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Civil Litigators and Employers Must Be Attuned to Shifting Landscape of Criminal Immigration Law

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Recent years have seen increased enforcement of immigration laws in the United States, including the enforcement of 8 U.S.C. § 1324, which creates criminal penalties for "[b]ringing in and harboring certain aliens." *See, e.g.*, Office of the Att'y Gen., Memorandum for All Federal Prosecutors, Renewed Commitment to Criminal Immigration Enforcement (Apr. 11, 2017) (calling on federal prosecutors to increase efforts to prosecute persons violating section 1324 and other criminal laws related to immigration); Press Release, Dep't of Homeland Sec., DHS Releases Worksite Enforcement Strategy to Protect the American Labor Market, Workers, and Worksite Conditions (Oct. 12, 2021) (explaining the department's plans to target employers engaged in illegal acts, with the help of U.S. Immigration and Customs Enforcement, U.S. Customs and Border Protection, and U.S. Citizen and Immigration Services); U.S. Dep't of Justice, *Special Report: Non-U.S. Citizens in the Federal Criminal Justice System, 1998–2018* (Nov. 2021) (highlighting that "[t]he number of non-U.S. citizens charged in U.S. district courts with immigration offenses increased from 9,875 in 1998 to 32,888 in 2018").

Criminal defense attorneys may have encountered 8 U.S.C. § 1324 in their practice, but civil litigators—particularly those who focus on employment and compliance issues—should also familiarize themselves with this statute.

Section 1324 provides in relevant part:

> Any person who—
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> (i) knowing that a person is an alien, brings to or attempts to bring to the United States in any manner whatsoever such person at a place other than a designated port of entry or place other than as designated by the Commissioner, regardless of whether such alien has received prior official authorization to come to, enter, or reside in the United States and regardless of any future official action which may be taken with respect to such alien;
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> (ii) 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, transports, or moves or attempts to transport or move such alien within the United States by means of transportation or otherwise, in furtherance of such violation of law;
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> (iii) 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;

(iv) encourages or induces an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law; or

(v) (I) engages in any conspiracy to commit any of the preceding acts, or

(II) aids or abets the commission of any of the preceding acts,

shall be punished as provided in subparagraph (B).

8 U.S.C. § 1324(a)(1)(A).

Subsection (a)(1)(B) explains that those who commit one of the above-listed offenses will be punished, "for each alien in respect to whom such a violation occurs," with fines and up to five years' imprisonment. If the offense was conducted "for the purpose of commercial advantage or private financial gain," which would almost always be the case in the employment context, the maximum term of imprisonment is increased to 10 years. 8 U.S.C. § 1324(a)(1)(B).

The Department of Justice's Bureau of Justice Statistics indicates that, in 2018, 3,929 persons were prosecuted for offenses under section 1324(a) and that 2,593 of those prosecuted were U.S. citizens. *See* U.S. Dep't of Justice, *Special Report*, *supra*, Table 3.

Conflicting Interpretations in the Circuit Courts

As is evident from the text, subsection (a)(1)(A)(iv) makes it a felony offense for an individual to encourage or induce a noncitizen to come to, enter, or reside in the United States with knowledge or reckless disregard of the fact that it would violate the law for the noncitizen to do so. Congress did not define conduct that "encourages or induces" a noncitizen to come to, enter, or remain in the United States; therefore, federal courts have been charged with interpretation. Numerous courts have grappled with the meaning of "encourage" and "induce" as used within the statute, and, as would be expected, there are conflicting rulings concerning the degree of conduct required to satisfy this standard.

