

## 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 Section 274(a)(1)(A)(iii); 8 U.S.C. Section 1324(a)(1)(A)(iii) [hereinafter the harboring provision].

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

To establish a violation of the harboring provision, the government must prove the following: **“(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.”** U.S. v. Shiu Sun Shum, 496 F.3d 390, 2007 U.S. App. LEXIS 19104 (5<sup>th</sup> Cir. 2007) (citing United States v. De Jesus-Batres, 410 F.3d 154, 160 (5<sup>th</sup> Cir.), cert. denied, 126 S.C. 1020 (2005)).

### **The Harboring Provision Applies to All Persons**

The harboring provision of the law is not restricted to those individuals who are in the business of smuggling undocumented immigrants into the United States. As interpreted by the courts, **harboring can apply to any person who knowingly harbors an undocumented immigrant, including employers.** See U.S. v. Shiu Sun Shum, 496 F.3d at 390 (emphasis added); U.S. v. Zheng, 306 F.3d 1080, 1085 (11<sup>th</sup> Cir.), cert. denied, 538 U.S. 925 (2002); U.S. v. Kim, 193 F.3d 567, 573-74 (2d Cir. 1999); U.S. v. Rubio-Gonzalez, 674 F.2d 1067, 1071 (5<sup>th</sup> Cir. 1982); (U.S. v. Cantu, 557 F.2d 1173, 1180 (5<sup>th</sup> Cir. 1977), cert. denied, 434 U.S. 1063 (1978)). Additionally, the harboring provision is not restricted to those who employ undocumented immigrants under sweat-shop-type conditions. See U.S. v. Zheng, 306 F.3d at 1085. As the Zheng court points out, the “plain language of 1324 does not limit its reach to certain specific individuals.” Id. at 1085-1086 (employers were found guilty of harboring undocumented immigrants for their private financial gain because they provided employment and housing for the workers; they paid the workers low wages; they failed to withhold federal taxes and Social Security payments for the workers; they failed to pay unemployment taxes; they

failed to pay the employer's portion of Social Security payments, and they transferred more than \$200,000 in unreported cash to China.).

**Case Law: What Actions Constitute Harboring?**

Under the relevant case law, *harboring* means “to afford shelter to,” and includes any conduct “tending to substantially facilitate an immigrant’s remaining in the U.S. illegally.” However, in some courts, such as the U.S. Court of Appeals for the Sixth and maybe the Ninth and Eleventh Circuits, *harboring* must be done with the “intent” to assist the immigrant’s attempt to evade or avoid detection.

**Second Circuit Case Law**

In *United States v. Lopez*, 521 F.2d 437 (2<sup>nd</sup> Cir.), cert. denied, 423 U.S. 995 (1975), 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.” *Id.* at 441.

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, the people received the addresses 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 to obtain jobs by completing work applications and transporting them to and from work. He arranged sham marriages for many of them so that they could appear to be in the U.S. in lawful status. With a warrant, immigration authorities searched six of his 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 in to the U.S. *Id.* The 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. **The Second Circuit held that the statute criminalizes conduct that tends substantially to facilitate an alien’s remaining in the United States illegally.** *Id.* at 441. And, it found that Mr. Lopez’s conduct did just that. The court pointed out that Mr. Lopez had a large number of undocumented immigrants living at his houses; they had his address upon entering the U.S. and 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 shield the illegal immigrants from detection by immigration authorities. *Id.*

The case of *U.S. v. Kim*, 193 F.3d 567 (2d Cir. 1999), also is instructive on the meaning of *harboring*. It states that *harboring* within the meaning of Section 1324 “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. 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 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.

#### Fifth Circuit Case Law

Like the Second Circuit, the Fifth Circuit 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 *U.S. v. De Jesus-Bartes*, 410 F.3d at 162 (specific intent is not an element of the offense of harboring). An early Fifth’s Circuit’s decision, *U.S. v. Cantu*, 557 F.2d 1173 (5<sup>th</sup> Cir. 1977), remains informative.

In *Cantu*, immigration agents visited the restaurant of 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 Lopez, 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, U.S. v. Varkonyi, 645 F.2d 453 (5<sup>th</sup> Cir. 1981), the court once again cited to the Second Circuit’s Lopez decision that the harboring statute prohibits “any conduct which tends to substantially facilitate an alien’s remaining in the U.S. illegally.” Id. at 459. Here, the court found that Mr. Varkonyi’s conduct went well beyond mere employment and thus constituted harboring. Id. at 459. The court pointed out that Mr. Varkonyi knew of the immigrant’s undocumented status, he instructed the immigrants on avoiding detection on a prior occasion, he was providing the immigrants with employment and lodging, he interfered with the 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 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.

