



## Harboring: Overview of the Law

---

The Immigration and Nationality Act (INA) prohibits individuals from concealing, shielding, or **harboring unauthorized individuals who come into and remain in the United States**. Under the law it is a criminal offense punishable by a fine or imprisonment for any person who:

knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation. INA §274(a)(1)(A)(iii); 8 U.S.C. §1324(a)(1)(A)(iii) [hereinafter the “harboring provision” or “Section 1324 (a)”].

### **The Harboring Prohibition Applies to Everyone**

The harboring prohibition is not restricted to those individuals who are in the business of smuggling undocumented immigrants into the United States or who employ undocumented immigrants in sweatshop-like conditions. As interpreted by the courts, *harboring can apply to any person who knowingly harbors an undocumented immigrant*. See, e.g., United States v. Shum, 496 F.3d 390 (5th Cir. 2007); United States v. Zheng, 306 F.3d 1080, 1085 (11th Cir. 2002), *cert. denied*, 538 U.S. 925 (2003); United States v. Kim, 193 F.3d 567, 573-74 (2d Cir. 1999); United States v. Rubio-Gonzalez, 674 F.2d 1067, 1073 (5th Cir. 1982); United States v. Cantu, 557 F.2d 1173, 1180 (5th Cir. 1977), *cert. denied*, 434 U.S. 1063 (1978).

### **What Are the Elements of Harboring?**

To establish a violation of the harboring provision, the government must prove the following in most jurisdictions: “**(1) the alien entered or remained in the United States in violation of the law, (2) the defendant concealed, harbored, or sheltered the alien in the United States, (3) the defendant knew or recklessly disregarded that the alien entered or remained in the United States in violation of the law, and (4) the defendant’s conduct tended to substantially facilitate the alien remaining in the United States illegally.**” Shum, 496 F.3d at 391-392 (quoting United States v. De Jesus-Batres, 410 F.3d 154, 160 (5th Cir. 2005), *cert. denied*, 546 U.S. 1097 (2006) (emphasis added)). The U.S. Court of Appeals for the Seventh Circuit has rejected the fourth element asserting that the phrase “conduct tending substantially to facilitate” is a judicial addition to the statute that is unnecessary for a conviction because the statute requires no specific degree of assistance. United States v. Xiang Hui Ye, 588 F.3d 411, 415-416 (7th Cir. 2009).

### **What Actions Constitute Harboring?**

Although Congress passed legislation to prohibit and punish the “harboring” of undocumented individuals, it never defined the term. The work of defining what constitutes “harboring” has been left to the courts. As shown below, the federal courts have not settled on one uniform definition, but rather many of the circuit courts have adopted their own definition of “harboring.”

- Harboring is conduct that substantially facilitates an immigrant’s remaining in the U.S. illegally and that prevents the authorities from detecting the individual’s unlawful presence. (U.S. Court of Appeals for the Second Circuit)
- Harboring includes affirmative conduct such as providing shelter, transportation, direction about how to obtain false documentation, or warnings about impending investigations that facilitates a person’s continuing illegal presence in the United States. (U.S. Court of Appeals for the Third Circuit)
- Harboring is conduct tending to substantially facilitate an immigrant’s remaining in the U.S. illegally. (U.S. Courts of Appeals for the Fifth Circuit)
- Harboring is conduct that clandestinely shelters, succors, and protects improperly admitted immigrants. (U.S. Court of Appeals for the Sixth Circuit)
- Harboring is conduct that provides or offers a known undocumented individual a secure haven, a refuge, a place to stay in which authorities are unlikely to be seeking him. (U.S. Court of Appeals for the Seventh Circuit)
- Harboring is conduct that affords shelter to undocumented individuals. (U.S. Court of Appeals for the Ninth Circuit)

## **Explanation of Harboring Through Case Law**

### **U.S. Court of Appeals for the Second Circuit**

In the influential case, United States v. Lopez, the U.S. Court of Appeals for the Second Circuit went through the legislative history of the harboring provision and stated that the term *harbor* “**was intended to encompass conduct tending substantially to facilitate an alien’s ‘remaining in the United States illegally,’ provided that the person charged has knowledge of the immigrant’s unlawful status.**” 521 F.2d 437, 441 (2d Cir 1975 ), cert. denied, 423 U.S. 995 (1975) (emphasis added).

In this case, Mr. Lopez owned at least six homes in Nassau County, New York, where he operated safe havens for undocumented individuals. Mr. Lopez knew that the people staying in his homes were undocumented. Each person paid Mr. Lopez \$15 per week to live in his houses. In many cases, people received the address for a particular house before they left their home countries, and, upon crossing the border illegally, they proceeded directly to the house. Mr. Lopez also helped these individuals obtain jobs by completing work applications and transporting them to and from work. He arranged sham marriages for many so that they could appear to be in the U.S. in lawful status. With a warrant, immigration authorities searched six of Lopez’s homes and found twenty-seven undocumented individuals. He was charged with harboring illegal immigrants.