The Third Circuit has adopted a narrow interpretation, finding that "encourages or induces" requires "substantial" facilitation by a defendant. The Third Circuit has, in effect, adopted a causation standard. In *DelRio-Mocci v. Connolly Properties*, the Third Circuit held that a conviction under subsection 1324(a)(1)(A)(iv) requires "substantial" assistance akin to "an affirmative act that served as a catalyst for aliens to reside in the United States in violation of immigration law when they might not have otherwise" and "not just general advice." 672 F.3d 241, 248–49 (3d Cir. 2012). The court thus concluded that renting apartments to noncitizens was insufficient to support a conviction, reasoning that there was no evidence demonstrating the noncitizens would not or could not have resided in the United States without renting apartments from the property owners. They could have resided in the United States by renting housing elsewhere. *See also Zavala v. Wal-Mart Stores, Inc.*, 691 F.3d 527, 542 (3d Cir. 2012) (concluding Wal-Mart's mere employment of noncitizens was insufficient, as there was no evidence that the noncitizens would not or could not have resided in the United States without

being employed by Wal-Mart); *but see* *Beltre Matos v. Att'y Gen. United States*, 2022 WL 260058, at *1 (3d Cir. Jan. 27, 2022) (defendant convicted for selling to noncitizens personally identifiable information belonging to United States citizens); *United States v. Henderson*, 857 F. Supp. 2d 191, 193–94 (D. Mass. 2012) (denying motion for acquittal from section 1324(a)(1)(A)(iv) conviction of a government immigration employee who advised her housecleaner about immigration laws and practices upon learning that she was undocumented).

Similarly, the Ninth Circuit has determined that encouragement and inducement require more substantial acts. In *United States v. Thum*, the Ninth Circuit held that subsection 1324(a)(1)(A)(iv) requires some action "to convince the illegal alien to stay in this country or to facilitate the alien's ability to live in the country indefinitely." 749 F.3d 1143, 1144–48 (9th Cir. 2014). Applying this standard, the Ninth Circuit held that the defendant could not be convicted for merely escorting a noncitizen from a fast-food restaurant near the border to a nearby vehicle that he knew was traveling north. There was no evidence that the defendant engaged in conduct to persuade, or assist, the noncitizen to *reside* in the United States. Rather than taking steps to encourage the noncitizen, the defendant simply helped the noncitizen *travel* within the United States. *See also Henderson*, 857 F. Supp. 2d at 210 (granting a new trial because the jury was not properly instructed that they must find conduct constituting "affirmative assistance that makes an alien lacking lawful immigration status more likely to enter or remain in the United States that she otherwise might have been")

The Fourth, Fifth, Seventh, and Eleventh Circuits, however, require much less to sustain a conviction under subsection 1324(a)(1)(A)(iv).

In *United States v. Oloyede*, the Fourth Circuit held that "encourage" merely requires actions taken to "convince" a noncitizen to come to or stay in the United States. 982 F.2d 133, 137 (4th Cir. 1992). The court thus concluded that the defendant encouraged noncitizens to reside in the United States by providing them with false documents, reasoning that his conduct "reassured [noncitizens] they could continue to work in the United States, that they would not be subject to the threat of imminent detection and deportation, and that they could travel back to their homeland without risk of being prevented from returning, thus providing all of the benefits of citizenship." *Id.*; *see also* *United States v. Tracy*, 456 F. App'x 267 (4th Cir. 2011) (finding indictment was sufficient to support charge under subsection 1324(a)(1)(A)(iv) where the defendant met with undocumented aliens and advised them how to travel from Cuba to the United States); *United States v. Batjargal*, 302 F. App'x 188, 191 (4th Cir. 2008) (upholding conviction under subsection 1324(a)(1)(A)(iv) for providing noncitizen with housing, a vehicle, auto insurance, a cell phone, and a gym membership).

In *United States v. Anderton*, the Fifth Circuit affirmed that "[e]ncourage means to *knowingly instigate, help, or advise*." 901 F.3d 278, 283–85 (5th Cir. 2018). The court concluded that the defendant "persistently and knowingly provided inducements and encouragements" to noncitizens employed by his company, as the evidence demonstrated he "knew that most of his workers [were] not lawfully present"; yet, "he worked with others . . . to employ them, anyway"; "rented or facilitated rental of living space to some of them"; and "assisted some in attaining public benefits." *Id.*; *see also United States v. Light*, 2021 WL 925515 (S.D. Fla. Mar. 11, 2021)

(defendant convicted for using a fake name and address to establish a noncitizen's identity with the Florida Department of Motor Vehicles).

