

No. 19-67

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**In the Supreme Court of the United States**

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UNITED STATES OF AMERICA, PETITIONER

*v.*

EVELYN SINENENG-SMITH

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*ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT*

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**JOINT APPENDIX**

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PETITION FOR A WRIT OF CERTIORARI FILED: JULY 12, 2019  
CERTIORARI GRANTED: OCT. 4, 2019

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UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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Docket No. 15-10614

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

*v.*

EVELYN SINENENG-SMITH, DEFENDANT-APPELLANT

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**DOCKET ENTRIES**

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<b>DATE</b>	<b>DOCKET NUMBER</b>	<b>PROCEEDINGS</b>
12/28/15	<u>1</u>	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. Reporters Transcript required: Yes. Sentence imposed: 18 months. Transcript ordered by 01/19/2016. Transcript due 02/17/2016. Appellant briefs and excerpts due by 03/28/2016 for Evelyn Sineneng-Smith. Appellee brief due 04/27/2016 for United States of America. Appellant's optional reply brief is due 14 days after service of the answering brief. [9807073] (WL) [Entered: 12/28/2015 02:56 PM]

\* \* \* \* \*

<b>DATE</b>	<b>DOCKET NUMBER</b>	<b>PROCEEDINGS</b>
4/27/16	<u>7</u>	Submitted (ECF) Opening Brief for review. Submitted by Appellant Evelyn Sineneng-Smith. Date of service: 04/27/2016. [9954486] [15-10614] (Cook, Daniel) [Entered: 04/27/2016 12:59 AM]
		* * * * *
9/15/16	<u>25</u>	Submitted (ECF) Answering Brief for review. Submitted by Appellee USA. Date of service: 09/15/2016. [10125567] [15-10614] (Gray, Susan) [Entered: 09/15/2016 05:00 PM]
		* * * * *
10/31/16	<u>31</u>	Submitted (ECF) Reply Brief for review. Submitted by Appellant Evelyn Sineneng-Smith. Date of service: 10/31/2016. [10180062] [15-10614] (Cook, Daniel) [Entered: 10/31/2016 02:02 PM]
		* * * * *
4/13/17	<u>39</u>	Filed clerk order (Deputy Clerk: WL): Counsel shall be prepared to address whether: (1) it was plain error for the district court to fail to instruct on the mens rea element of 18 U.S.C.

DATE	DOCKET NUMBER	PROCEEDINGS
		§ 1324(a)(1)(A)(iv); (2) the prejudice element of plain error is met in this case; and (3) this is an appropriate case for the court sua sponte to invoke the plain error doctrine. [10395070] (WL) [Entered: 04/13/2017 01:03 PM]
		* * * * *
4/18/17	<u>44</u>	ARGUED AND SUBMITTED TO STEPHEN REINHARDT, A. WALLACE TASHIMA and MARSHA S. BERZON. [10401100] (DAB) [Entered: 04/18/2017 02:50 PM]
		* * * * *
9/18/17	<u>46</u>	Filed order (STEPHEN REINHARDT, A. WALLACE TASHIMA and MARSHA S. BERZON): Defendant was convicted of violations of 8 U.S.C. § 1324(a)(1)(A)(iv). The case has been fully briefed, argued and taken under submission. Subsequent to submission, however, the panel has determined that the decision of the issues raised by this case would be significantly aided by further briefing. The court therefore invites

DATE	DOCKET NUMBER PROCEEDINGS
	<p>the Federal Defender Organizations of the Ninth Circuit (as a group), and the Immigrant Defense Project and the National Immigration Project of the National Lawyers Guild to file amicus briefs on the following issues:</p> <p>1. Whether the statute of conviction is overbroad or likely overbroad under the First Amendment, and if so, whether any permissible limiting construction would cure the First Amendment problem?</p> <p>2. Whether the statute of conviction is void for vagueness or likely void for vagueness, either under the First Amendment or the Fifth Amendment, and if so, whether any permissible limiting construction would cure the constitutional vagueness problem?</p> <p>3. Whether the statute of conviction contains an implicit mens rea element which the Court should enunciate. If so: (a) what should that mens rea element be; and (b) would such a mens rea element cure any serious constitutional problems the Court might determine existed?</p> <p>Amici are, of course, not restric-</p>

DATE	DOCKET NUMBER PROCEEDINGS
	<p>ted to briefing the above-specified topics and may brief such further issues as they, respectively, believe the law and the record calls for. Any invited amicus brief shall be filed within 30 days of the date of this order. Counsel for the parties may, but are not required to, file supplemental briefs limited to responding to any and all amicus/amici briefs. Any supplemental brief shall be filed within 21 days after service of the amicus/amici brief(s). Requests by the parties for extensions of time will not be viewed favorably by the Court. All briefs filed under this order shall comply with the length requirement of Fed. R. App. P. 29(a)(5). The Clerk shall serve this order on each of the amicus organizations named in this order and shall furnish each organization with a copy of all Excerpts of Record and copies of the parties' Briefs. This order shall not preclude any other interested organizations or groups from filing amicus or amici briefs on either side. Any such filings</p>