Recently, the **Fifth Circuit** ruled in an employment harboring case in U.S. v. Shiu Sun Shum, 496 F.3d 390, 2007 U.S. App. LEXIS 19104 (5<sup>th</sup> Cir. 2007). **It defined “substantially facilitate” as the “means to make an alien’s illegal presence in the United States substantially ‘easier or less difficult.’”** Id. 2007 U.S. App. LEXIS 19104 at \* 4 (citations omitted). It pointed out that Section 1324 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. 2007 U.S. App. LEXIS 19104 at \* 3. He pointed out 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.* 2007 U.S. App. LEXIS 19104 at \*4. The Court noted 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.* 2007 U.S. App. LEXIS 19104 \*5. In addition, the court noted that Mr. Shum did not file Social Security paperwork on these workers. According to the court, there was sufficient evidence to show that Mr. Shum "substantially facilitated" these workers' ability to remain in the United States illegally. *Id.*

#### Sixth Circuit Case Law

The Sixth Circuit's interpretation of the *harboring* provision differs from the approach taken by the Second and Fifth Circuits. **The Sixth Circuit construes "harbor" to mean "to clandestinely shelter, succor and protect improperly admitted aliens ...."** *Susnjar v. U.S.*, 27 F.2d 223, 224 (6<sup>th</sup> Cir. 1928). This case, though probably out of date, remains the precedent in the Circuit. See *U.S. 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 *U.S. 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 an immigrant, a person must harbor the individual secretly or in hiding.

#### The Ninth Circuit Case Law

**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 the crime of harboring.** See *United States v. Acosta De Evans*, 531 F.2d 428 (9<sup>th</sup> Cir.), cert. denied, 429 U.S. 836 (1976).

In this case, the U.S. Border patrol visited Ms. Margarita Acosta De Evans' apartment on 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 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 U.S. v. Aguilar, 883 F.2d 662, 689-690 (9<sup>th</sup> 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.** For instance, in U.S. v. You, 382 F.3d 958 (9<sup>th</sup> Cir.), cert. denied, 543 U.S. 1076 (2004), the Ninth Circuit appears to have held that where a defendant is charged with illegal harboring under Section 1324, 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. Section 1324(a)(1)(A)(iii), for harboring illegal immigrants. *Id.* at 962. In a challenge to the jury instruction, the court held that the jury 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 U.S. v. Latysheva, 162 Fed. Appx. 720, 727 (9<sup>th</sup> Cir. 2006) (“harboring of illegal aliens, 8 U.S.C. Section 1324(a)(1)(A)(iii), is a specific intent crime”). However, the intent requirement was not clear in the case of Hernandez v. Balakian, 488 F.Supp.2<sup>nd</sup> 1198, 1211-1212 (E.D. Cal. 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.

#### Case Law from other Circuit Courts of Appeal

Relying on the Ninth Circuit’s opinion in Acosta De Evans case, the U.S. Court of Appeals for the **Eighth Circuit concluded that a conviction for harboring does not require proof of secrecy or concealment.** See U.S. v. Rushing, 313 F.3d 428, 434 (8<sup>th</sup> 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 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 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 U.S. v. Sanchez, 927 F.3d 376, 379 (8<sup>th</sup> Cir. 1991). Here the defendant, Mrs. Sanchez, was convicted, among other things, of 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 court found that these actions were sufficient evidence to support the jury's finding of guilt for harboring. Id.

This October, the U.S. Court of Appeals for the **Eleventh Circuit** decided the case of U.S. v. Saleem Khanani, David Portlock, 2007 U.S. App. LEXIS 23037 (11<sup>th</sup> Cir. 2007), a somewhat complicated case involving businessmen who hired undocumented workers to work in their retail stores. Before the trial court, the defendants were found guilty, among other things, of conspiracy to conceal, harbor, and shield immigrant workers from detection in violation of 8 U.S.C. Section 1324(a)(1)(A)(iii). On appeal, they argued that the trial court erred in failing to give an instruction stating that mere employment of undocumented immigrants cannot support a conviction for harboring. Id. at \*12. Based upon the jury instruction that the judge gave, the Eleventh Circuit 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 \*13. Additionally, the court rejected defendant Portlock's argument that there was insufficient evidence to convict him of harboring. Id. at \*26. According to the court, the jury could reasonably have found that defendant Portlock, the accountant, 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 of unauthorized workers. Id. at \* 30-31.