In *United States v. He*, the Seventh Circuit affirmed that "encouraged" means merely to knowingly *help or advise*. 245 F.3d 954, 957–59 (7th Cir. 2001). The Seventh Circuit thus upheld the defendant's conviction because the evidence demonstrated that he forged travel documents and attempted to help a noncitizen come to the United States. *See also United States v. Fujii*, 301 F.3d 535, 540 (7th Cir. 2022) (upholding conviction based on defendant's forging of travel documents and arranging travel plans for noncitizens); *but see United States v. Borrero*, 771 F.3d 973, 977 (7th Cir. 2014) (holding evidence insufficient to support a conviction where defendant merely served noncitizens who were customers of his business without knowledge or reckless disregard of the fact that they were illegally in the United States).

The Eleventh Circuit has imposed criminal liability for simply *helping* noncitizens. *See Edwards v. Prime, Inc.*, 602 F.3d 1276, 1295 (11th Cir. 2010) (collecting cases). In *United States v. Lopez*, the Eleventh Circuit rejected the defendant's argument that including "help" in the definition was overly broad and inappropriate, recognizing that multiple dictionaries use "help" to define the word "encourage." 590 F.3d 1238 (11th Cir. 2009). Under this standard, the Eleventh Circuit has upheld convictions under subsection 1324(a)(1)(A)(iv) for driving a boat with numerous undocumented immigrants to the United States (*Lopez*, 602 F.3d at 1295), helping a noncitizen obtain fraudulent documentation (*United States v. Ndiaye*, 434 F.3d 1270 (11th Cir. 2006)), and arranging fraudulent marriages between citizens and noncitizens to avoid deportation (*United States v. Lozada*, 742 F. App'x 451 (11th Cir. 2018)).

However, despite its seemingly broad interpretation, the Eleventh Circuit has clarified that a conviction under subsection 1324(a)(1)(A)(iv) requires more than "mere employment" of noncitizens. *United States v. Khanani*, 502 F.3d 1281, 1288–89 (11th Cir. 2007). There must be a level of knowledge and intent coupled with the employment of noncitizens. For example, in *Edwards*, the Eleventh Circuit found sufficient evidence to support a conviction where an employer knowingly supplied noncitizens with jobs and Social Security numbers to facilitate their illegal employment. 602 F.3d at 1295–96.

Constitutionality and Overbreadth Challenges in the Supreme Court

The varying interpretations and applications of subsection 1324(a)(1)(A)(iv) underscore the ambiguity and overbreadth arguments. There are no universal limitations on how the statute should be enforced, nor are individuals on notice of the behavior that will be criminalized under the statute. For example, the government recently prosecuted under subsection 1324(a)(1)(A)(iv) the owner of a construction business whose *independent contractors* employed undocumented noncitizens. *United States v. Perez*, No. 4:19-cr-31 (N.D. Ga.). The defendant in that case pleaded guilty without formally challenging the government's theory, but the fact that prosecutors are willing to pursue criminal charges against defendants who are a step removed from the employment of illegal aliens should concern any business that relies on contractors for labor or other services.

In November 2022, the U.S. Supreme Court granted certiorari in *United States v. Hansen*, a case challenging the constitutionality and overbreadth of section 1324(a)(1)(A)(iv). The defendant in *Hansen* operated an organization that ran an adult-adoption program. *United States v. Hansen*, 25 F.4th 1103, 1105 (9th Cir. 2022). The program was advertised as a means to help undocumented immigrants obtain U.S. citizenship, and Hansen told participants that others had achieved citizenship through the process. He later told federal agents, however, that no person had become a citizen through the program and that adult adoption is not a means through which one can achieve citizenship.

Hansen was ultimately convicted by a jury on 12 counts of mail fraud, 3 counts of wire fraud, and 2 counts of encouraging or inducing illegal immigration for private financial gain under section 1324(a)(1)(A)(iv) as a result of this scheme. The encouraging-and-inducing counts were based on two instances in which he encouraged noncitizens to overstay their visas. After the trial and conviction, Hansen moved to dismiss those counts on the grounds that subsection 1324(a)(1)(A)(iv) is overbroad on its face, unconstitutionally vague, and unconstitutional as applied to him. The district court rejected his arguments and sentenced him to 240 months' imprisonment. Hansen appealed his conviction and sentence to the Ninth Circuit Court of Appeals.