DATE	DOCKET NUMBER	PROCEEDINGS
		shall be subject to the same conditions as applied to the amici specified above. [10584133] (AF) [Entered: 09/18/2017 09:11 AM]
		* * * * *
10/18/17	<u>50</u>	Submitted (ECF) Amicus brief for review (by government or with consent per FRAP 29(a)). Submitted by Prof. Eugene Volokh. Date of service: 10/18/2017. [10621749] [15-10614] (Volokh, Eugene) [Entered: 10/18/2017 09:52 AM]
10/18/17	<u>51</u>	Submitted (ECF) Amicus brief for review (by government or with consent per FRAP 29(a)). Submitted by Immigrant Defense Project, National Immigration Project of the National Lawyers Guild. Date of service: 10/18/2017. [10622152] [15-10614] (Fleming, Mark) [Entered: 10/18/2017 11:54 AM]
		* * * * *
10/18/17	<u>55</u>	Submitted (ECF) Amicus brief for review (by government or with consent per FRAP 29(a)). Submitted by National Associa-



DATE	DOCKET NUMBER	PROCEEDINGS
		tion of Criminal Defense Lawyers. Date of service: 10/18/2017. [10622223] [15-10614]—[COURT UPDATE: Attached corrected brief. 10/18/2017 by LA] (Thomas, Tina) [Entered: 10/18/2017 12:24 PM]
		* * * * *
10/18/17	<u>58</u>	Submitted (ECF) Amicus brief for review (by government or with consent per FRAP 29(a)). Submitted by City and County of San Francisco. Date of service: 10/18/2017. [10622832] [15-10614] (Lee, Matthew) [Entered: 10/18/2017 04:04 PM]
10/18/17	<u>59</u>	Submitted (ECF) Amicus brief for review (by government or with consent per FRAP 29(a)). Submitted by Federal Defender Organizations of the Ninth Circuit. Date of service: 10/18/2017. [10622834] [15-10614] (Sady, Stephen) [Entered: 10/18/2017 04:05 PM]
10/18/17	<u>60</u>	Submitted (ECF) Amicus brief for review (by government or with consent per FRAP 29(a)). Submitted by BRIEF OF AMICI CURIAE AMERICAN

DATE	DOCKET	PROCEEDINGS
		CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA IN SUPPORT OF DEFENDANT-APPELLANT SEEKING REVERSAL. Date of service: 10/18/2017. [10622896] [15-10614] (Rowland, Lee) [Entered: 10/18/2017 04:30 PM]
		* * * * *
10/18/17	<u>65</u>	Submitted (ECF) Amicus brief for review (by government or with consent per FRAP 29(a)). Submitted by Amici Curiae Oregon Interfaith Movement for Immigrant Justice, Causa Immigrant Rights Coalition of Oregon, Catholic Charities of Oregon, and Immigration Counseling Services of Oregon In Support of Defendant-Appellant. Date of service: 10/18/2017. [10623207] [15-10614]—[COURT UPDATE: Attached corrected brief (corrected word count). 10/19/2017 by LA] (Hong, Kari) [Entered: 10/18/2017 09:17 PM]
10/18/17	<u>66</u>	Submitted (ECF) Amicus brief for review (by government or with consent per FRAP 29(a)).

DATE	DOCKET NUMBER	PROCEEDINGS
10/18/17	<u>67</u>	Submitted by Asian Americans Advancing Justice. Date of service: 10/18/2017. [10623212] [15-10614] (Kuwahara, Emily) [Entered: 10/18/2017 10:21 PM]  Submitted (ECF) Amicus brief for review (by government or with consent per FRAP 29(a)). Submitted by Public Counsel. Date of service: 10/18/2017. [10623214] [15-10614] (Hudson-Price, Anne) [Entered: 10/18/2017 11:46 PM]
* * * * *		
11/22/17	<u>84</u>	Submitted (ECF) Supplemental Brief for review. Submitted by Appellant Evelyn Sineneng-Smith. Date of service: 11/22/2017. [10664531] [15-10614] (Cook, Daniel) [Entered: 11/22/2017 11:40 AM]
* * * * *		
11/22/17	<u>87</u>	Submitted (ECF) Supplemental Brief for review. Submitted by Appellee USA. Date of service: 11/22/2017. [10665199]—[COURT ENTERED FILING to correct entry [86].] (TYL) [Entered: 11/22/2017 03:16 PM]

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
2/15/18	104	ARGUED AND SUBMITTED TO STEPHEN REINHARDT, A. WALLACE TASHIMA and MARSHA S. BERZON. [10766346] (BG) [Entered: 02/15/2018 04:39 PM]
		* * * * *
4/17/18	<u>106</u>	Filed clerk order (Deputy Clerk: AF): Pursuant to G.O. § 3.2.h, Judge Hurwitz has been drawn as the replacement for Judge Reinhardt. The panel for this case will now consist of: TASHIMA, BERZON and HURWITZ, Circuit Judges. [10839777] (AF) [Entered: 04/17/2018 12:10 PM]
		* * * * *
12/4/18	<u>109</u>	FILED OPINION (A. WALLACE TASHIMA, MARSHA S. BERZON and ANDREW D. HURWITZ) REVERSED in part, AFFIRMED in part, sentence VACATED and REMANDED for resentencing. Judge: AWT Authoring, FILED AND ENTERED JUDGMENT.