Mr. Lopez argued that the mere providing of shelter to undocumented immigrants does not constitute harboring. Id. at 439. He argued that to constitute harboring the conduct must be part of the process of smuggling immigrants into the U.S. or facilitating the immigrants’ illegal entry into the U.S. Id. The circuit court noted that he essentially argued that to constitute harboring the sheltering would have to be provided either clandestinely or for the purposes of sheltering the immigrants from the authorities. Id.



The Second Circuit rejected these arguments. It held that the statute criminalizes conduct that tends substantially to facilitate an alien's remaining in the United States illegally. *Id.* at 441. The circuit court found that Mr. Lopez's conduct did just that. It pointed out that Mr. Lopez had a large number of undocumented immigrants living at his houses; they obtained the addresses and, upon entering the U.S., proceeded to those houses; Mr. Lopez provided transportation for them to and from work; and, he helped arrange sham marriages. *Id.* The Second Circuit did not require that Mr. Lopez provide the shelter clandestinely nor that he shield the illegal immigrants from detection by immigration authorities. *Id.*

The case of *United States v. Kim* also is instructive on the meaning of harboring. 193 F.3d 567 (2d Cir. 1999). It states that harboring within the meaning of Section 1324(a) “**encompasses conduct tending substantially to facilitate an alien's remaining in the U.S. illegally and to prevent government authorities from detecting [the immigrant's] unlawful presence.**” *Id.* at 574 (emphasis added). In this case, Mr. Myung Ho Kim owned and operated a garment-manufacturing business called “Sewing Masters” in New York City. He employed a number of undocumented workers, including Nancy Fanfar. During the course of her employment, Mr. Kim instructed Ms. Fanfar to bring in new papers with a different name that would indicate that she had work authorization. He instructed Ms. Fanfar to change her name and remain in his employ a second time, even while he was being investigated by immigration authorities.

According to the circuit court, Mr. Kim's actions constituted harboring, for they were designed to help Ms. Fanfar remain in his employ and to prevent her continued presence from being detected by the authorities. Thus, his conduct substantially facilitated her ability to remain in the U.S. illegally in prohibition of the harboring provision. *Id.* at 574 -575.

### **U.S. Court of Appeals for the Third Circuit**

The Third Circuit also has considered what conduct constitutes “shielding,” “harboring,” and “concealing” within the meaning of Section 1324(a). Like the Second Circuit, it determined that these terms encompass **conduct “tending to substantially facilitate an alien's remaining in the U.S. illegally” and [that] prevent[s] government authorities from detecting the alien's unlawful presence.**” *U.S. v. Ozelik*, 527 F.3d 88, 100 (3d Cir. 2008) (emphasis added); *see also Delrio-Mocci v. Connolly Props.*, 672 F.3d 241, 246 (3d Cir. 2012); *U.S. v. Cuevas-Reyes*, 572 F.3d 119, 122 (3d Cir. 2009); *U.S. v. Silveus*, 542 F.3d 993, 1003 (3d Cir. 2008).

In *United States v. Ozelik*, the defendant knew that the individual remained in the U.S. illegally and advised him to “lay low” and “stay away” from the address he had on file with the government. 527 F.3d at 100. However, Mr. Ozelik did not actively attempt to intervene or delay an impending immigration investigation and the Third Circuit held that advising an individual without legal status to stay out of trouble and to keep a low profile does not tend substantially to facilitate their remaining in the country. *Id.* at 100-01. The circuit court reasserted that shielding or **harboring a person without status ordinarily includes affirmative conduct such as providing shelter, transportation, direction about how to obtain false documentation, or warnings about impending investigations that facilitates a person's continuing illegal presence in the United States.** *See Id.* at 99.

In United States v. Silveus, the Third Circuit held that cohabitation, along with reasonable control of premises during an immigration agent's inquiry regarding the whereabouts of the suspected undocumented individual, does not constitute harboring without sufficient evidence that a defendant's conduct substantially facilitated the individual's remaining in the U.S. illegally and prevented authorities from detecting his/her unlawful presence. 542 F.3d at 1002-04. In this case, the agent never saw the suspected undocumented individual, but only heard the apartment door slam, heard some bushes break, and as he approached, saw the defendant shut her front door. Id. at 1002. The defendant spoke to the agent through her window and when asked if anybody had run out of her apartment, she said "I don't know." Id. at 1003. The circuit court determined that the act of shutting a door as an agent rounded the corner and her subsequent reply to the agent's question did not establish "harboring" under Section 1324(a) because it only led to speculation as to the suspect's presence. Id. at 1004.

In United States v. Cuevas-Reyes, the Third Circuit reaffirmed that shielding an undocumented person includes *affirmative* conduct (such as providing shelter, transportation, direction about how to obtain false documents, or warnings about impending investigations) that facilitates the person's continuing illegal presence in the U.S. 572 F.3d at 122. The circuit court held that the defendant's actions (taking undocumented people from the U.S. to the Dominican Republic in his private plane) were undertaken for the purpose of removing them from the U.S., not helping them remain in the U.S. Id. It noted that the goal of Section 1324 is to prevent undocumented individuals from entering or remaining illegally in the U.S. by punishing those that shield or harbor. Id. It asserted that punishing a defendant for helping individuals without legal status leave the U.S. would be contrary to that goal. Id.

