



U.S. Department of Justice

Executive Office for United States Attorneys

Office of the Director

Washington, D.C. 20530

MEMORANDUM FOR: William W. Mercer
Principal Associate Deputy Attorney General

FROM: Natalie A. Voris
Associate Counsel to the Director
Executive Office for United States Attorneys

SUBJECT: Information Request – For Official Use Only

Below please find responses to your recent request regarding the immigration policies of the five (5) Southwest Border districts.

District of Arizona

(a) Does DOJ have a policy on the number of times an alien is apprehended before being prosecuted?

The Phoenix/Tucson/Yuma offices do not have an official policy on the number of times an illegal entrant alien must enter before being prosecuted for the misdemeanor offense of 8 U.S.C. §1325. It is evaluated on a case-by-case basis but almost certainly an alien would not be prosecuted on a first or second offense unless there were aggravating circumstances. However, there is a standing policy of zero tolerance on illegal aliens who come from countries of interest, other than Mexico and Central and South America.

(b) What exceptions are there to this policy (e.g., aggravated felonies, alien smugglers, etc.)?

The Phoenix/Tucson/Yuma offices have guidelines in place to prosecute all provable 8 U.S.C. §§1326(b)(2) and 1326(b)(1) cases where the alien is calculated to be at a level 24 under the U.S.S.G. These offices also prosecute defendants who are currently on Federal Probation or Supervised Release. Under certain circumstances, the Phoenix/Tucson/Yuma offices also prosecute some lower level 8 U.S.C. §1326(b)(2)

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cases. Again, there is a standing policy of zero tolerance on illegal aliens who come from countries of interest, other than Mexico and Central and South America.

(c) What is the minimum prosecutable offense before DOJ prosecutes illegal aliens?

The minimum prosecutable offenses for Phoenix/Tucson/Yuma are misdemeanor illegal entry in violation of 8 U.S.C. § 1325 and misdemeanor aiding and abetting in violation of 8 U.S.C. §1325 and 18 U.S.C. §2.

Southern District of California

(a) Does DOJ have a policy on the number of times an alien is apprehended before being prosecuted?

To SDCA's knowledge, other than the Principles of Federal Prosecution contained in USAM 9-27.000, and the general guidance on immigration violations set forth USAM 9-73.000 and the corresponding sections in the Criminal Resource Manual, the Department does not have a specific policy regarding the prosecution of illegal aliens. Instead, the United States Attorneys are charged with establishing such policies based on the particular circumstances and enforcement priorities in their respective districts. In the SDCA, as a general rule SDCA does not prosecute purely economic migrants. Nor are SDCA's prosecution guidelines based on the "number of times an alien is apprehended." SDCA's prosecution policies are based on the premise that illegal aliens with the most serious criminal histories should be our priority for prosecution. As such, SDCA has directed its resources to bringing felony (as opposed to misdemeanor) charges against illegal aliens with substantial criminal histories so that SDCA can seek longer prison sentences against those who present the greatest threat to public safety. SDCA employs prosecution guidelines for offenses under 8 U.S.C. §1326 which categorize criminal aliens into essentially four categories: violent/major felons (which includes convictions for national security or terrorism offenses), recidivist felons, repeat immigration violators on supervised release, and alien smugglers (guides) who otherwise do not meet our guidelines for smuggling prosecution under 8 U.S.C. §1324.

(b) What exceptions are there to this policy (e.g., aggravated felonies, alien smugglers, etc.)?

Any case not meeting SDCA's prosecution guidelines may be considered for prosecution on a case-by-case basis. SDCA regularly approves for prosecution deserving cases that do not otherwise fall within SDCA's guidelines.

(c) What is the minimum prosecutable offense before DOJ prosecutes illegal aliens?

SDCA believes that it is unclear what is being asked by this question. If this question is asking what is the least severe charge SDCA would employ to prosecute an illegal alien, it would be a Class B misdemeanor under 8 U.S.C. §1325.

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District of New Mexico

(a) Does DOJ have a policy on the number of times an alien is apprehended before being prosecuted?

With regard to *Illegal Entry or Failure to Register* offenses, the District of New Mexico will accept prosecutable cases involving persons who have failed to register as referred by law or who have been previously deported from the United States or if there is sufficient, objective proof that the person was/is involved in terrorism or support thereof.

The decision to accept or decline a re-entry case will be largely determined by the defendant's criminal history in the United States. The District of New Mexico will accept for prosecution readily provable cases when the defendant is subject to an enhancement because of a felony conviction; see 8 U.S.C. §§1326(b)(1) and (b)(2). The District of New Mexico will generally accept for prosecution defendants who do not have a felony conviction but who have prior contact with the criminal justice system; see 8 U.S.C. §§1326(b)(1) and (2). Defendants who have been deported and who re-enter the United States but who do not have prior contact with the criminal justice system will generally be prosecuted only for the misdemeanor offense of entry without inspection, 8 U.S.C. §1325.

For 8 U.S.C. §1325 offenses (improper entry by alien), the District of New Mexico will seek prosecution after the tenth entry without inspection.

With regard to *Transporting or Harboring Undocumented Aliens* offenses, the District of New Mexico will accept prosecutable cases if there is some evidence of a profit motive, if the health or safety of the persons transported was jeopardized, or if the prosecution would further another active investigation, or if there is sufficient, objective proof that the person was/is involved in terrorism or support thereof.

(b) What exceptions are there to this policy (e.g., aggravated felonies, alien smugglers, etc.)?

See above.

(c) What is the minimum prosecutable offense before DOJ prosecutes illegal aliens?

See above.

