

October 18, 1990

Memorandum

TO: Commissioner Gelacak

FROM: Peter Hoffman

SUBJECT: Aliens ~~Working Group~~

Enclosed are some thoughts and background material pertaining to §2L1.1 and related sections. If I can be of further assistance, please let me know.

cc: Phyllis Newton ✓  
John Steer  
Carol Ricca

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

The addition of specific offense characteristic (b)(2) to §2L1.1 in the April 1987 guidelines was intended to conform the guidelines to the offense level indicated by the FPSSIS proxy "ongoing criminal conduct". However, the specific offense characteristic "prior conviction for the same or similar offense" simply is not a good proxy for such conduct. That was pointed out by the U.S. Attorney's office in San Diego almost immediately upon implementation of the guidelines. That office had recommended the Commission adopt a more direct measure of the scope of the offense (as part of the January 1988 emergency guideline amendments) but the Commission indicated at that time that public comment should be sought prior to such a change.'

The amendment recommended below addresses this issue by substituting the number of aliens smuggled, transported, or harbored as a more direct measure of the scope of the offense. Consistent with the Commission's general approach, the offense level increases gradually with the number of aliens.

Recommended Amendment: Section 2L1.1(b)(2) is amended by deleting:

"If the defendant previously has been convicted of smuggling, transporting, or harboring an unlawful alien, or a related offense, increase by 2 levels.",

and inserting in lieu thereof:

"If subsection (b)(1) does not apply, and the offense involved the smuggling, transporting, or harboring of six or more aliens, increase as follows:

<u>Number of Unlawful Aliens Smuggled, Transported, or Harbored</u>	<u>Increase in Level</u>
6-11	add 1
12-24	add 2
25-49	add 3
50-99	add 4
100 or more	add 5".

The Commentary to §2L1.1 captioned "Application Notes" is amended by deleting Note 2 and inserting in lieu thereof the following:

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'It is also noted that the inclusion of a prior criminal record variable in the offense guideline also is inconsistent with the general treatment of prior record as a separate dimension in the guidelines.

"2. The number of unlawful aliens smuggled, transported, or harbored does not include the defendant."

The Commentary to §2L1.1 captioned "Application Notes" is amended by deleting Note 4, and renumbering Notes 5, 6, 7, and 8 as 4, 5, 6, and 7 respectively.

The Commentary to §2L1.1 captioned "Application Notes" is amended in Note 8 in the first sentence by deleting "extremely large numbers or".

The Commentary to §2L1.1 captioned "Background" is amended by deleting the last sentence.

Conforming Amendments: Section 2L2.1(b) is amended by inserting the following additional specific offense characteristic:

"(2) If the offense involved six or more sets of documents, increase as follows:

<u>Number of Sets of Documents</u>	<u>Increase in Level</u>
6-11	add 1
12-24	add 2
25-49	add 3
50-99	add 4
100 or more	add 5".

Section 2L2.3(b) is amended by inserting the following additional specific offense characteristic:

"(2) If the offense involved six or more passports, increase as follows:

<u>Number of Passports</u>	<u>Increase in Level</u>
6-11	add 1
12-24	add 2
25-49	add 3
50-99	add 4
100 or more	add 5".

Section 3D1.2(d) is amended in the third paragraph, by deleting "2L1.1, 2L2.1, 2L2.3," and in the second paragraph by inserting in the appropriate place by section "§§2L1.1, 2L2.1, 2L2.3;".

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

\* \* \*

- (2) ~~If the defendant previously has been convicted of smuggling, transporting, or harboring an unlawful alien, or a related offense, increase by 2 levels.~~

If subsection (b)(1) does not apply, and the offense involved the smuggling, transporting, or harboring of six or more aliens, increase as follows:

<u>Number of Unlawful Aliens Smuggled, Transported, or Harbored</u>	<u>Increase in Level</u>
6-11	add 1
12-24	add 2
25-49	add 3
50-99	add 4
100 or more	add 5

\* \* \*

- ~~2. "Convicted of smuggling, transporting, or harboring an unlawful alien, or a related offense" includes any conviction for smuggling, transporting, or harboring an unlawful alien, and any conviction for aiding and abetting, conspiring or attempting to commit such offense.~~

2. The number of unlawful aliens smuggled, transported, or harbored does not include the defendant.

\* \* \*

- ~~4. The adjustment under §2L1.1(b)(2) for a previous conviction is in addition to any points added to the criminal history score for such conviction in Chapter Four, Part A (Criminal History). This adjustment is to be applied only if the previous conviction occurred prior to the last overt act of the instant offense.~~

54. For the purposes of §3B1.1 (Aggravating Role), the aliens smuggled, transported, or harbored are not considered participants unless they actively assisted in the smuggling, transporting, or harboring of others.