More recently, the Third Circuit reiterated that "harboring" requires some act that obstructs the government's ability to discover the undocumented person and that it is highly unlikely that landlords renting apartments to people lacking lawful status could, without more, satisfy the court's definition of harboring. Delrio-Mocci, 672 F.3d at 246 (citing Lozano v. City of Hazleton, 620 F.3d 170, 223 (3d Cir. 2010)). The circuit court reiterated that "[r]enting an apartment in the normal course of business is not in and of itself conduct that prevents the government from detecting an alien's presence." Id.

### **U.S. Court of Appeals for the Fifth Circuit**

The Fifth Circuit's definition of harboring is broader than the Second and Third Circuits. It rejects the notion that to be convicted of harboring a defendant's conduct must be part of a smuggling operation or involve actions that hide immigrants from law enforcement authorities. See De Jesus-Batres, 410 F.3d at 162 (specific intent is not an element of the offense of harboring). An early Fifth Circuit decision, U.S. v. Cantu, 557 F.2d 1173 (5th Cir. 1977), remains informative.

In Cantu, immigration agents visited the restaurant owned by Mr. Cantu because they received information that he was employing undocumented workers. The agents wanted to question the employees. Mr. Cantu refused admission to his restaurant until they could provide a warrant.

While the immigration authorities waited outside for the warrant, Mr. Cantu made arrangements with at least two of his patrons to drive some of his undocumented employees into town. Mr.



Cantu also arranged for his employees to sit in the restaurant and then leave the restaurant like customers. As the employees left the restaurant, the immigration agents approached them and questioned them about their immigration status. The agents determined their illegal status and arrested them.

Mr. Cantu argued that, because he did not instruct his employees to “hide,” and because the employees left the restaurant in full view of the officers, he could not be charged with shielding immigrants from detection. He also argued that his actions were not connected to any smuggling activity. The Fifth Circuit, relying on the Second Circuit’s Lopez decision, rejected these arguments, and determined that Mr. Cantu’s actions – instructing the employees to act like customers so they could evade arrest – tended to facilitate the immigrants remaining in the U.S. illegally. Id. at 1180.

In another Fifth Circuit case, United States v. Varkonyi, 645 F.2d 453 (5th Cir. 1981), the court cited to Lopez to assert that the harboring statute prohibits “any conduct which tends to substantially facilitate an alien’s remaining in the U.S. illegally.” Id. at 459. Mr. Varkonyi provided a group of undocumented immigrants with steady employment at his scrap metal yard six days a week as well as lodging at his warehouse. On previous occasions, he had instructed and aided the men in avoiding detection and apprehension. On the day of their detention, Mr. Varkonyi interfered with Customs and Border Protection agents’ actions by forcibly denying them entry to his property through physical force.

Here, the circuit court found that Mr. Varkonyi’s conduct went well beyond mere employment and thus constituted harboring. Id. at 459. In this case, the court pointed out that Mr. Varkonyi knew of the immigrants’ undocumented status; he had instructed the immigrants on avoiding detection on a prior occasion; he was providing the immigrants with employment and lodging; he interfered with immigration agents to protect the immigrants from apprehension; and he was partly responsible for the escape of one of the immigrants from custody. Id. Given these facts, the circuit court found that Mr. Varkonyi’s conduct, both before and after the detention of the immigrants, was calculated to facilitate the immigrants remaining in the U.S. unlawfully. Id. at 460.

In 2007, the Fifth Circuit ruled in another employment harboring case that “substantially facilitate” means to make an individual’s illegal presence in the United States substantially “easier or less difficult.” United States v. Shum, 496 F.3d 390, 392 (5th Cir. 2007) (citations and quotation marks omitted). The court noted that Section 1324(a) was enacted to deter employers from hiring unauthorized individuals and it refused to adopt a narrow definition of “substantially facilitate” that undermines Congress’s purpose. Id.

In this case, Mr. Shum was vice-president of an office-cleaning company and he employed janitors without legal status. According to witnesses, he provided false identifications to the workers to facilitate background checks so that the workers could clean government office buildings.

Mr. Shum argued on appeal that the government failed to prove that his conduct (employing illegal workers) substantially facilitated their ability to remain in the U.S. illegally. Id. at 392. He asserted that their employment made it more likely that they would be detected and deported. Id. He also argued that those individuals whom he was charged with harboring remained in the U.S. before and after they were employed by him, and thus his conduct had no bearing on them remaining in the U.S. Id.

The Fifth Circuit rejected Mr. Shum's arguments. It held that Mr. Shum made it easier for the workers to remain in the United States illegally by employing them and shielding their identities from detection by the government. Id. At 392-393. The circuit court observed that Mr. Shum not only hired the undocumented workers, but he provided false identification to them to facilitate the background checks required to clean government buildings. Id. In addition, the circuit court remarked that Mr. Shum did not file Social Security paperwork on these workers. According to the Fifth Circuit, there was sufficient evidence to show that Mr. Shum "substantially facilitated" these workers' ability to remain in the United States illegally. Id. at 392.

