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## Immigration-Related Criminal Offenses

The Immigration and Nationality Act (INA) governs the admission, removal, and presence of individuals who are not citizens or nationals of the United States (i.e., “aliens” as defined in the INA). Congress has established criminal sanctions for certain conduct that undermines immigration rules. Immigration-related cases make up a significant portion of the federal criminal caseload, accounting for 29.6% of all cases in Fiscal Year 2021. *See* U.S. SENTENCING COMMISSION, FISCAL YEAR 2021 OVERVIEW OF FEDERAL CRIMINAL CASES 18 (2022). Immigration-related crimes generally cover three categories of conduct: (1) improper entry and reentry; (2) smuggling, transporting, and harboring aliens; and (3) immigration-related fraud.

### Improper Entry and Illegal Reentry

Unlawfully entering the United States may result in criminal sanction with enhanced penalties for illegal reentry.

**Improper Entry:** 8 U.S.C. § 1325(a) makes it a criminal offense to enter or attempt to enter the United States without authorization. A violation may result in a fine and imprisonment for up to six months for a first offense and up to two years’ imprisonment for a subsequent violation. An alien may commit improper entry in three ways:

1. entering or attempting to enter the United States at any time or place other than as designated by immigration officers;
2. eluding examination or inspection by immigration officers; or
3. attempting to enter or obtaining entry by a willfully false or misleading representation or the willful concealment of a material fact.

**Illegal Reentry:** 8 U.S.C. § 1326 makes it a felony for an alien previously denied admission or removed from the United States (or who departed the country while an order of removal was outstanding) to enter, attempt to enter, or be found in the United States without prior authorization. Absent certain factors, a conviction carries a punishment of a fine and imprisonment for up to two years. Aliens may face enhanced penalties if they were previously removed or excluded on certain grounds or had committed specified crimes. *See* 8 U.S.C. § 1326(b). In some cases, the maximum penalty may be up to 20 years’ imprisonment.

Some reviewing courts have held that the alien must have entered “free from official restraint,” though the statutory language does not expressly use that term. *See United States v. Gaspar-Miguel*, 947 F.3d 632, 633-34 (10th Cir. 2020) (detailing history of the concept of “freedom from official restraint”); *United States v. Pacheco-Medina*, 212 F.3d 1162, 1166 (9th Cir. 2000) (reversing conviction for

illegal reentry when the defendant was immediately apprehended when stepping on U.S. soil and was thus never free from official restraint); *see also United States v. Lombera-Valdovinos*, 429 F.3d 927 (9th Cir. 2005) (overturning conviction for attempted illegal reentry because the alien crossed with the specific intent to be imprisoned). Some circuits have neither explicitly endorsed nor rejected the doctrine. *See, e.g., United States v. Rojas*, 770 F.3d 366, 368 (5th Cir. 2014) (deciding case without reaching the question of whether the circuit should recognize the official restraint doctrine).

### Bringing in, Harboring, Transporting, or Encouraging Aliens

Several provisions in the INA criminalize activities that involve smuggling aliens into the United States, transporting aliens within the United States, or otherwise assisting unlawfully present aliens to remain in the country. Located in 8 U.S.C. § 1324, these offenses typically constitute felonies and may sometimes carry lengthy prison terms, including enhanced penalties when the offense is performed for commercial advantage or private financial gain. In a few instances, such as alien smuggling offenses resulting in serious harm to or the death of a person, the maximum available penalty may be life imprisonment or death. Additionally, any vehicle, vessel, or aircraft that was used in the commission of the crime or otherwise traceable to gross proceeds from a violation of 8 U.S.C. § 1324 may be seized and subject to forfeiture. Humanitarian concerns are not a defense to a charge of transporting or harboring aliens. *United States v. Aguilar*, 883 F.2d 662 (9th Cir. 1989); *see also Dimova v. Holder*, 783 F.3d 30 (1st Cir. 2015) (reasoning that the statute’s plain language includes no exception for humanitarian assistance).

**Smuggling:** 8 U.S.C. § 1324(a)(1)(A)(i) makes it a crime for any individual to bring or attempt to bring a person to the United States between ports of entry knowing that person is an alien. The individual may be convicted even if the smuggled alien had received prior authorization to enter, come to, or reside in the United States and regardless of any future official action that might be taken with respect to the alien. The defendant must have made an affirmative and knowing act of help or assistance. An individual’s mere presence during the commission of the crime is insufficient. *See Altamirano v. Gonzalez*, 427 F.3d 586 (9th Cir. 2005).

**Transporting:** To be guilty of the crime of transporting under 8 U.S.C. § 1324(a)(1)(A)(ii), a person must—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”—have knowingly transported the alien for the purpose of helping him or her further such violation of law. A defendant acts with “reckless disregard” if he or she is aware of but consciously disregards facts and

circumstances indicating that the person being transported is an alien who had unlawfully entered or remained in the United States. *See, e.g., United States v. Tydingco*, 909 F.3d 297 (9th Cir. 2018).

