**7.5 Alien—Bringing or Attempting to Bring to The United States**

**(Without Authorization)** **(8 U.S.C. § 1324(a)(2)(B)(i)-(iii))**

The defendant is charged in [Count \_\_\_\_\_\_\_ of] the indictment with [bringing] [attempting to bring] an alien to the United States [knowing] [in reckless disregard of the fact] that the alien has not received prior official authorization to [come to] [enter] [reside in] the United States. For the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant [brought] [attempted to bring] a person who was an alien to the United States [for the purpose of the defendant’s [commercial advantage] [private gain]] [and upon arrival did not immediately bring and present the alien to an appropriate immigration official at a designated port of entry] [with the intent or with reason to believe that the alien will commit an offense against the United States or any state punishable by imprisonment for more than one year];

Second, the defendant [knew] [was in reckless disregard of the fact] that the person was an alien who had not received prior official authorization to [come to] [enter] [reside in] the United States; [and]

Third, the defendant acted with the intent to violate the United States immigration laws[.] [; and]

[Fourth, the defendant did something that was a substantial step toward committing the crime.

A “substantial step” is conduct that strongly corroborates a defendant’s intent to commit the crime. To constitute a substantial step, a defendant’s act or actions must unequivocally demonstrate that the crime will take place unless interrupted by independent circumstances. Mere preparation is not a substantial step toward committing the crime.

Jurors do not need to agree unanimously as to which particular act or actions constituted a substantial step toward the commission of a crime.]

An alien is a person who is not a natural-born or naturalized citizen of the United States.

**Comment**

*See* Comment to Instructions 7.1 (Alien—Bringing or Attempting to Bring to the United States (Other than Designated Place)) for “aiding and abetting” and “bringing to” the United States and 7.2 (Alien—Illegal Transportation or Attempted Transportation) for “reckless disregard.”

This is a separate crime from 8 U.S.C. § 1324(a)(1)(A)(i) (as to that statutory provision, *see* Instruction 7.1). Nevertheless, the two crimes share the same elements. Both require that the alien lack prior authorization to enter the United States, but §1324(a)(1)(A)(i) requires that the entry be at a place not designated as a port of entry. *United States v. Barajas-Montiel*, 185 F.3d 947, 951 (9th Cir. 1999).

The instruction should be modified to reflect which subsection in § 1324(a)(2)(B) is charged: (i) an offense committed with the intent or with reason to believe that the alien will commit an offense against the United States or any state punishable by imprisonment for more than one year; (ii) an offense done for the purpose of commercial advantage or private financial gain or (iii) an offense in which the alien is not upon arrival immediately brought to an appropriate immigration official at a designated port of entry.

Commercial advantage or financial gain may be established under either the theory that, as a principal, the defendant acted for his own commercial advantage or financial gain or under the theory that he aided another individual in committing the crime for a pecuniary motive. *United States v. Lopez-Martinez*, 543 F.3d 509, 515-16 (9th Cir. 2008); *United States v. Munoz*, 412 F.3d 1043, 1046-47 (9th Cir. 2005); *United States v. Tsai*, 282 F.3d 690, 697 (9th Cir. 2002). If the theory of liability is aiding and abetting, the jury need not find that the defendant committed the offense for his own financial advantage. It is enough that the offense was committed for the purpose of commercial advantage and financial gain of another. *Lopez-Martinez*, 543 F.3d at 515-16*.* If the defendant is charged with aiding and abetting instead of as a principal, modify the first element by deleting the words “the defendant’s” to reflect the offense was done “for the purpose of [commercial advantage] [private financial gain].”

Statutory maximum sentences are increased for offenses involving groups of aliens in excess of 10. 8 U.S.C. § 1324(c). In such cases, a special jury finding is required.

*See Barajas–Montiel*,185 F.3d at 951-53 (holding that criminal intent is required for felony convictions under 8 U.S.C. § 1324(a)(1) and (2)(B), as distinguished from misdemeanor offense under § 1324(a)(2)(A), where Congress eliminated mens rea requirement if illegal alien is brought to United States and taken directly to INS official at designated port of entry). This instruction may be used for a misdemeanor charge by excluding the felonies described in § 1324(a)(2)(B)(i), (ii), and (iii) in the first element and omitting the third element.

The bracketed language stating an additional element applies only when the charge is an attempt. In attempt cases, “[t]o constitute a substantial step, a defendant’s ‘actions must cross the line between preparation and attempt by unequivocally demonstrating that the crime will take place unless interrupted by independent circumstances’.” *United States v. Goetzke*, 494 F.3d 1231, 1237 (9th Cir. 2007) (per curiam) (quoting *United States v. Nelson*, 66 F.3d 1036, 1042 (9th Cir. 1995)).

The “strongly corroborated” language in this instruction comes from *United States v. Snell*, 627 F.2d 186, 187 (9th Cir. 1980) (per curiam) (“A conviction for attempt requires proof of culpable intent and conduct constituting a substantial step toward commission of the crime that strongly corroborates that intent.”) and *United States v. Darby*, 857 F.2d 623, 625 (9th Cir. 1988) (same).

Jurors do not need to agree unanimously as to which particular act or actions constituted a substantial step toward the commission of a crime. *United States v. Hofus*, 598 F.3d 1171, 1176 (9th Cir. 2010).

“[A] person may be convicted of an attempt to commit a crime even though that person

may have actually completed the crime.” *United States v. Rivera-Relle*, 333 F.3d 914, 921 (9th

Cir. 2003).

*Revised May 2023*