The District Court for the Eastern District of Louisiana followed Shum in the case of United States v. Louisiana Home Elevations, LLC, CRIM.A. 11-274, 2012 WL 1033619 (E.D. La. Mar. 27, 2012). Here, the defendants challenged the sufficiency of the indictment. They argued that the charge that they conspired to harbor workers without status was deficient because the mere employment of people without legal status does not constitute "substantial facilitation." Id. at \*2. In opposition, the government argued that, by providing the workers with a means of financial support through employment at LHE work sites, the defendants did knowingly and intentionally combine, conspire, confederate, and agree with each other to conceal, harbor, and shield from detection and attempt to conceal, harbor, and shield said workers from detection. Id. at \*4. The district court considered the breadth of the Fifth Circuit's standard and concluded that it cannot hold that knowingly employing undocumented individuals is insufficient as a matter of law to constitute "substantial facilitation." Id. at \*4-5. It also noted that the case was then at the indictment stage and that the indictment did cite and track the four essential elements of a harboring charge. Id. at \*6-7.

### **The U.S. Court of Appeals for the Sixth Circuit**

The Sixth Circuit's interpretation of the harboring provision differs markedly from the approach taken by the Fifth Circuit. **The Sixth Circuit construes "harbor" to mean "to clandestinely shelter, succor and protect improperly admitted aliens ...."** Susnjar v. United States, 27 F.2d 223, 224 (6th Cir. 1928). This case, though quite old, remains the precedent in the Sixth Circuit. See United States v. Belevin-Ramales, 458 F. Supp.2d 409, 411 (E.D. Ky. 2006) (court recognizes that Susnjar is a 1928 case and was decided before the Supreme Court ruling in United States v. Evans, 333 U.S. 483 (1948) and amendments to the statute; however, because neither the Evans case nor the amendments contain language which warrants a holding that Susnjar has been abrogated or implicitly overruled, the court cannot ignore Susnjar). Thus, in the Sixth Circuit, to be guilty of harboring, a person must harbor the undocumented individual secretly or in hiding. Hager v. ABX Air, Inc., 2:07-CV-317, 2008 WL 819293, at \*6-7 (S.D. Ohio Mar. 25, 2008) (knowingly hiring and employing undocumented immigrants does not



establish concealment, harboring, or shielding within the Sixth Circuit because there are no allegations in the complaint that the defendants provided housing or other shelter to the employees and no allegations that the defendants took any steps to shield the employees from detection).

### **U.S. Court of Appeals for the Seventh Circuit**

In United States v. Xiang Hui Ye, 588 F.3d 411 (7th Cir. 2009), the defendant was initially convicted under Section 1324(a)(1)(A)(iii) for employing and shielding undocumented workers. On appeal, defendant Ye argued that “shielding” should not have been defined as “the use of any means to prevent the detection of illegal aliens in the U.S. by the Government,” and cited the Fifth Circuit’s use of “tending substantially to facilitate” as the proper definition through which to examine his conduct. Id. at 415. The circuit court rejected the use of the phrase “conduct tending substantially to facilitate.” It also affirmed Ye’s conviction, taking note that defendant Ye advised undocumented workers to purchase fake documents, kept them off payroll records, provided them with transportation to work, and provided them with housing by entering into lease agreements and making rent payments.

In a recent case, the Seventh Circuit refused to equate harboring with providing a place to stay through cohabitation. See United States v. Costello, 666 F.3d 1040, 1050 (7th Cir. 2012). In this case, the defendant had a romantic relationship and cohabited with her undocumented boyfriend who was eventually removed from the U.S. and subsequently returned without authorization. Id. at 1042. Sometime after his return, the defendant picked him up at a bus terminal and drove him to her home where he then lived more or less continuously until his arrest. Id. The district court judge characterized her actions, including picking the boyfriend up at the Greyhound station, giving him shelter, and coming to his aid after he was arrested, as ‘substantial assistance’ that made his illegal presence in the U.S. easier and helped him avoid detection. Id. at 1042. The circuit court rejected this characterization and the use of “substantial facilitation.” Id. at 1042-3, 1050. Instead, it defined **harboring as providing or offering a known undocumented person a secure haven, a refuge, a place to stay in which the authorities are unlikely to be seeking him.** Id. at 1050. The Seventh Circuit held that cohabitation, without more, is not harboring. Id. The circuit court also rejected the notion that the primary meaning of harboring is “simple sheltering.” Id. at 1049. The Seventh Circuit concluded that there was nothing in the facts to suggest that defendant Costello induced the illegal entry or planned for the illegal entry and subsequent cohabitation. Id. at 1049-50.