**Harboring:** 8 U.S.C. § 1324(a)(1)(A)(iii) penalizes 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 the law—conceals, harbors, or shields from detection an alien in any place, including any building or means of transportation. Likewise, attempts to engage in the proscribed activity are punishable under the provision. Courts have generally defined *harboring* as conduct that substantially facilitates an alien’s unlawful presence in the United States and prevents authorities from detecting the alien’s unlawful presence. *See, e.g., United States v. Kim*, 193 F.3d 567 (2d Cir. 1999). Any surreptitious shielding violates this provision, including giving shelter from or warning as to the presence of immigration officers. *See, e.g., United States v. Rubio-Gonzalez*, 674 F.2d 1067 (5th Cir. 1982) (holding that a warning given to unlawfully present alien workers about a federal immigration enforcement inspection constituted concealing or shielding).

**Inducing or Encouraging:** 8 U.S.C. § 1324(a)(1)(A)(iv) bars persons from encouraging or inducing an alien to come to, enter, or reside in the United States while knowing or in reckless disregard of the fact that the alien’s entry or presence is or will be in violation of law. *See, e.g., United States v. Anderton*, 901 F.3d 279 (5th Cir. 2018) (affirming conviction where an employer knew workers were not lawfully present, continued to employ them, facilitated housing, and helped them obtain public benefits). There has been some debate over what conduct falls within this provision and whether the provision is overbroad in violation of the Free Speech Clause of the First Amendment. *See United States v. Hansen*, 25 F.4th 1103, 1107 (9th Cir. 2022), *cert. granted*, 2022 WL 17544995 (Dec. 9, 2022); *see also* CRS Legal Sidebar LSB10705, *Ninth Circuit Holds that Criminal Penalties for Encouraging or Inducing Illegal Immigration Violate First Amendment*, by Kelsey Y. Santamaria.

**Bringing to the United States:** It is a criminal offense under 8 U.S.C. § 1324(a)(2) for any person to—knowing or in reckless disregard of the fact that an alien had not received prior authorization to come to, enter, or reside in the United States—bring or attempt to bring an alien to the United States in *any* manner, regardless of whether any future official action may occur with respect to that alien. *See, e.g., United States v. Yoshida*, 303 F.3d 1145 (9th Cir. 2002) (affirming conviction where defendant guided aliens to aircraft heading to the United States). A conviction for “bringing to” may result in a fine and imprisonment up to one year. A vehicle, vessel, or aircraft used in or traceable to the commission of the violation may be subject to forfeiture. Notably, this is a separate crime from smuggling under 8 U.S.C. § 1324(a)(1)(A)(i), which applies when the unlawful entry is between ports of entry.

**Other Offenses:** Other offenses related to alien smuggling, harboring, or transporting include failure by owners, officers, or agents of any vessel to prevent the landing of an alien (8 U.S.C. § 1321); bringing in aliens who are

inadmissible on health-related grounds (8 U.S.C. § 1322); unlawful bringing of aliens into the United States by a carrier (8 U.S.C. § 1323); knowingly hiring 10 or more aliens within a 12-month period while having actual knowledge that they were unlawfully brought to the United States (8 U.S.C. § 1324(a)(3)); and aiding or assisting aliens to enter the country who are inadmissible for certain criminal, subversive, or terrorist activity (8 U.S.C. § 1327).

## Immigration-Related Fraud

**Visa Fraud and False Statements:** Under 18 U.S.C. § 1546, it is a felony to knowingly forge, counterfeit, alter, or falsely make visas, permits, and other immigration-related documents, as well as to knowingly use a false identification document or make a false attestation. Offenders may be subject to a criminal penalty of a fine and a term of imprisonment ranging from 10 to 25 years.

**Marriage Fraud:** Under 8 U.S.C. § 1325(c), marriage fraud is committed by a person who knowingly enters into a marriage to evade immigration rules. A conviction carries a penalty of a fine and imprisonment for no more than five years.

**False Claim of U.S. Citizenship:** Under 18 U.S.C. § 911, whoever falsely and willfully represents to be a U.S. citizen may be subject to a fine and imprisonment for up to three years.

**Passport Fraud:** 18 U.S.C. § 1542 makes it a criminal offense to willfully and knowingly make a false statement in a passport application or willfully and knowingly use or attempt to use a passport secured by a false statement. This offense carries a penalty of a fine and term of imprisonment ranging from 10 to 25 years.

**Procurement of Citizenship or Naturalization Unlawfully:** 18 U.S.C. § 1425 makes it a felony to knowingly procure or attempt to procure, contrary to law, the naturalization of any person. This offense carries a fine and a term of imprisonment ranging from 10 to 25 years.

Immigration-related identity theft may be prosecuted under laws of general applicability targeting identity theft or making false statements to the government. *See* 18 U.S.C. §§ 1001, 1028A.

## Other Offenses

There are additional immigration-related offenses in federal statutes, such as high-speed flight from an immigration checkpoint (18 U.S.C. § 758); importation, holding, or keeping of an alien for prostitution or “any other immoral purpose” (8 U.S.C. § 1328); failure to depart after a final order of removal (8 U.S.C. § 1253(a)); willful failure to comply with terms of release under supervision (8 U.S.C. § 1253(b)); willful failure by an alien to apply for registration and be fingerprinted (8 U.S.C. § 1306(a)); failure to notify of a change of address (8 U.S.C. § 1306(b)); making fraudulent statements in application for registration (8 U.S.C. § 1306(c)); and counterfeiting photographs or prints in any alien registration certificate or card (8 U.S.C. § 1306(d)).

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