Casillas-Casillas, 845 F.3d 623, 626–27 (5th Cir. 2017) (rejecting defendant’s argument that the enhancement only applied to “regular passports,” but not passport cards).

## **F. DEPARTURES AND VARIANCES**

### *1. National Security*

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Section 2L2.2 authorizes an upward departure “[i]f the defendant fraudulently obtained or used a United States passport for the purpose of entering the United States to engage in terrorist activity.”<sup>228</sup>

Without relying on this provision, courts have increased sentences based on national security and terrorism concerns. In one case, the Eleventh Circuit affirmed a 28-month sentence for conspiracy to produce identification documents, despite a guideline range of 15-21 months under §2L2.1, where the offense was linked to “widespread corruption” within the Florida Department of Motor Vehicles that “impact[ed] national security.”<sup>229</sup> In another case, the Second Circuit affirmed a 36-month sentence for possessing a counterfeit green card, despite a guideline range of zero to six months under §2L2.2, where the defendant was involved in a bombing plot.<sup>230</sup>

### *2. Facilitating Another Offense – §5K2.9*

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One court affirmed a 24-month sentence for making false statements on a passport application, based on an upward departure from base offense level 6 to 15 and from criminal history category I to II, where evidence established that the crime was committed to facilitate another offense for which the defendant had never been convicted—the abduction of his children.<sup>231</sup>

### *3. Motive*

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One court reversed an upward departure based on the defendant’s motive to escape punishment for sexual misconduct, reasoning that motive had already been adequately taken into account by the guidelines.<sup>232</sup>

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<sup>228</sup> USSG §2L2.2, comment. (n.6) (2018).

<sup>229</sup> *United States v. Valnor*, 451 F.3d 744, 747, 749 (11th Cir. 2006).

<sup>230</sup> *United States v. Khalil*, 214 F.3d 111, 126 (2d Cir. 2000).

<sup>231</sup> *United States v. Lazarevich*, 147 F.3d 1061, 1063–64 (9th Cir. 1998). Note that §2L2.2 includes a cross-reference when a passport or visa is used “in the commission or attempted commission of a felony offense.” USSG §2L2.2(c)(1) (2018).

<sup>232</sup> *United States v. Donaghe*, 50 F.3d 608, 613 (9th Cir. 1994) (construing former §2L2.3).