### **U.S. Court of Appeals for the Eighth Circuit**

The U.S. Court of Appeals for the Eighth Circuit has determined that **a conviction for harboring does not require proof of secrecy or concealment.** See United States v. Rushing, 313 F.3d 428, 434 (8th Cir. 2002). In this case, two defendants, Mr. Jones and Mr. Ma, were convicted of harboring an undocumented immigrant, Mrs. Zhong. On appeal, they argued that the evidence was not sufficient, and that the jury instruction was in error, because they did not try to hide Mrs. Zhong -- she was working in their restaurant in plain view. Id. The circuit court rejected their arguments. It noted that the evidence justified a finding that Mr. Ma, knowing that Mrs. Zhong had entered the country illegally, gave her a job and a place to live. Id. It also noted that there was sufficient evidence that Mr. Jones, with the same knowledge, helped her to receive

medical care and banking privileges. *Id.* Thus, according to the circuit court, there was more than enough to support a conviction for harboring. *Id.*

The Court of Appeals for the Eighth Circuit also found sufficient evidence to convict a defendant of harboring in United States v. Sanchez, 927 F.3d 376, 379 (8th Cir. 1991). Here the defendant, Mrs. Sanchez, was convicted of, among other things, harboring an undocumented immigrant. The evidence at trial showed that she and her husband met with undocumented immigrants; her husband told the immigrants that he could provide them with immigration papers; her husband rented the undocumented immigrants an apartment; Mrs. Sanchez took the undocumented immigrants to the apartment; and, she told an undocumented immigrant that she would give him a paper that would allow him to work. The Eighth Circuit found that these actions were sufficient evidence to support the jury's finding of guilt for harboring. *Id.*

### **The U.S. Court of Appeals for the Ninth Circuit**

In an early precedent-setting case, the Ninth Circuit **found that the mere provision of shelter, with knowledge of a person's illegal presence, constituted harboring.** See United States v. Acosta De Evans, 531 F.2d 428 (9th Cir.), *cert. denied*, 429 U.S. 836 (1976).

In this case, the U.S. Border patrol visited Ms. Margarita Acosta De Evans' apartment after a tip that undocumented immigrants were living there. At the apartment, the Border Patrol found four undocumented immigrants who stated that they were at the apartment in passing. While the Border Patrol was questioning these individuals, another individual returned to the apartment from a shopping trip. She was an undocumented relative and had been living in the apartment for approximately two months. Ms. Acosta De Evans knew that her relative was not authorized to be present in the United States.

The government charged Ms. Acosta De Evans with harboring unauthorized immigrants. She argued that she did not engage in activities to prevent detection of the unauthorized individuals by law enforcement agents. *Id.* at 429.

The Ninth Circuit rejected her argument. It noted that the standard definition of "harbor" includes both concealment and simple sheltering, and stated that the latter appears to be the primary meaning. *Id.* at 430. The circuit court also looked at the legislative history of the harboring provision and found that the purpose of the section is to keep unauthorized individuals from entering or remaining in the country, and that this "purpose is best effectuated by construing 'harbor' to mean 'afford shelter to.'" *Id.*

As noted above, the Acosta De Evans court concluded that the word "harbor" means "to afford shelter to," and it does not require that the harboring involve the "intent" to shield an immigrant from detection by the authorities. See United States v. Aguilar, 883 F.2d 662, 689-690 (9th Cir. 1989) (harbor means to afford shelter to and does not require an intent to avoid detection) (citations omitted).

However, it is unclear from more recent Ninth Circuit cases if this still remains the standard in the Ninth Circuit or if harboring involves conduct that gives an undocumented individual shelter to avoid detection from authorities. For instance, in United States v. You, 382 F.3d 958 (9th





Cir.), cert. denied, 543 U.S. 1076 (2005), the Ninth Circuit appears to have held that where a defendant is charged with illegal harboring under Section 1324(a), the jury must find that the defendant intended to violate the law. Id. at 966. In this case, defendants were charged with violating 8 U.S.C. §1324(a)(1)(A)(iii), for harboring illegal immigrants. Id. at 962. In a challenge to the jury instructions, the circuit court held that the instruction that required the jury to find that the defendant acted with “the purpose of avoiding [the alien’s] detection by immigration authorities” was adequate, and synonymous with having acted with necessary intent. Id. at 966; see also United States v. Latysheva, 162 Fed. App’x. 720, 727 (9th Cir. 2006) (“harboring of illegal aliens, 8 U.S.C. §1324(a)(1)(A)(iii), is a specific intent crime”); see also United States v. Castaneda-Melchor, 387 Fed. App’x. 767, 769 (9th Cir. 2010) (following You as binding precedent). However, the intent requirement was not clear in the case of Hernandez v. Balakian, CVF06-1383OWW/DLB, 2007 WL 1649911 at \*6-8 (E.D. Cal. June 1, 2007), where the court found that agricultural workers sufficiently alleged the RICO predicate act of harboring undocumented immigrants by alleging that defendants conspired to provide housing to undocumented immigrants and directed their hiring personnel to obtain the housing.