<b>DATE</b>	<b>DOCKET NUMBER</b>	<b>PROCEEDINGS</b>
		[11108185] (RMM) [Entered: 12/04/2018 07:20 AM]
12/4/18	<u>110</u>	Filed memorandum (A. WAL- LACE TASHIMA, MARSHA S. BERZON and ANDREW D. HURWITZ) AFFIRMED. [11108188] (RMM) [Entered: 12/04/2018 07:22 AM]
		* * * * *
1/17/19	<u>119</u>	Filed (ECF) Appellee USA peti- tion for rehearing en banc (from 12/04/2018 opinion). Date of ser- vice: 01/17/2019. [11157498] [15-10614] (Laing, Andrew) [En- tered: 01/17/2018 02:00 PM]
1/17/19	<u>120</u>	Filed (ECF) Appellant Evelyn Sineneng-Smith petition for panel rehearing and petition for rehearing en banc (from 12/04/2018 memorandum). Date of service: 01/17/2019. [11157585] [15- 10614] (Cook, Daniel) [Entered: 01/17/2019 02:37 PM]
		* * * * *
2/12/19	<u>122</u>	Filed order (A. WALLACE TASHIMA, MARSHA S. BER- ZON and ANDREW D. HUR- WITZ): Plaintiff-Appellee has filed a petition for rehearing en banc. [Dkt. [119]] Defendant-

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<b>DATE</b>	<b>DOCKET NUMBER</b>	<b>PROCEEDINGS</b>
		Appellant has filed a petition for panel rehearing and for rehearing en banc. [Dkt. [120]] The panel has voted to deny the petition for panel rehearing. Judges Berzon and Hurwitz vote to deny both petitions for rehearing en banc, and Judge Tashima so recommends. The full court has been advised of the petitions for rehearing en banc and no judge of the court has requested a vote on en banc rehearing. See Fed. R. App. P. 35(f). The petition for panel rehearing and the petitions for rehearing en banc are DENIED. [11186842] (AF) [Entered: 02/12/2019 09:32 AM]

\* \* \* \* \*

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
(SAN JOSE)

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Criminal Docket for Case No. 5:10-cr-00414-RMW-1

UNITED STATES OF AMERICA, PLAINTIFF

*v.*

EVELYN SINENENG-SMITH, DEFENDANT

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**DOCKET ENTRIES**

DATE	DOCKET NUMBER	PROCEEDINGS
5/26/10	<u>1</u>	INDICTMENT as to Evelyn Sineneng-Smith (1) count(s) 1-3, 4-6, 7-8. (cfeS, COURT STAFF) (Filed on 5/26/2010) (Entered: 05/27/2010)
		* * * * *
7/14/10	<u>6</u>	SUPERSEDING INDICTMENT as to Evelyn Sineneng-Smith (1) count(s) 1s-3s, 4s-6s, 7s-8s, 9s-10s. (cfeS, COURT STAFF) * * * (Attachment: counts Two through six was changed on the face of the documents to Four through six) * * * (filed on 7/14/2010) Modified on 7/14/2010) (cfeS, COURT STAFF). (Entered: 07/14/2010)

DATE	DOCKET	PROCEEDINGS
8/10/11	<u>46</u>	<p style="text-align: center;">* * * * *</p> <p><i>Notice of Motion and Motion to Dismiss Counts 1-3, 9-10, and the Forfeiture Allegations of the Superseding Indictment</i> by Evelyn Sineneng-Smith. Motion Hearing set for 9/26/2011 09:00 AM in Courtroom 6, 4th Floor, San Jose before Hon. Ronald M. Whyte. (Cook, Daniel) (Filed on 8/10/2011) Modified on 8/15/2011 (cfeS, COURT STAFF). (Entered: 08/10/2011)</p>
9/12/11	<u>48</u>	<p style="text-align: center;">* * * * *</p> <p>OPPOSITION to Defendant's Motion to Dismiss Counts One Through Three, Nine and Ten, and Two Forfeiture Allegations of the Superseding Indictment re <u>46</u> by USA as to Evelyn Sineneng-Smith (Attachments: # 1 Exhibit A) (Knight, Susan) (Filed on 9/12/2011) Modified on 9/26/2011 (cfeS, COURT STAFF). (Entered: 09/12/2011)</p>
9/27/11	<u>50</u>	<p style="text-align: center;">* * * * *</p> <p>REPLY in Support of Motion to Dismiss Counts 1-3 and 9-10 and the Forfeiture Allegations of the</p>



DATE	DOCKET NUMBER	PROCEEDINGS
10/3/11	<u>52</u>	<p>Superseding Indictment to Motion re <u>46</u> and <u>48</u> by Evelyn Sineneng-Smith (Cook, Daniel) (Filed on 9/27/2011) Modified on 9/28/2011 (cfeS, COURT STAFF). (Entered: 09/27/2011)</p> <p>Minute Entry for proceedings held before Judge Hon. Ronald M. Whyte: Motion Hearing as to Evelyn Sineneng-Smith held on 10/3/2011 re <u>46</u> MOTION to Dismiss <i>Notice of Motion and Motion to Dismiss Counts 1-3, 9-10, and the Forfeiture Allegations of the Superseding Indictment</i> filed by Evelyn Sineneng-Smith. Status Conference set for 11/14/2011 09:00 AM in Courtroom 6, 4th Floor, San Jose before Hon. Ronald M. Whyte. (Court Reporter Lee-Anne Shortridge.) (jg, COURT STAFF) (Filed on 10/3/2011) (Entered: 10/13/2011)</p>
10/12/11	<u>51</u>	<p>ORDER DENYING <u>46</u> MOTION TO DISMISS COUNTS ONE THROUGH THREE, NINE, TEN, AND THE FORFEITURE ALLEGATIONS OF THE SUPERSEDING INDICTMENT as to Evelyn</p>