#### **Knowledge or Recklessly Disregarded**

**For an individual to be convicted of 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 Section 274(a)(1)(A)(iii); 8 U.S.C. Section 1324(a)(1)(A)(iii)

The Kim case, supra, discusses the concept of “knowledge.” U.S. 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: 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, 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 U.S. v. De Jesus-Batres, 410 F.3d 154, 161 (5<sup>th</sup> 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 smuggling fee, the immigrants came to the defendant’s 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); U.S. 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 defendant he rode his motorcycle to base of hill to where two undocumented immigrants were working and told them that “immigration” was there, that immigrants were from defendant’s home state in Mexico, with one from his home town, and that defendant’s brother also was an undocumented immigrant working at the site).

A recent Eleventh Circuit case, U.S. v. Perez, 443 F.3d 772 (11<sup>th</sup> Cir. 2006), discusses “reckless disregard” in the context of a case involving a defendant and co-defendant 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,

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<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.

1029 (11<sup>th</sup> Cir. 2001) (quoting United States v. Uresti-Hernandez, 968 F.2d 1042, 1046 (10<sup>th</sup> Cir. 1992)).

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 pointed out 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 like Mr. Perez indicated; and Mr. Perez was 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.

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

The criminal penalties for violating the harboring provision are set forth in the INA Section 274(a)(1)(B); 8 U.S.C. Section 1324 (a)(1)(B). A defendant that is 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 Section 274(a)(1)(B)(i); 8 U.S.C. Section 274(a)(1)(B)(i). See U.S. v. Zheng, 306 F.3d at 1086.

**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 Section 274(a)(1)(B)(ii); 8 U.S.C. Section 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 Section 274(a)(1)(B)(iii); 8 U.S.C. Section 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 might be punished by death or imprisoned for any term of years or for life, fined, or both. INA Section 274 (a)(1)(B)(iv); 8 U.S.C. Section 274(a)(1)(B)(iv).

### **U.S. ICE and the Harboring Provision**

U.S. Immigration and Customs Enforcement (ICE) dramatically increased its worksite enforcement actions against employers over the past year. **In many cases, it has chosen to bring criminal indictment against employers for *harboring* illegal immigrants rather than pursuing civil actions against employers for *knowingly hiring* undocumented workers.<sup>2</sup>**

ICE’s commitment to this strategy was recently affirmed by Julie Meyers, the Assistant Secretary of Homeland Security for U.S. Immigration and Customs Enforcement (ICE), in her answer to a pre-hearing questionnaire sent by the U.S. Senate Committee on Homeland Security and Governmental Affairs. In response to the question “what criteria does ICE use to select the handful of establishments that are the subjects of raids?” Ms. Meyers responded:

ICE pursues leads of criminal wrongdoing in worksite enforcement investigations, as well in other programmatic areas. In determining which cases will be prosecuted, ICE pursues those cases that will be most likely to result in criminal prosecutions, seizure of assets and overall deterrent effect that will result from the investigation.

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<sup>2</sup> Note: INA Section 274 Differs from INA Section 274A

INA Section 274, 8 U.S.C. Section 1324 should not be confused with INA Section 274A, 8 U.S.C. Section 1324a, which is entitled “unlawful employment of aliens.” This section imposes on an employer the obligation to refrain from knowingly employing an individual who is not authorized to work in the U.S. See INA Section 274A(a); 8 U.S.C. Section 1324a(a). It also imposes on employers an employment verification system whereby employers who are hiring workers must complete an Employment Eligibility Verification form (I-9 Form) for each new hire. See INA Section 274A(b)(1); 8 U.S.C. Section 1324a(b)(1). This section also imposes lesser penalties on individuals that are found to have unlawfully employed workers who are not work authorized. Cf. INA Section 274, 8 U.S.C. Section 1324 and INA Section 274A(e)(5), 8 U.S.C. Section 274a(e)(5).