### **U.S. Court of Appeals for the Eleventh Circuit**

In 2007, the U.S. Court of Appeals for the Eleventh Circuit decided the case of United States v. Khanani, 502 F.3d 1281 (11th Cir. 2007). This complicated case involves businessmen who hired undocumented workers to work in their retail stores. Before the district court, the defendants were found guilty of, among other things, conspiracy to conceal, harbor, and shield immigrant workers from detection in violation of 8 U.S.C. §1324(a)(1)(A)(iii). On appeal, they argued that the district court erred in failing to give an instruction stating “that mere employment of undocumented workers cannot support a conviction for harboring.” Id. at 1288. The circuit court rejected this argument. It concluded that the instruction properly required the government to prove a level of knowledge and intent beyond mere employment of illegal immigrants. Id. at 1289. Additionally, the circuit court rejected defendant Portlock’s argument that there was insufficient evidence to convict him of harboring. Id. at 1294. According to the Eleventh Circuit, the jury could reasonably have found that defendant Portlock, the accountant for the businesses, knew that his efforts in forming the four sham companies furthered the defendants’ actions in harboring illegal immigrants, and that his preparation of tax returns was done with the knowledge that the information in those returns improperly omitted sales that were diverted toward paying unauthorized workers. Id. at 1294.

In 2010, the Eleventh Circuit discussed more fully the issue of whether knowingly employing illegal aliens is enough by itself to constitute a violation of the harboring provision. Edwards v. Prime Inc., 602 F.3d 1276 (11th Cir. 2010). In its decision, the circuit court examined the statutory evolution of Section 1324(a)(1)(A)(iii) and noted that knowingly or recklessly hiring illegal aliens is probably enough by itself to establish concealing, harboring, or shielding from detection under the statute. Id. at 1298. However, the circuit court held that they did not need to decide this exact issue because the allegations in the complaint indicated that the defendants not only knew of the workers’ undocumented status, but also that they provided names, social security numbers, and cash payments in order to prevent detection. Id. at 1299 (citing Shum, 496 F. 3d at 392; United States v. Kim, 193 F.3d at 574-75; and United States v. Ye, 588 F.3d 411, 417 (7th Cir. 2009).

## **Knowledge of or Reckless Disregard for Unauthorized Status**

**For an individual to be convicted under the harboring provision, the law requires that the accused either “know” that the individual is not authorized to be in the U.S. or “recklessly disregard” the fact that the individual is not authorized to be in the U.S. INA §274(a)(1)(A)(iii); 8 U.S.C. §1324(a)(1)(A)(iii).**

The Kim case described above discusses the concept of “knowledge.” United States v. Kim, 193 F.3d at 567. Here, the court found that Mr. Kim clearly knew or recklessly disregarded Ms. Farfan’s illegal status. Id. at 574. Proof of Mr. Kim’s knowledge included the facts that: Mr. Kim initially instructed his manager to fire Ms. Farfan because she and others were believed to be illegal immigrants; he allowed Ms. Farfan to remain as an employee and asked her why she had chosen “Ortiz” as her first substitute surname; Ms. Farfan’s real name and first substitute surname appeared on the suspect document list submitted by the immigration authorities; the list indicated that Ms. Farfan’s real name and her substitute name did not have valid social security numbers, and this list was served on Mr. Kim; Mr. Kim and Ms. Farfan spoke several times about her lack of work authorization; and, Mr. Kim told his manager that if the employment scheme was discovered he (Mr. Kim) could go to jail. Id.

**While the Kim case involved direct knowledge, circuit courts have noted that circumstantial evidence alone can establish a defendant’s knowledge or reckless disregard that the individuals harbored are illegally in the country.** See United States v. De Jesus-Batres, 410 F.3d 154, 161 (5th Cir. 2005) (evidence showed that the defendant had knowledge that the immigrants were illegal as she was part of an operation to smuggle illegal immigrants for a fee, the immigrants came to her home directly upon entry into the U.S. with the smugglers who led them over the border, and defendant took turns guarding the immigrants until their fee was paid); United States v. Rubio-Gonzalez, 674 F.2d at 1071-72 (defendant’s knowledge inferred from circumstantial evidence where evidence showed that immediately after the immigration officer released the defendant, he rode his motorcycle to the base of the hill to where two undocumented immigrants were working and told them that “immigration” was there, that the immigrants were from the defendant’s home state in Mexico, with one from his home town, and that the defendant’s brother also was an undocumented immigrant working at the site).

An Eleventh Circuit case, United States v. Perez, 443 F.3d 772 (11th Cir. 2006), discusses “reckless disregard” in the context of a case involving co-defendants who allowed Cuban nationals to board their boat. It interprets the phrase “reckless disregard” by referring to cases and jury instructions for the prohibition for “transporting illegal aliens.”<sup>1</sup>

**The phrase “reckless disregard of the fact,” as it has been used from time to time in these instructions, means deliberate indifference to facts which, if considered and weighted in a reasonable manner, indicate the highest probability that the alleged aliens were in fact aliens and were in the United States unlawfully.** Id. at 781 (citing United States v. Zlatogur, 271 F.3d 1025, 1029 (11th Cir. 2001) (quoting United States v. Uresti-Hernandez, 968 F.2d 1042, 1046 (10th Cir. 1992)).

---

<sup>1</sup> It is a well-established canon of statutory interpretation that identical words used in the same statute are intended to have the same meaning.