DATE	DOCKET NUMBER	PROCEEDINGS
		Sineneng-Smith (1). Signed by Judge Hon. Ronald M. Whyte on 10/11/2011. (rmwlc2, COURT STAFF) Modified on 10/13/2011 (cfeS, COURT STAFF). (Entered: 10/12/2011)
		* * * * *
2/19/13	<u>94</u>	Proposed Jury Instructions by USA as to Evelyn Sineneng-Smith (Knight, Susan) (Filed on 2/19/2013) Modified on 2/20/2013 (cfeS, COURT STAFF). (Entered: 02/19/2013)
		* * * * *
3/18/13	<u>101</u>	ORDER OF DISMISSAL, on Count(s) <b>9s-10s</b> , Leave is GRANTED to the government to DISMISS Counts 9&10, and Criminal Forfeiture Allegation Three without prejudice as to Evelyn Sineneng-Smith (1). Signed by Judge Hon. Ronald M. Whyte on 3/18/13. (cfeS, COURT STAFF) (Filed on 3/18/2013) (Entered: 03/19/2013)
		* * * * *
4/18/13	<u>113</u>	MOTION for leave to <i>File a Motion for Reconsideration re <u>51</u> Order on Motion to Dismiss</i> by

DATE	DOCKET	PROCEEDINGS
		Evelyn Sineneng-Smith. (Cook, Daniel) (Filed on 4/18/2013) Modified on 4/19/2013 (cfeS, COURT STAFF). (Entered: 04/18/2013)
		* * * * *
5/2/13	<u>117</u>	RESPONSE to Defendant's <u>113</u> Motion for leave to File a Motion for Reconsideration on <u>51</u> Order on Motion to Dismiss by USA as to Evelyn Sineneng-Smith (Knight, Susan) (Filed on 5/2/2013) Modified on 5/7/2013 (cfeS, COURT STAFF). (Entered: 05/02/2013)
5/7/13	<u>118</u>	REPLY <i>in Support of Motion for Reconsideration re <u>117</u></i> by Evelyn Sineneng-Smith (Attachments: * * * # <u>1</u> Exhibit 1 FILED IN ERROR. DOCUMENT LOCKED. DOCUMENT TO BE REFILED LATER (Sealed per dkt 123. * * *) (Cook, Daniel) (Filed on 5/7/2013) Modified on 5/8/2013 (ewn, COURT STAFF). Modified on 5/9/2013 (cfeS, COURT STAFF). Modified on 5/13/2013 (cfeS, COURT STAFF). (Entered: 05/07/2013)
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
6/20/13	<u>136</u>	OBJECTIONS <i>to Government's Proposed Jury Instructions 94; Proposed Preliminary Elements Instructions</i> by Evelyn Sineneng-Smith (Cook, Daniel) (Filed on 6/20/2013) * * * (Linked) * * * Modified on 6/21/2013 (cfeS, COURT STAFF). (Entered: 06/20/2013)
		* * * * *
6/24/13	<u>144</u>	Minute Entry for proceedings held before Judge Hon. Ronald M. Whyte: Voir Dire begun on 6/24/2013 Evelyn Sineneng-Smith (1) on Count 1-3, 1s-3s, 4-6, 4s-6s, 7-8,7s-8s, 9s-10s. (Court Reporter Summer Fisher.) (srmS, COURT STAFF) (Filed on 6/24/2013) (Entered: 07/02/2013)
		* * * * *
6/25/13	<u>145</u>	Minute Entry for proceedings held before Judge Hon. Ronald M. Whyte: Jury Trial as to Evelyn Sineneng-Smith held on 6/25/2013. (Court Reporter Summer Fisher.) (jg, COURT STAFF) (Filed on 6/25/2013) (Entered: 07/03/2013)

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
6/26/13	<u>146</u>	Minute Entry for proceedings held before Judge Hon. Ronald M. Whyte: Jury Trial as to Evelyn Sineneng-Smith held on 6/26/2013. (Court Reporter Summer Fisher.) (jg, COURT STAFF) (Filed on 6/26/2013) (Entered: 07/03/2013)
6/27/13	<u>147</u>	Minute Entry for proceedings held before Judge Hon. Ronald M. Whyte: Jury Trial as to Evelyn Sineneng-Smith held on 6/27/2013. (Court Reporter Summer Fisher.) (jg, COURT STAFF) (Filed on 6/27/2013) (Entered: 07/03/2013)
		* * * * *
7/1/13	<u>148</u>	Minute Entry for proceedings held before Judge Hon. Ronald M. Whyte: Jury Trial as to Evelyn Sineneng-Smith held on 7/1/2013. (Court Reporter Summer Fisher.) (jg, COURT STAFF) (Filed on 7/1/2013) (Entered: 07/03/2013)
		* * * * *
7/8/13	<u>181</u>	Minute Entry for proceedings held before Judge Hon. Ronald

DATE	DOCKET NUMBER	PROCEEDINGS
7/9/13	<u>183</u>	<p>M. Whyte: Jury Trial as to Evelyn Sineneng-Smith held on 7/8/2013. (Court Reporter Lee-Anne Shortridge.) (jg, COURT STAFF) (Filed on 7/8/2013) (Entered: 07/25/2013)</p> <p>Minute Entry for proceedings held before Judge Hon. Ronald M. Whyte: Jury Trial as to Evelyn Sineneng-Smith held on 7/9/2013. (Court Reporter Summer Fisher.) (jg, COURT STAFF) (Filed on 7/9/2013) (Entered: 07/25/2013)</p>
7/10/13	<u>184</u>	<p style="text-align: center;">* * * * *</p> <p>Minute Entry for proceedings held before Judge Hon. Ronald M. Whyte: Jury Trial as to Evelyn Sineneng-Smith held on 7/10/2013. (Court Reporter Summer Fisher.) (jg, COURT STAFF) (Filed on 7/10/2013) (Entered: 07/25/2013)</p>
7/11/13	<u>185</u>	<p>Minute Entry for proceedings held before Judge Hon. Ronald M. Whyte: Jury Trial as to Evelyn Sineneng-Smith held on 7/11/2013. (Court Reporter Summer Fisher.) (jg, COURT</p>