65. For the purposes of §3B1.2 (Mitigating Role), a defendant who commits the offense solely in return for his own entry or transportation is not entitled to a reduction for a minor or minimal role. This is because the reduction at §2L1.1(b)(1) applies to such a defendant.

76. Where the defendant smuggled, transported, or harbored an alien knowing that the alien intended to enter the United States to engage in subversive activity, an upward departure may be warranted.

87. The Commission has not considered offenses involving ~~large numbers of aliens or~~ dangerous or inhumane treatment. An upward departure should be considered in those circumstances.

Background: This section includes the most serious immigration offenses covered under the Immigration Reform and Control Act of 1986. A specific offense characteristic provides a reduction if the defendant did not commit the offense for profit. ~~A second specific offense characteristic provides an enhancement if the defendant was previously convicted of a similar offense.~~

\* \* \*

§2L2.1. Trafficking in Evidence of Citizenship or Documents Authorizing Entry

\* \* \*

(2) If the offense involved six or more sets of documents, increase as follows:

<u>Number of Sets of Documents</u>	<u>Increase in Level</u>
6-11	add 1
12-24	add 2
25-49	add 3
50-99	add 4
100 or more	add 5

\* \* \*

§2L2.3. Trafficking in a United States Passport

\* \* \*

(2) If the offense involved six or more passports, increase as follows:

<u>Number of Passports</u>	<u>Increase in Level</u>
6-11	add 1
12-24	add 2
25-49	add 3
50-99	add 4
100 or more	add 5

\* \* \*

§3D1.2. Groups of Closely-Related Counts

\* \* \*

- (d) When the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior.

Offenses covered by the following guidelines are to be grouped under this subsection:

§§2B1.1, 2B1.2, 2B1.3, 2B4.1, 2B5.1, 2B5.2, 2B5.3, 2B5.4, 2B6.1;  
§§2C1.1, 2C1.2;  
§§2D1.1, 2D1.2, 2D1.5;  
§§2E4.1, 2E5.1, 2E5.2, 2E5.4, 2E5.6;  
§§2F1.1, 2F1.2;  
§2K2.2;  
§§2L1.1, 2L2.1, 2L2.3;  
§2N3.1;  
§2R1.1;  
§§2S1.1, 2S1.2, 2S1.3;  
§§2T1.1, 2T1.2, 2T1.3, 2T1.4, 2T1.6, 2T1.7, 2T1.9, 2T2.1, 2T3.1, 2T3.2.

Specifically excluded from the operation of this subsection are:

all offenses in Chapter Two, Part A;

§§2B2.1, 2B2.2, 2B2.3; 2B3.1, 2B3.2, 2B3.3;  
§2C1.5;  
§§2D2.1, 2D2.2, 2D2.3;  
§§2E1.3, 2E1.4, 2E1.5, 2E2.1;  
§§2G1.1, 2G1.2, 2G2.1;  
§§2H1.1, 2H1.2, 2H1.3, 2H1.4, 2H2.1, 2H4.1;  
§§~~2L1.1, 2L2.1~~, 2L2.2, ~~2L2.3~~, 2L2.4, 2L2.5;  
§§2M2.1, 2M2.3, 2M3.1, 2M3.2, 2M3.3, 2M3.4, 2M3.5, 2M3.6, 2M3.7, 2M3.8,  
2M3.9;  
§§2P1.1, 2P1.2, 2P1.3.

\* \* \*

Chapter Two, Part L, Subpart 2

The amendment recommended below would expand the titles of §§2L2.1 and 2L2.2 to include expressly additional conduct appropriately covered by these provisions. Conforming revisions in the Statutory Provisions and Appendix A (Statutory Index) would also be made. This amendment would assist the field in selecting the appropriate guideline in these cases. A conforming and clarifying amendment is also recommended to the Commentary captioned "Statutory Provisions" in §2L1.2.