On appeal, Hansen again argued that subsection (a)(1)(A)(iv) is "(1) facially overbroad, (2) overbroad as applied to Hansen, [and] (3) void for vagueness." *Id.* He further argued that that subsection is unconstitutional because it is "(4) a content- and viewpoint-based prohibition on speech that cannot survive strict scrutiny." *Id.* at 1106. The Ninth Circuit concluded that the statute is facially overbroad, and therefore unconstitutional, and did not reach Hansen's remaining arguments.

As the Ninth Circuit explained, "[t]he Constitution gives significant protection from overbroad laws that chill speech within the First Amendment's vast and privileged sphere." *Id.* (quoting *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 244 (2002)). Hansen and amici curiae based their overbreadth argument on their contention that subsection 1324(a)(1)(A)(iv) penalizes several categories of immigration-related speech, including, they argued, general immigration advocacy. *Id.* at 1107. The government, on the other hand, argued that the statute applies more narrowly—covering only inherently criminal speech involved in solicitation, aiding, and abetting. *Id.*

The court of appeals reasoned that subsection 1324(a)(1)(A)(iv) was overbroad because "a substantial number of the statute's applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Id.* at 1106–7 (quoting *United States v. Stevens*, 559 U.S. 460, 472–73 (2010)). In so doing, the Ninth Circuit relied on the definitions of "encourage" and "induce" that it had previously recognized in *Thum* and concluded that the statute applies to situations in which a defendant encouraged or induced an alien to enter or reside in the country in violation of civil *or* criminal law. Based on these definitions and other canons of construction, the court held that the statute proscribes the following:

> (1) inspiring, helping, persuading, or influencing, (2) through speech or conduct, (3) one or more specified aliens (4) to come to or reside in the United States in violation of civil or criminal law.

The Ninth Circuit also concluded that, while the subsection "encompasses some criminal conduct," it "has a relatively narrow legitimate sweep." *Id.* at 1109. The court determined that the danger of chilling constitutionally protected speech, in contrast, was quite high and justified invalidation of the statute:

> Many commonplace statements and actions could be construed as encouraging or inducing an undocumented immigrant to come to or reside in the United States. For example, the plain language of subsection (iv) covers knowingly telling an undocumented immigrant "I encourage you to reside in the United States."

Id. at 1110 (explaining that such a statement is protected under the First Amendment).

The Supreme Court heard oral argument in *Hansen* on March 27, 2023. A number of justices—on both sides of the ideological line—were skeptical of the constitutionality of the "encourages" provision of section 1324. The attorney for the government who was defending the statute faced a battery of hypotheticals demonstrating the potential broad sweep of the prohibition on encouraging an undocumented immigrant to come to or remain in the United States. At the same time, the justices did not display much sympathy for Hansen's actions or his claim that the statute chilled his speech. Justice Gorsuch pointed out, "It is a little awkward, though, that this case comes up in a posture with Mr. Hansen, who I don't think anybody could say he's been chilled from speaking. I mean, he's had no problem soliciting people here in this country and defrauding them to the tune of lots and lots of money." Transcript of Oral Argument at 74, *United States v. Hansen*, No. 22-179 (U.S. Mar. 27, 2023). The government argued that "encourages" should be read as a term of art requiring "soliciting or aiding and abetting unlawful activity" to the exclusion of casual "encouraging" comments, an argument that seems at odds with the text and the principle that criminal statutes should clearly define prohibited conduct. Whether the Court will be able to craft a workable interpretation remains to be seen. A decision is expected by this summer.

Conclusion

Regardless of the outcome and the fact that *Hansen* stemmed from the operation of a relatively novel adult-adoption scheme, employers and contractors will remain vulnerable, perhaps even despite their knowledge, to prosecution under section 1324.

Practitioners and their corporate clients would be well advised to thoroughly consider these uncertainties when considering their hiring and recruiting practices. Resources such as E-Verify are available to employers, and employers should be mindful that their responsibility for ensuring legal hiring and employment might extend beyond their doorstep.

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