<b>DATE</b>	<b>DOCKET NUMBER</b>	<b>PROCEEDINGS</b>
		STAFF) (Filed on 7/11/2013) (Entered: 07/25/2013)
7/18/13	<u>186</u>	Minute Entry for proceedings held before Judge Hon. Ronald M. Whyte: Status Conference as to Evelyn Sineneng-Smith held on 7/18/2013. (Court Reporter Summer Fisher.) (jg, COURT STAFF) (Filed on 7/18/2013) (Entered: 07/25/2013)
		* * * * *
7/22/13	<u>187</u>	Minute Entry for proceedings held before Judge Hon. Ronald M. Whyte: Jury Trial as to Evelyn Sineneng-Smith held on 7/22/2013. (Court Reporter Summer Fisher.) (jg, COURT STAFF) (Filed on 7/22/2013) (Entered: 07/25/2013)
		* * * * *
7/23/13	<u>188</u>	Minute Entry for proceedings held before Judge Hon. Ronald M. Whyte: Jury Trial as to Evelyn Sineneng-Smith held on 7/23/2013. (Court Reporter Summer Fisher.) (jg, COURT STAFF) (Filed on 7/23/2013) (Entered: 07/25/2013)
7/24/13	<u>169</u>	Proposed Jury Instructions by USA as to Evelyn Sineneng-

<b>DATE</b>	<b>DOCKET NUMBER</b>	<b>PROCEEDINGS</b>
7/24/13	<u>170</u>	Smith (Knight, Susan) (Filed on 7/24/2013) (Entered: 07/24/2013) Statement re <u>169</u> Proposed Jury Instructions by USA as to Evelyn Sineneng-Smith (Knight, Susan) (Filed on 7/24/2013) (Entered: 07/24/2013)
		* * * * *
7/24/13	<u>189</u>	Minute Entry for proceedings held before Judge Hon. Ronald M. Whyte: Jury Trial as to Evelyn Sineneng-Smith held on 7/24/2013. (Court Reporter Summer Fisher.) (jg, COURT STAFF) (Filed on 7/24/2013) (Entered: 07/25/2013)
		* * * * *
7/25/13	<u>180</u>	Proposed Jury Instructions by USA as to Evelyn Sineneng-Smith (Knight, Susan) (Filed on 7/25/2013) (Entered: 07/25/2013)
7/25/13	<u>182</u>	Defense Objections to Government's Revised Proposed Jury Instructions Proposed Jury Instructions by Evelyn Sineneng-Smith (Cook, Daniel) (Filed on 7/25/2013) Modified on 7/26/2013 (srmS, COURT STAFF). (Entered: 07/25/2013)



<b>DATE</b>	<b>DOCKET NUMBER</b>	<b>PROCEEDINGS</b>
7/25/13	<u>190</u>	Minute Entry for proceedings held before Judge Hon. Ronald M. Whyte: Jury Trial as to Evelyn Sineneng-Smith held on 7/25/2013. (Court Reporter Summer Fisher.) (jg, COURT STAFF) (Filed on 7/25/2013) (Entered: 07/25/2013)
7/26/13	<u>191</u>	Minute Entry for proceedings held before Judge Hon. Ronald M. Whyte: Motion Hearing to Discuss Jury Instructions. (Court Reporter Summer Fisher.) (jg, COURT STAFF) (Filed on 7/26/2013) (Entered: 07/31/2013)
7/29/13	<u>192</u>	Minute Entry for proceedings held before Judge Hon. Ronald M. Whyte: Jury Trial as to Evelyn Sineneng-Smith held on 7/29/2013. (Court Reporter Summer Fisher.) (jg, COURT STAFF) (Filed on 7/29/2013) (Entered: 07/31/2013)
7/29/13	<u>193</u>	Jury Instructions as to Evelyn Sineneng-Smith. (jg, COURT STAFF) (Filed on 7/29/2013) (Entered: 07/31/2013)
7/30/13	<u>194</u>	Minute Entry for proceedings held before Judge Hon. Ronald M. Whyte: Jury Trial as to

DATE	DOCKET NUMBER PROCEEDINGS	
7/30/13	<u>195</u>	<p>Evelyn Sineneng-Smith held on 7/30/2013, Jury Verdict as to Evelyn Sineneng-Smith (1) <b>Guilty on Count 1s-3s, 4s-6s</b> held on 7/30/2013. Motion Hearing as to Tax Charges set for 11/4/2013 09:00 AM in Courtroom 7, 4th Floor, San Jose before Hon. Ronald M. Whyte. Time is excluded from 7/30/13 to 11/4/13. All original trial exhibits were returned to counsel. All exhibits will be kept by counsel. The Court will retain a set of trial exhibits (copies). The defendant shall remain on the same conditions of release pending sentencing. (Court Reporter Summer Fisher.) (cfeS, COURT STAFF) (Filed on 7/31/2013) (Entered: 08/01/2013)</p> <p>VERDICT FORM—Guilty on Count 1s-3s, 4s-6s as to Evelyn Sineneng-Smith (1) (cfeS, COURT STAFF) (Filed on 7/30/2013) (Entered: 08/01/2013)</p>
* * * * *		
10/7/13	<u>213</u>	<p>Notice of Motion and Motion for <i>Acquittal on Counts 1-6; Memorandum in Support</i> by Evelyn</p>