Applying the facts to the law, the court found that the defendant, Mr. Perez, acted knowingly or with reckless disregard of the fact that his passengers were Cuban nationals and, thus, inadmissible immigrants. *Id.* The court observed the following: Mr. Perez allowed the passengers to board the boat after their boat became stranded; while some of the individuals presented identification to Mr. Perez, one individual was not asked to do so; when Mr. Perez asked them where in Miami they wanted to go, the passengers simply indicated they wanted to reach “land;” Mr. Perez did not try to help/assist the captain of the first boat after the boat broke down or to report that it was still stranded; Mr. Perez acted nervously and failed to reveal the presence of the passengers in the cabin of the boat before the police officer discovered them; there was no indication that the passengers on the boat had been fishing as Mr. Perez indicated; and Mr. Perez had been convicted of alien smuggling in 2002. *Id.*

Importantly, the district court noted that Mr. Perez was in a different position than his co-defendant because of his prior conviction. Because of his plea and conviction in a similar case, “he was put on notice that it’s not enough to simply take somebody aboard and bring them over here, and the failure to do more, the failure to inquire further, other than to look at some driver’s licenses[,], in his position and under these facts does lead me to conclude that he did act in reckless disregard.” *Id.* at 782. As noted above, the Eleventh Circuit agreed.

### **Charges for Past Conduct**

Charges for harboring an individual pursuant to 8 U.S.C. §1324(a) are now governed by a ten-year statute of limitations. 18 U.S.C. §3298.

A district court in the Sixth Circuit was the first court to address the issue of whether harboring an undocumented individual under 8 U.S.C. §1324(a)(1)(A)(iii) is a continuing offense. *United States v. Arce*, CRIMINAL ACTION NO. 3:11CR-79-H., 2012 BL 131927 (W.D. Ky. May 30, 2012). Because it is not evident in the language of the statute whether the crime is construed so as to extend beyond the time period encompassing the completion of its elements, the court examined the implicit nature of the conduct targeted by the legislature with respect to the tension created with a statute of limitations. *Id.* at 2. The court compared harboring to other continuing offenses, holding that harboring could likewise “be completed over long periods of time, in different geographic locations, and through a multitude of overt acts.” *Id.* at 3, citing *United States v. Lopez*, 484 F.3d 1186, 1192-93 (holding that bringing in an illegal alien can constitute a continuing offense under 8 U.S.C. §1324(a)(2)); *United States v. Strain*, 396 F.3d 689, 697 (5th Cir. 2005) (holding that, for the purpose of venue selection, harboring a fugitive is a continuing offense).

The district court ultimately dismissed the defendant’s motion to dismiss, holding that the defendant could be liable for his conduct beginning in June of 1994 and continuing through 2006, so long as an overt act of furtherance of harboring occurred between 2001 and 2011. *Arce*, 2012 BL 131927 at \*3 (W.D. Ky. May 30, 2012). The defendant was indicted for violations of 8 U.S.C. §§ 1324(a) and 1324(b), on the grounds that he and his wife had knowingly employed an undocumented individual as a live-in domestic worker for nearly 12 years, through which the defendant provided the undocumented individual with a small amount of monetary support and shelter in exchange for her labor. *Id.* at 1.

## **Criminal Penalties -- Commercial Advantage or Private Financial Gain**

The criminal penalties for violating the harboring provision are set forth in the INA §274(a)(1)(B); 8 U.S.C. §1324 (a)(1)(B). A defendant convicted of violating this provision may be fined and/or imprisoned for not more than ten years for *each* foreign national he/she harbors, **when the violation “was done for the purpose of commercial advantage or private financial gain.”** INA §274(a)(1)(B)(i); 8 U.S.C. §274(a)(1)(B)(i). See United States v. Zheng, 306 F.3d 1080, 1086 (11th Cir. 2002).

**Importantly, the statute does not mandate that the government prove that the defendant received payment or asked for any money or anything else of value. Instead, it merely requires that the government show that the defendant acted for the purpose of commercial advantage or financial gain.**

## **Criminal Penalties: No Commercial Advantage, Bodily Injury, & Death**

For *each* foreign national with respect to whom a violation occurs, but where there is no showing that the violation was done for commercial advantage or private financial gain, the defendant may be fined and/or imprisoned for not more than five years. INA §274(a)(1)(B)(ii); 8 U.S.C. §274(a)(1)(B)(ii).

For *each* foreign national with respect to whom a violation occurs and in which the defendant “causes serious bodily injury ... or places in jeopardy the life of any person, may be fined and/or imprisoned for not more than twenty years. INA §274(a)(1)(B)(iii); 8 U.S.C. §274(a)(1)(B)(iii).

For *each* foreign national with respect to whom a violation occurs and which results in the death of any person, the defendant may be punished by death or imprisoned for any term of years or for life, fined, or both. INA §274 (a)(1)(B)(iv); 8 U.S.C. §274(a)(1)(B)(iv).

## **Conclusion**

To establish a violation of the harboring provision, all the government needs to show is that: (1) the immigrant entered or remained in the United States in violation of the law, (2) the person concealed, harbored, or sheltered the immigrant in the United States, (3) the defendant knew or recklessly disregarded the fact that the immigrant was not authorized to be present in the U.S., and (4) the person took some action that tended to substantially facilitate the immigrant’s remaining in the United States in violation of the law. As noted above, this fourth element is not necessary in the jurisdiction covered by the U.S. Court of Appeals for the Seventh Circuit.