Recommended Amendment: The caption of §2L2.1 is amended by inserting the following at the end "; False Statement in Respect to the Citizenship or Immigration Status of Another; Fraudulent Marriage to Assist Alien to Evade Immigration Law".

The Commentary to §2L2.1 captioned "Statutory Provisions" is amended by inserting "8 U.S.C. § 1325(b);" immediately before "18 U.S.C.", and by inserting "1015(c), (d)," immediately after "§§".

The caption of §2L2.2 is amended by inserting the following at the end: "; False Personation or Fraudulent Marriage by Alien to Evade Immigration Law".

The Commentary to §2L2.2 captioned "Statutory Provisions" is amended by deleting "18 U.S.C. §§" and inserting in lieu thereof "8 U.S.C. § 1325(b); 18 U.S.C. §§ 911, 1015(c),".

Conforming Amendment: The Commentary to §2L1.2 captioned "Statutory Provisions" is amended by deleting "1325" and inserting in lieu thereof "1325(a)".

The Commentary to §2L1.2 captioned "Application Notes" is amended in Note 1 by deleting the text of the application note and inserting in lieu thereof:

"'A first offense' under 8 U.S.C. § 1325(a) is a Class B misdemeanor for which no guideline has been promulgated."

Appendix A (Statutory Index) is amended by deleting:

"8 U.S.C. § 1325 2L1.2",

and inserting in lieu thereof:

"8 U.S.C. § 1325(a) (second and subsequent offense only) 2L1.2";  
"8 U.S.C. § 1325(b) 2L2.1, 2L2.2".

**§2L2.1. Trafficking in Evidence of Citizenship or Documents Authorizing Entry; False Statement in Respect to the Citizenship or Immigration Status of Another; Fraudulent Marriage to Assist Alien to Evade Immigration Law**

\* \* \*

Statutory Provisions: 8 U.S.C. § 1325(b); 18 U.S.C. §§ 1015(c), (d), 1425-1427, 1546.

\* \* \*

**§2L2.2. Fraudulently Acquiring Evidence of Citizenship or Documents Authorizing Entry for Own Use; False Personation or Fraudulent Marriage by Alien to Evade Immigration Law**

\* \* \*

Statutory Provisions: 18 U.S.C. §§ 8 U.S.C. § 1325(b); 18 U.S.C. §§ 911, 1015(c), 1425-1427, 1546.

\* \* \*

2L1.2

\* \* \*

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

\* \* \*

Application Notes:

1. ~~This guideline applies only to felonies. First offenses under 8 U.S.C. § 1325 are petty offenses for which no guideline has been promulgated.~~

~~\*A first offense\* under 8 U.S.C. § 1325(a) is a Class B misdemeanor for which no guideline has been promulgated.~~

\* \* \*

Appendix A

\* \* \*

8 U.S.C. § 1325 2L1.2

8 U.S.C. § 1325(a) (second and subsequent offense only) 2L1.2;

8 U.S.C. § 1325(b) 2L2.1, 2L2.2

December 20, 1989

Memorandum

TO: Peter Hoffman

FROM: Jim Beck

SUBJECT: Offenses Involving Immigration, Naturalization, and Passports (Chapter Two - Part L)

At your request, I recently reviewed a random sample of 100 cases involving violations of immigration and naturalization laws (Chapter Two - Part L). These cases were selected by the Monitoring Unit from the most recent cases received at the Sentencing Commission and care was taken to insure that none of the larger districts were over or under represented.

The sample of cases reviewed includes offenders convicted of smuggling illegal aliens (N=53), offenders convicted of selling fraudulent documents (N=15), and offenders convicted of "illegal entry" (N=32). "Illegal entry" in this review includes a variety of offenses (e.g., illegal entry, possession of false citizenship documents for the offender's own use, and false statements to immigration authorities). A number of the 100 offenders studied, however, were codefendants in the same offense. When codefendants are excluded, 83 separate offenses were examined. For example, one offense involved 5 codefendants out of the 100 offenders studied. To avoid over representing any one offense, codefendants are excluded from this review. The 83 individual offenses studied included smuggling illegal aliens (N=40), selling fraudulent documents (N=11), and "illegal entry" (N=32).