DATE	DOCKET NUMBER	PROCEEDINGS
10/7/13	<u>214</u>	<p>Sineneng-Smith. Motion Hearing set for 10/18/2013 09:00 AM in Courtroom 6, 4th Floor, San Jose before Hon. Ronald M. Whyte. (Attachments: # <u>1</u> Proposed Order) (Cook, Daniel) (Filed on 10/7/2013) Modified on 10/8/2013 (cfeS, COURT STAFF). (Entered: 10/07/2013)</p> <p>Notice of Motion and Motion for <i>New Trial</i> by Evelyn Sineneng-Smith. Motion Hearing set for 10/18/2013 09:00 AM in Courtroom 6, 4th Floor, San Jose before Hon. Ronald M. Whyte. (Attachments: # <u>1</u> Proposed Order) (Cook, Daniel) (Filed on 10/7/2013) Modified on 10/8/2013 (cfeS, COURT STAFF). (Entered: 10/07/2013)</p>
11/5/13	<u>218</u>	<p>* * * * *</p> <p>OPPOSITION to <i>Defendant's Motions for <u>213</u> Acquittal Under Rule 29 and a <u>214</u> New Trial Under Rule 33</i> by USA as to Evelyn Sineneng-Smith (Knight, Susan) (Filed on 11/5/2013) * * * (Linked to motions) * * * * * Modified on 11/6/2013 (cfeS, COURT STAFF). (Entered: 11/05/2013)</p>

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
12/3/13	<u>221</u>	REPLY in Support of <i>Motion for Judgment of Acquittal on Counts 1-6</i> <u>213</u> re <u>218</u> by Evelyn Sineneng-Smith (Cook, Daniel) (Filed on 12/3/2013) Modified on 12/4/2013 (cfeS, COURT STAFF). * * * (Linked) * * * Modified on 12/4/2013 (cfeS, COURT STAFF). (Entered: 12/03/2013)
12/3/13	<u>222</u>	REPLY in Support of <i>Motion for New Trial</i> <u>214</u> by Evelyn Sineneng-Smith (Cook, Daniel) (Filed on 12/3/2013) * * * (Linked) * * * Modified on 12/4/2013 (cfeS, COURT STAFF). (Entered: 12/03/2013)
12/16/13	<u>223</u>	Minute Entry for proceedings held before Judge Hon. Ronald M. Whyte: Motion Hearing as to Evelyn Sineneng-Smith held on 12/16/2013 re <u>213</u> MOTION for Acquittal <i>Nortice of Motion and Motion for Acquittal</i> filed by Evelyn Sineneng-Smith, <u>214</u> MOTION for New Trial <i>Notice of Motion and Motion for New Trial</i> filed by Evelyn Sineneng-Smith (Court Reporter Irene Rodriguez.) (jgS, COURT STAFF)

DATE	DOCKET NUMBER	PROCEEDINGS
12/23/13	<u>224</u>	(Filed on 12/16/2013) (Entered: 12/20/2013) <b>Order granting in part and denying in part <u>213</u> Motion for Acquittal as to Evelyn Sineneng-Smith; granting in part and denying in part <u>214</u> Motion for New Trial as to Evelyn Sineneng-Smith. Signed by Judge Hon. Ronald M. Whyte on 12/23/13. (rmwlc1, COURT STAFF) (Entered: 12/23/2013)</b>
* * * * *		
12/14/15	<u>262</u>	Minute Entry for proceedings held before Judge Hon. Ronald M. Whyte: Sentencing held on 12/14/2015 for Evelyn Sineneng-Smith (1), Count(s) 2s-3s, 5s-6s, 7s-8s, 18 months BOP custody as to each counts 2, 3, 5, 6, 7, & 8, to be served concurrently; 3 years supervised release as to each counts 2, 3, 5, 6 to be served concurrently and 1 year supervised release as to each counts 7 & 8, all terms to run concurrently. The defendant is to serve 6 months home confinement to include wearing a location monitor; \$43,550.00 in restitution, \$15,000 in fine, \$600.00 special assessment; Count(s) 1-3, 4-6, 7-8, Dismissed

DATE	DOCKET NUMBER PROCEEDINGS
	<p>by way of superseding indictment; Count(s) 1s, &amp; 4s previously dismissed. The Court granted the government's motion to dismiss counts 9 &amp; 10 of the Superseding Indictment and the criminal forfeiture allegations 1 through 3.</p> <p>The Defendant is to self-surrender on 3/16/2016 by 2 PM either at the designated facility of incarceration or to the US Marshal's Office. The Court recommend to the BOP that the defendant be incarcerated in minimum level custody. Also, for BOP to recognize that the defendant is from the San Jose area * * (CC: USM) * * * (Court Reporter Summer Fisher.)</p> <p>Note: Counts 1s &amp; 4s Previously dismissed: Pursuant to Order #224, Motion Granted for Acquittal as to counts 1s &amp; 4s. Counts 9s&amp;10s—Previously Dismissed: Count(s) 9s-10s, Leave is GRANTED to the government to DISMISS Counts 9 &amp; 10], and Criminal Forfeiture Allegation Three without prejudice, Per Order with Docket # 101]. (cfeS,</p>