Without a doubt, harboring is not restricted to smugglers or those in the smuggling business or to employers that operate businesses in sweatshop-type conditions. Indeed, it applies to *any person* who knowingly *harbors* an undocumented immigrant. The definitions of “harboring” adopted by the federal circuit courts are varied:

- conduct that substantially facilitates an immigrant’s remaining in the U.S. illegally and that prevents government authorities from detecting the individual’s unlawful presence. (U.S. Court of Appeals for the Second Circuit)
- conduct such as providing shelter, transportation, direction about how to obtain false documentation, or warnings about impending investigations that facilitates a person’s



continuing illegal presence in the United States. (U.S. Court of Appeals for the Third Circuit)

- conduct tending to substantially facilitate an immigrant's remaining in the U.S. illegally (U.S. Courts of Appeals for the Fifth Circuit);
- conduct that clandestinely shelters, succors, and protects improperly admitted immigrants (U.S. Court of Appeals for the Sixth Circuit);
- conduct that provides or offers a known undocumented individual a secure haven, a refuge, a place to stay in which authorities are unlikely to be seeking him (U.S. Court of Appeals for the Seventh Circuit); and,
- conduct that affords shelter to undocumented individuals (U.S. Court of Appeals for the Ninth Circuit).

In today's world of increased immigration enforcement, it is difficult to list all of the conduct that may constitute *harboring*. In the employment context, *harboring*, thus far, has been interpreted by most courts to require an affirmative act in addition to the mere employment of undocumented immigrants. Indeed, in the cases analyzed above, the employers' conduct included at least one other affirmative act (besides employing an undocumented worker) that made it easier for the individual to remain in the U.S. illegally. For example, in United States v. Kim, the defendant not only knowingly employed undocumented workers, but he instructed the employee to bring in new papers with a different name to indicate that she was work authorized, and he instructed her to change her name a second time while immigration authorities were investigating the company. In United States v. Shum, the employer not only hired workers without legal status, but he provided the workers with background checks so that they could clean government buildings and not have their status revealed to authorities. Additionally, he failed to file paperwork for the workers with the Social Security Administration. In United States v. Zheng, the employers not only hired undocumented workers, but they housed the workers, paid them low wages for long hours of work, and failed to withhold federal taxes or pay into Social Security.

As noted above, employers have not been convicted of violating the harboring provision for the mere employment of undocumented workers. However, it seems reasonable to infer from case law that some circuit courts, especially the U.S. Courts of Appeals for the Fifth and Eleventh Circuits, with the right set of facts, would determine that knowingly or recklessly hiring illegal workers could be enough (by itself) to establish a violation of the harboring provision.

Outside the employment context, the case law shows that *harboring* can consist of providing shelter to an undocumented immigrant if this conduct substantially facilitates (makes it easier for) the immigrant to remain in the U.S. illegally, undetected by immigration authorities. United States v. Acosta De Evans, above. In the housing context, harboring, thus far, also has been interpreted by the courts to require an affirmative act in addition to merely providing an apartment or house to rent. For instance, in Delrio-Mocci v. Connolly Props, the Third Circuit concluded that renting an apartment, in the normal course of business is not in and of itself harboring. Also, in United States v. Silveus, and United States v. Costello, the Third Circuit and Seventh Circuit Courts found that cohabitation without more is not enough to constitute harboring. That said, it seems reasonable to extrapolate from the case law that some circuit

courts, including the U.S. Court of Appeals for the Fifth, Eleventh, and Ninth Circuits, with the right set of facts, would determine that knowingly or recklessly providing housing to undocumented individuals could be enough (by itself) to establish a violation of the harboring provision.

It also seems clear from case law that any conduct that instructs undocumented immigrants on how to avoid arrest and detection by immigration authorities and conduct that impedes an investigation may fall within the ambit of harboring. Thus, union organizers, teachers, and social workers, for example, should be wary of hindering an immigration investigation in any way and telling undocumented individuals how to avoid arrest and detection by immigration authorities.

In situations where a person is helping an undocumented immigrant seek lawful status in the United States, it does not appear that the government is pursuing penalties under the harboring provision. Indeed, CLINIC has never seen reported or heard of a harboring case that involves this type of legal assistance.

In summary, it appears likely that the government will continue to prosecute harboring cases and argue for the broadest possible definition. It also appears likely that the federal courts will continue to grapple with the meaning of what conduct constitutes harboring. Finally, it seems likely that contradictory precedents will guide decisions in the federal circuit courts.

*This document was updated in March of 2013 by Karen A. Herrling with the assistance of legal interns Julie Silvia and Théophé Love. This document is for informational purposes only and is not intended as legal advice. For questions, please contact CLINIC's State & Local Advocacy Attorney, Jen Riddle at (202)635-7410 or [jriddle@cliniclegal.org](mailto:jriddle@cliniclegal.org).*