The first issue to be addressed concerns the number of illegal aliens transported in alien smuggling offenses. Generally, the number of aliens transported is easily determined. In the typical situation, a group of alien is intercepted by Border Patrol agents as part of a routine patrol and the number of aliens intercepted (usually fifteen or less) is clear on the record. Only occasionally is the arrest in an alien smuggling offense the result

of a long term investigation. When this occurs, however, the number of aliens transported can be fairly large. For example, the largest number involved in the cases reviewed was 107 aliens in one offense. These 107 aliens, however, were transported over a six month period on eight separate occasions.

The distribution of the number of aliens transported in the 40 alien smuggling cases reviewed is shown in table 1 below.

Table 1. Number of Aliens Transported

0-5 aliens:	N=12
6-10 aliens:	N=9
11-15 aliens:	N=5
16-20 aliens:	N=4
21-30 aliens:	N=3
31-40 aliens:	N=2
41-50 aliens:	N=1
51-100 aliens:	N=1
100-110 aliens:	N=1
Unknown:	N=2

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TOTAL N=40

The second issue concerns the number of documents distributed in offenses involving the distribution of false documents. Unlike alien smuggling offenses, arrests for distributing false citizenship documents to illegal aliens are almost always the result of undercover investigations. As the result, convictions are often based on the sale of two or three sets of false documents to an undercover agent although there may be evidence of more extensive involvement. Rather than attempting to summarize the number of documents in a table, the individual circumstances in each of the eleven offense reviewed as part of this study are summarized below.

Example 1. The offender sold one set of fraudulent documents as part of an undercover operation. There was no discussion in the file of more extensive involvement in the offense. (S.D. California)

Example 2. The offender sold five sets of fraudulent documents to undercover agents. It was alleged, however, that over a seven month period he sold fraudulent documents to an additional 97 individuals for \$23,000. (D. New Mexico)

Example 3. The offenders sold three sets of fraudulent documents to undercover agents. It was alleged, however, that over a seven month period that they sold fraudulent documents to 280 individuals for "several hundred" dollar each. (W.D. Texas)

Example 4. The offender sold one set of fraudulent documents as part of an undercover operation. There was evidence of extensive

involvement in the sale of documents but the total number was not clear in the record. (W.D. Texas)

Example 5. The offender sold one set of fraudulent documents to undercover agents on three separate occasions. He also admitted to selling documents to 110 individuals listed on a confiscated ledger. The number of documents sold is extensive but the exact total is unknown. (S.D. California)

Example 6. The offender sold three sets of documents to undercover agents for \$1,500. There was no information concerning the extent of further involvement. (C.D. California)

Example 7. The offender possessed materials for imprinting immigration papers but there was no evidence that any documents were actually produced or distributed. The offender was convicted of possession of an immigration stamp but the guidelines were based upon trafficking in documents authorizing entry. (S.D. Florida)

Example 8. A group of offenders sold 3 sets of fraudulent documents to undercover agents. Over a period of time, it was alleged that the group sold approximately 10,000 documents. The codefendant in the case reviewed as part of this study, however, was a middle man who bought documents from the larger group for resale to individuals. This offender bought and resold approximately 20 documents. (D. Arizona)

Example 9. The offender sold one set of fraudulent documents as part of an undercover operation. The total number of documents the offender may have distributed is unclear in the record but he is alleged to have earned over \$150,000 from this activity. (M.D. Florida)

Example 10. The offender distributed fraudulent documents to approximately 100 individuals. (S.D. Florida)

Example 11. The offender distributed two sets of fraudulent documents to undercover agents. The extent of further involvement in the offense is unclear.

Lastly, Attachment A shows the guideline range and sentence imposed for each of the 100 cases reviewed.

ATTACHMENT A

Transporting/Harboring Aliens

	<u>Level</u>	<u>Score</u>	<u>Range</u>	<u>Sentence</u>	<u># of Aliens</u>
Case #1	13	III	18-24	18 months	3
Case #2	7	I	1-7	125 days	3
Case #3	7	I	1-7	110 days	25
Case #4	7	I	1-7	5 months	22
Case #5	9	II	6-12	12 months	17
Case #6	9	I	4-10	150 days	17
Case #7	11	I	8-14	10 months	10
Case #8	9	I	4-10	probation	9
Case #9	7	I	8-14	9 months	107
Case #10	9	I	4-10	8 months	5
Case #11	5	I	0-5	probation	8
Case #12	9	I	4-10	4 months	14
Case #13	11	I	8-14	8 months	18
Case #14	9	I	4-10	7 months	10
Case #15	7	I	1-7	probation	10
Case #16	9	I	4-10	6 months	4
Case #17	11	III	12-18	16 months	4
Case #18	9	I	4-10	4 months	?
Case #19	9	I	4-10	6 months	?
Case #20	7	IV	8-14	12 months	13
Case #21	9	II	6-12	7 months	13
Case #22	7	I	1-7	6 months	19
Case #23	9	I	4-10	4 months	?
Case #24	13	IV	24-30	30 months	13