DATE	DOCKET NUMBER	PROCEEDINGS
12/17/15	<u>263</u>	COURT STAFF) (Filed on 12/14/2015) (Entered: 12/15/2015) <b>JUDGMENT in a Criminal Case            as to Evelyn Sineneng-Smith.            Signed by Judge Ronald M. Whyte            on 12/14/2015. (amk, COURT            STAFF) (Filed on 12/17/2015) (En-            tered: 12/17/2015)</b>
* * * * *		
12/28/15	<u>265</u>	<b>NOTICE OF APPEAL re <u>263</u>            Judgment in a Criminal Case by            Evelyn Sineneng-Smith (Filing            Fee: PAID—0971-10093100,            \$505.00) (Pay.gov Agency Track-            ing ID 25P3URC6.) (Cook,            Daniel) (Filed on 12/28/2015)            Modified on 12/29/2015 (cfeS,            COURT STAFF). (Entered:            12/28/2015)</b>
* * * * *		

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

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CR-10-00414 RMW  
San Jose, California

UNITED STATES OF AMERICA, PLAINTIFF

*v.*

EVELYN SINENENG-SMITH, DEFENDANT

---

Oct. 3, 2011

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**Pages 1-34**

**TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE RONALD M. WHYTE  
UNITED STATES DISTRICT JUDGE**

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APPEARANCES:

FOR THE PLAINTIFF:

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FOR THE DEFENDANTS:

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[2]

\* \* \* \* \*

THE CLERK: Next matter, cr-10-00414, U.S.A. versus Evelyn Sineneng-Smith, on for motion to dismiss.

MS. KNIGHT: Good morning, your Honor. Susan Knight for the United States.

MR. COOK: Good morning, your Honor. Daniel Cook on behalf of Ms. Sineneng-Smith, who is present.

THE COURT: All right. As I understand the motion, it's directed at counts 1 through 3, and then the forfeiture counts that are related thereto.

MR. COOK: And the money laundering counts.

THE COURT: And the money laundering, right.

As I understand the government's position—correct me if I'm misstating this—it is that by encouraging or taking retainers from individuals who were applying for foreign worker status in the United States when the defendant knew [3] the individuals weren't eligible, she was encouraging illegal immigration and an illegal alien to remain in the country.

Is that essentially correct?

MS. KNIGHT: Yes, your Honor.

\* \* \* \* \*

[17]

THE COURT: I understand that.

What do you—what are the elements you have to prove to prove your immigration case? I know it's in your briefing, but I'd like to go through it.

MS. KNIGHT: Yeah. So the first count is that the defendant encourages or induces an alien to reside in the united states knowing or in reckless disregard that such residence was in [12] violation of the law.

And here we've also charged for the purpose of financial gain.

So we—

THE COURT: So how is the defendant encouraging them?

MS. KNIGHT: By—what we know from interviewing aliens who were Ms. Sineneng-Smith's clients, once they entered into that contract, the contract allowed them—the employer put down a down payment on the contract, they would make monthly payments. They would then work at, typically, a residential health care facility.

And they believed, by entering into that contract with Ms. Sineneng-Smith, that at some point they're on the path towards citizenship. She had counselling with them, she had a graph that we would submit at trial, "this is the path to citizenship. You apply for this D.O.L. Labor Certification, you apply for an I-140, you get your priority date," as Mr. Cook correctly explained, "and then you can apply for the last piece of the puzzle."

THE COURT: What's the distinction between the elements you would have to prove to [13] prove the fraud and the elements you'd have to prove to prove the immigration?

MS. KNIGHT: We would have to prove the encouraging and inducing element, that she assisted or aided, substantially assisted or aided an alien.

We would also have to prove that she knew that these individuals were in the United States illegally.

So it is a specific intent crime that she knew that they remained in the United States in violation of U.S. law.

And what we know from the evidence that would be submitted at trial, she knew their immigration status, and they had the whole hope, "if I just file, go through the process, I'm going to be able to stay in the United States."

\* \* \* \* \*

[28]

THE COURT: How is she in a different position from an employer who knowingly hires an illegal alien?

MS. KNIGHT: Because she is—this is beyond the scope of what's in the record right now, but we will submit at trial that she counselled people on these paths to citizenship, that this is the way to become a citizen.

And this is beyond the record again—

THE COURT: But why isn't that what should be charged, that she misrepresented or defrauded—

MS. KNIGHT: She is charged in the mail fraud count.

The encouraging and inducing is based on—she was—she’s been in the business since 1990. She knew about the change in law.

She knew people would, by entering into these retainer agreements, remain and work in the United States.

[29]

And that’s what we submit is the illegal immigration portion of this. She knew that these folks would take the first step, with the retainer agreement that’s charged in the indictment, and they’d have to follow through to the next step.

And the effect of that retainer agreement was they had bought into this path to citizenship and she knew that they would remain and work.

THE COURT: They’re the victims of that scheme, not the government; correct?

MS. KNIGHT: Correct.

I concede, this is a unique case. She did not file any fraudulent applications.

The government—I know U.S.C.I.S. is reviewing thousands of applications right now and hundreds were approved. I’ll concede that.

THE COURT: What do you not have to prove to prove the immigration charge that you would have to prove to prove the fraud charge?

MS. KNIGHT: I think it would be the alien aspect, that she knew—well, I think it would be the encouraging and inducing, that she encouraged and induced illegal immigration. That's the element that would be different from the mail fraud count.

[30]

MR. COOK: And intent to defraud.