It is clear from Ms. Meyers' statement that ICE will continue to target those employers that it perceives to be involved in criminal wrongdoing and bring criminal prosecutions against them. There are at least four reasons for this strategy. First, criminal prosecutions can yield longer prison terms and higher fines than a civil fine imposed for unlawfully employing immigrants. Second, the government can receive the forfeiture of assets that are the product of the illicit activity in criminal prosecutions (this is not possible when the government alleges civil violations). Third, criminal prosecutions instill fear among employers and will likely deter them from knowingly employing and harboring undocumented immigrants. Fourth, in a criminal prosecution for harboring the government must show 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. The reckless disregard standard may be easier for the government to prove in some instances and thus contribute to the increased number of criminal prosecutions.

Below is information about employers that have been criminally charged with harboring undocumented workers. This information was taken from ICE's website and includes criminal prosecutions in varying stages of prosecution during the months of July and August of 2007. In all of the cases below, the defendants allegedly have done more than simply employing undocumented workers.

#### Criminal Indictments:

1. The president, production manager, and contracts specialist of **Michael Bianco, Inc., in New Bedford, Massachusetts**, were indicted on August 2, 2007, and charged with conspiring to harbor and hire undocumented immigrants.

The indictment charges, among other things, that as part of the alleged conspiracies, the defendants knowingly employed undocumented immigrants; certain defendants assisted undocumented immigrants in obtaining housing in the local area by providing advance payments to some employees; defendants instructed undocumented immigrants in how to avoid detection by the authorities; the defendants attempted to conceal, harbor, and shield from detection certain undocumented employees; the defendants assisted certain undocumented employees in obtaining fraudulent identification documents; and certain defendants knowingly filed and caused to be filed, W-2 tax forms with the Social Security Administration containing false identity information.

2. On July 12, 2007, several owners of **El Pollo Rico Restaurant in the DC Metropolitan area** were charged with employing and harboring immigrants, money laundering and structuring deposits to avoid reporting requirements. According to the affidavit filed in support of the criminal complaint, the defendants allegedly employed numerous undocumented immigrants at the restaurant and paid them in cash until the

employee obtained temporary status, at which time they were paid by check. The employees were housed in residences owned by one of the defendants. Customers paid for their food in cash. According to the complaint, the cash payments permitted the defendants to hide payments to undocumented employees. (Note: The allegations with respect to money laundering and structuring deposits to avoid reporting requirements are not set forth here.)

3. ICE made additional criminal arrests at **Swift & Company plants** on July 11, 2007. Those arrested included a human resources employee, a union official, and current or former Swift employees identified by the Federal Trade Commission (FTC) as suspected identity thieves. Both the human resources employee and the union official were charged with harboring undocumented immigrants. Mr. Pereyra-Gabino, the union official, was charged with a single count of shielding from detection and attempting to shield from detection undocumented immigrants at the Marshalltown meatpacking plant from June 2003 until he was arrested in early July 2007. Prosecutors have alleged that, in orientation speeches that he gave to new Spanish-speaking employees, Mr. Pereyra-Gabino told undocumented workers how to avoid detection and arrest.

#### Guilty Pleas

1. Abelino Chicas, a systems manager for the **Pallet Management Division of IFCO Systems North America (IFCO)** pled guilty on July 16, 2007, before a U.S. District Judge in Albany, N.Y., to the felony offense of aiding and abetting the transportation and harboring of illegal immigrants. His sentencing is scheduled for Nov. 8, 2007.

In connection with his guilty plea, Mr. Chicas admitted that from sometime in 1990 through in or about April 2006, he transported and harbored undocumented immigrants in the U.S. Among other things, at the request of senior and plant managers at Texas Pallet and IFCO, Mr. Chicas found pallet workers for the plants that he knew or recklessly disregarded were unauthorized workers or workers with false documents. Additionally, between November 2004 and December 2005, Mr. Chicas assisted two managers at IFCO find Hispanic pallet workers. Also, he discussed the undocumented status of the workers he was sending to the Albany plant with managers. In the case of one of the workers he helped to send to Albany, Mr. Chicas knew that the individual entered the U.S. from Nicaragua to join his son at the Albany IFCO plant. Mr. Chicas suggested to the son that he obtain a loan from the managers in Albany to pay to get his father into the U.S. After the father had entered the U.S., Mr. Chicas arranged for an acquaintance to house him and transport him toward Albany for work. Further, Mr. Chicas was recorded on the telephone helping to plan a failed attempt to transport several undocumented immigrants from Houston to Albany to work at IFCO.

2. Gerardo Dominguez-Chacon, a former supervisor for **Quality Service Integrity Inc. (QSI)** at a Cargill Pork Processing Plant, pled guilty to harboring illegal immigrants and aiding and aggravated identity fraud on July 12, 2007 before a U.S. District Judge in Illinois. His sentencing is scheduled for November 19<sup>th</sup>.