Case #25	4	I	0-4	4 months	4
Case #26	11	I	8-14	7 months	3
Case #27	13	I	12-18	18 months	29
Case #28	7	I	1-7	1 month	6
Case #29	7	I	1-7	1 month	6
Case #30	5	I	0-5	3 months	11
Case #31	11	IV	18-24	24 months	11
Case #32	7	I	1-7	6 months	5
Case #33	11	I	8-14	10 months	3
Case #34	9	I	4-10	5 months	34
Case #35	6	IV	4-10	10 months	13
Case #36	7	I	1-7	1 month	8
Case #37	9	II	6-12	6 months	8
Case #38	7	III	4-10	10 months	9
Case #39	9	I	4-10	6 months	4
Case #40	9	I	4-10	6 months	4
Case #41	11	VI	27-33	9 months	1
Case #42	7	I	1-7	1 month	4
Case #43	7	I	1-7	1 month	4
Case #44	9	I	4-10	18 months	47
Case #45	7	I	1-7	4 months	47
Case #46	7	I	1-7	7 months	5
Case #47	9	I	4-10	10 months	69
Case #48	11	I	8-14	14 months	69
Case #49	2	I	0-2	117 days	2
Case #50	7	I	1-7	150 days	6
Case #51	7	II	2-8	8 months	18

Case #52	7	I	1-7	145 days	31
Case #53	7	I	1-7	probation	31

DISTRIBUTING FRAUDULANT DOCUMENTS

Case #54	7	I	1-7	7 months	
Case #55	9	I	12-18	14 months	
Case #56	9	I	4-10	probation	
Case #57	7	I	1-7	probation	
Case #58	9	I	4-10	probation	
Case #59	7	I	1-7	probation	
Case #60	11	I	8-14	8 months	
Case #61	13	I	12-18	15 months	
Case #62	7	I	1-7	18 months	
Case #63	7	I	1-7	2 months	
Case #64	6	I	0-6	3 months	
Case #65	11	II	10-16	18 months	
Case #66	9	I	4-10	3 months	
Case #67	7	I	1-7	7 months	
Case #68	9	I	4-10	6 months	

OFFENSE RELATED TO ILLEGAL ENTRY

Case #69	6	IV	6-12	6 months	
Case #70	6	VI	12-18	18 months	
Case #71	6	VI	12-18	12 months	
Case #72	6	III	2-8	8 months	
Case #73	6	VI	12-18	18 months	
Case #74	4	I	0-4	100 days	
Case #75	4	I	0-4	78 days	
Case #76	4	I	0-4	90 days	

Case #77	4	I	0-4	70 days
Case #78	6	V	9-15	90 days
Case #79	6	III	2-8	5 months
Case #80	6	II	1-7	90 days
Case #81	6	IV	6-12	9 months
Case #82	4	V	4-10	6 months
Case #83	4	I	0-4	probation
Case #84	6	III	2-8	6 months
Case #85	6	I	0-6	probation
Case #86	6	III	2-8	3 months
Case #87	4	I	0-4	4 months
Case #88	4	II	0-5	100 days
Case #89	6	III	2-8	4 months
Case #90	6	VI	12-18	18 months
Case #91	8	IV	10-16	14 months
Case #92	6	III	0-6	4 months
Case #93	6	IV	6-12	6 months
Case #94	8	V	15-21	12 months
Case #95	6	III	2-8	8 months
Case #96	4	III	0-6	130 days
Case #97	6	III	2-8	8 months
Case #98	6	V	9-15	9 months
Case #99	6	IV	6-12	6 months
Case #100	6	VI	12-18	12 months

**NOTE:** Codefendants in the same offense are marked with a bracket. For example, cases 56 through 60 are all codefendants.