District

(a) Does DOJ have a policy on the number of times an alien is apprehended before being prosecuted?

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Depending on the Division, will prosecute for illegal entry, after between 6-8 "ident hits" or previous encounters with Border Patrol.

(b) What exceptions are there to this policy (e.g., aggravated felonies, alien smugglers, etc.)?

The will prosecute all aggravated felons with at least one prior deportation as an illegal re-entry case or 8 U.S.C. §1326 case.

(c) What is the minimum prosecutable offense before DOJ prosecutes illegal aliens?

The minimum prosecution is a misdemeanor illegal entry prosecution in Magistrate's Court. If an alien has no criminal history, the alien will be prosecuted after three convictions for 8 U.S.C. §1325 prior to prosecution for 8 U.S.C. §1326.

District

(a) Does DOJ have a policy on the number of times an alien is apprehended before being prosecuted?

prosecutes illegal entrants (misdemeanor 8 U.S.C. §1325) if they have been voluntarily returned (VR'd to Mexico) on seven or more prior occasions, or if they have previously been convicted of some crime (but not previously deported), or if there are other aggravating circumstances (such as resistance, uncooperativeness, etc.) If they have prior illegal entry (technically entry w/o inspection) conviction, but no deportation, prosecutes as felony 8 U.S.C. §1325 prosecutes felony 8 U.S.C. §1326, illegal entry after deportation, for all previously deported aliens who have some criminal history (virtually any prior conviction). If they have no criminal history, may prosecute as 8 U.S.C. §1325 entry without inspection, depending on circumstances. prosecutes all alien smuggling cases involving 6 or more aliens, or involving commercial gain (even if less than 6 aliens). In practice, does not really follow that threshold, and prosecutes almost every case with multiple aliens being transported. Exception may be family members, unless the transporter uses false documents. Then prosecutes as false document case. As a practical matter, turns away few transporting cases.

(b) What exceptions are there to this policy (e.g., aggravated felonies, alien smugglers, etc.)?

Answered above.

(c) What is the minimum prosecutable offense before DOJ prosecutes illegal aliens?

is uncertain about what is being asked.

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U.S. Department of Justice

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MEMORANDUM FOR: Courtney Elwood
Deputy Chief of Staff and Counselor

Bill Mercer
Principal Associate Deputy Attorney General

FROM: Michael A. Battle
Director

DATE: November 22, 2005

SUBJECT: Immigration Prosecution Policy

Prosecution of illegal aliens entering or found in the United States, and particularly along the Southwest Border (SWB), varies between jurisdictions, but all of the United States Attorneys' Offices (USAOs) prosecute the most serious offenses and those offenders with established criminal records as a priority. Along the SWB, offenders entering the country illegally but with no criminal record and no prior deportation are almost certainly going to be voluntarily removed ("VR'd") numerous times before they are formally deported barring some unusual or aggravating circumstance in the case. Several factors contribute to this policy, the most pronounced being the lack of resources and bed space to detain and prosecute every illegal entry violator. Additionally, there is also very little punishment for first-time offenders, and investigative agencies and USAOs are inclined to spend their resources on the more serious offenses. Therefore, offenses in which aliens are smuggled for profit or where an alien with a serious criminal record re-enters the country after being deported will receive priority attention.

In instances where the illegal alien has committed a state or local offense and is then referred to a federal agency for prosecution or deportation, the Department of Justice obviously does not have the authority or jurisdiction to prosecute the alien on his (or her) local or state charge in addition to the immigration violation. This scenario happens frequently in interior jurisdictions as well as border districts. Immigration officers frequently do "jail checks" in which they see if any jailed inmates held on state or local charges are illegal aliens. Additionally, most state and local law enforcement agencies will contact the immigration officers if they suspect that an arrestee is an illegal alien. When an immigration officer encounters an illegal alien either by "jail check" or referral and the alien is charged with a separate state crime, the officer will

normally put a detainer on the subject so that he is turned over to the federal officer to answer the immigration violation as well. The practical effect when this happens is that frequently the state or local authorities will turn the subject over to the federal officer for proceedings - prosecution and/or deportation - on the immigration violation and then dismiss the state charge if it is a minor violation.

Consider this scenario: A county deputy stops and arrests a motorist for *Driving While Intoxicated* (DWI) somewhere in Texas. It is suspected that the motorist is an illegal alien, and an Immigration and Customs Enforcement (ICE) agent is called. The ICE agent interviews the suspect at the jail and determines that (1) he is, in fact, in the country illegally, (2) he has been deported before, and (3) he has a lengthy criminal record. Anticipating a prosecution for 8 U.S.C. 1326 (*Illegal Re-Entry*), the agent places a detainer on the subject with the jail so that he will be held and remanded to federal custody should he post bond on his DWI charge. At this point, what frequently occurs is that the state will allow the USAO to proceed with the federal immigration case. In that scenario, once the alien is successfully prosecuted federally and remanded to the Bureau of Prisons, the state or locals will dismiss the DWI. The Department of Justice has no jurisdiction to prosecute the original DWI charge, and therefore the alien is prosecuted for the immigration violation but escapes prosecution for the original crime through no fault of the USAO. No matter how serious the state or local charge is, the USAO is unable to control the disposition of the state or local prosecution.

Federal prosecution efforts are further affected by the fact that some state and local law enforcement agencies do not contact federal immigration authorities when they encounter suspected illegal aliens or otherwise deportable aliens. Many cities have established "sanctuary" policies in which their police departments are instructed not to contact immigration authorities when they encounter suspected illegal aliens. Therefore, ICE and other federal law enforcement agencies are never made aware of ongoing immigration violators who are released upon completion of their state or local charge or case.