At his plea agreement, Mr. Dominguez-Chacon admitted that between December 2006 and April 3, 2007, he knowingly hired immigrants without proper work authorization. He admitted that he instructed prospective QSI employees without proper work authorization in how to obtain new identities. He then employed these workers under the assumed identities. Also, on separate occasions, Mr. Dominguez-Chacon admitted that he provided four QSI employees with the identification and corresponding social security number of another person.

### Sentencing

1. The owner of the **Stitching Post**, a store that sells and repairs sewing machines in Centerville, Ohio, was sentenced to prison on July 23, 2007. The owner, Joseph Fulmer, had previously pled guilty to a four-count information charging him with one count each of encouraging and inducing illegal immigrants to come to the United States, harboring illegal immigrants, fraud and misuse of government documents, and engaging in a pattern of employing illegal immigrants. According to the statement of facts filed with the plea, Mr. Fulmer began making regular trips from the U.S. to Mexico in March 2002, where he approached Mexican nationals about coming to work for him. He agreed to pay for at least four undocumented workers to travel from Texas to Dayton, where he picked them up at the bus station and took them to his home. In March of 2007, Mr. Fulmer took three undocumented persons on a cruise, knowing that at least one of them possessed and used false identification documents to get back into the U.S.

### 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, harboring is not restricted to smugglers or those in the smuggling business. Indeed, it applies to *any person* who knowingly *harbors* an undocumented immigrant. Case law generally defines *harbor* to mean "to afford shelter to" and includes any conduct tending to substantially facilitate an immigrants remaining in the U.S. illegally.

In the U.S. Courts of Appeals for the Second, Fifth and Eighth Circuits, it appears that the government does not have to prove that the defendant harbored an undocumented immigrant with the intent to assist the individual attempt to evade or avoid detection by law enforcement. However, as noted above, the U.S. Courts of Appeals for the Sixth Circuit does have a specific intent requirement and it appears that the Ninth and Eleventh Circuit Courts have one as well.

**In the employment context, it seems reasonable, based upon the case law, to conclude that *harboring* will be interpreted to require acts 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 that made it easier for the undocumented immigrant to remain in the U.S. illegally.** For example, in U.S. v. Kim, *supra*, 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 U.S. v. Shiu Sun Shum, *supra*, 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 paper work for the workers with the Social Security Administration. And, in U.S. v. Zheng, *supra*, the employers not only hired undocumented workers, but they housed the workers, paid low wages to the workers for long hours of work, and failed to withhold federal taxes or pay into Social Security Administration for the workers.

It also appears that when the government prosecutes an employer for harboring undocumented immigrants, it alleges conduct that goes beyond merely employing undocumented workers. By looking at the cases in varying stages of prosecution from July and August of 2007, the allegations show that each employer took some affirmative step(s) to make it easier for the undocumented immigrants in their workforce to remain in the U.S. illegally. As an example, in the Michael Bianco, Inc. case, the allegations include helping undocumented workers obtain housing, instructing them on how to avoid detection, assisting them with obtaining fraudulent identification documents, and filing false information with the Social Security Administration. In the El Pollo Rico Restaurant case, the allegations include, employing undocumented immigrants, paying them in cash, housing them, and structuring a customer payment system that permits the defendants to hide payments to its undocumented employees from being detected by the authorities. In the guilty plea entered by the former QSI supervisor, the supervisor admitted that he knowingly hired undocumented immigrants, he told prospective employees without work authorization how to obtain new identities, he then employed these workers under assumed identities, and on a separate occasion, he provided former QSI employees with identification documents and Social Security numbers of another person.



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. U.S. v. Acstoa De Evans, *supra*.

In today's world of increased ICE enforcement actions it is difficult to list all of the conduct outside of the employment and sheltering context that ICE and the courts might construe as "as tending to substantially facilitate an immigrant's remaining in the United States illegally." In situations where a person is helping an undocumented immigrant to seek lawful status in the United States, it does not appear that the government is currently pursuing penalties under the harboring provision. Indeed, CLINIC has never seen a harboring case reported that involves this type of legal assistance. That said it is unclear at this time to which conduct the harboring penalties might be attached.

Written by Karen Herrling and edited by Kathleen Sullivan of the Catholic Legal Immigration Network, Inc. (CLINIC).

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