MS. KNIGHT: And intent to defraud would be the difference.

THE COURT: Well, wouldn't—so in the immigration charge, you would not have to prove there was an intent to defraud?

MS. KNIGHT: No. We'd have to prove that she knew these individuals were aliens who overstayed their visas and remained in the United States in violation of the law.

MR. COOK: And that she encouraged and induced them within the meaning of the statute.

MS. KNIGHT: Yes.

MR. COOK: Part of the problem—

THE COURT: Hang on a minute. As distinguished from having a specific intent to cause them to stay in the country illegally? Is that what you'd have to prove for the fraud claim?

MS. KNIGHT: For the fraud claim, yeah, it would be an intent to defraud.

She knew they weren't eligible. She took their money and counselled them to apply for a benefit that

ultimately—a benefit two levels down the road that they were not eligible for.

I think the problem in this case—we [31] get caught up because there are so many steps because it is a complex process and it's a very bureaucratic process.

MR. COOK: Part of—

THE COURT: I'm just trying to figure out, just from a practical standpoint, why the government is charging counts one through three.

I mean, it just seems to me that even though there's technically some differences, it would be hard to prove one and not the other.

\* \* \* \* \*

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

---

CR No. 10-00414 RMW

UNITED STATES OF AMERICA, PLAINTIFF

*v.*

EVELYN SINENENG-SMITH, DEFENDANT

---

Pretrial Conference: Feb. 7, 2013

Trial: Mar. 18, 2013

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**UNITED STATES' PROPOSED JURY INSTRUCTIONS**

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The government hereby submits a list of proposed jury instructions. The government may seek leave to amend or supplement these instructions depending on the evidence presented at trial.

\* \* \* \* \*

**PROPOSED JURY INSTRUCTION NO. 2**

**INSTRUCTION NO. \_\_\_\_\_**

**THE CHARGE AND PRESUMPTION OF INNOCENCE**

[Model Instruction 1.2]

This is a criminal case brought by the United States government. The government charges the defendant with encouraging and inducing illegal immigration for private financial gain, in violation of Title 8, United States Code, Sections 1324(a)(1)(A)(iv) and (B)(i), and

mail fraud, in violation of Title 18, United States Code, Section 1341. The charges against the defendant is contained in a Superseding Indictment. The Superseding Indictment simply describes the charges the government brings against the defendant. The indictment is not evidence and does not prove anything.

The defendant has pleaded not guilty to the charges and is presumed innocent unless and until the government proves the defendant guilty beyond a reasonable doubt. In addition, the defendant has the right to remain silent and never has to prove innocence or to present any evidence.

In order to help you follow the evidence, I will now give you a brief summary of the elements of the crimes which the government must prove to make its case. In order to prove that the defendant encouraged and induced illegal immigration for private financial gain, in violation of Title 8, United States Code, Sections 1324(a)(1)(A)(iv) and (B)(i), the government must prove each of the following elements beyond a reasonable doubt for a particular count:

*First*, the person identified in that count was an alien. An alien is a person who is not natural-born or naturalized citizens of the United States;

*Second*, the defendant encouraged or induced the alien to reside in the United States in violation of the law; and

*Third*, the defendant knew that the alien's residence in the United States was or would be in violation of the law.

Furthermore, if you find the defendant guilty of encouraging and inducing illegal immigration as alleged in



Counts One through Three, you will also need to determine whether or not the government has proved beyond a reasonable doubt for each count that the defendant committed the offense or offenses for private financial gain.

In order to prove that the defendant committed mail fraud, in violation of Title 18, United States Code, Section 1341, the government must prove the following elements beyond a reasonable doubt:

*First*, the defendant knowingly devised and intended to devise a scheme or plan to defraud, or a scheme or plan for obtaining money by means of false or fraudulent pretenses, representations, or promises;

*Second*, the statements made or fact omitted as part of the scheme were material; that is, they had a natural tendency to influence, or were capable of influencing, a person to part with money;

*Third*, the defendant acted with the intent to defraud; that is, the intent to deceive or cheat and;

*Fourth*, the defendant used, or caused to be used, the mails to carry out or attempt to carry out an essential part of the scheme.

Authority: *Manual of Model Criminal Jury Instructions for the District Courts of the Ninth Circuit* (2010 ed.), §§ 1.2 (as modified)

\* \* \* \* \*

**PROPOSED JURY INSTRUCTION NO. 31****INSTRUCTION NO. \_\_\_\_\_****ENCOURAGING ILLEGAL RESIDENCE - ELEMENTS**

[Model Instruction 9.4]

The defendant is charged in Counts One through Three of the Superseding Indictment with encouraging illegal entry by an alien for private financial gain, in violation of Section 1324(a)(1)(A)(iv) and (B)(i) of Title 8 of the United States Code.

In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt for a particular count:

*First*, the person identified in that count was an alien.

*Second*, the defendant encouraged or induced the alien to reside in the United States in violation of the law; and

*Third*, the defendant knew that the alien's residence in the United States was or would be in violation of the law.

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

Authority: *Manual of Model Criminal Jury Instructions for the District Courts of the Ninth Circuit* (2010 ed.), § 9.4 (as modified).

**PROPOSED JURY INSTRUCTION NO. 33**

**INSTRUCTION NO. \_\_\_\_\_**

**SPECIAL INSTRUCTION**

If you find the defendant guilty of encouraging and inducing illegal immigration as alleged in Counts One through Three, you will also need to determine for each count whether or not the government has proved beyond a reasonable doubt that the defendant committed the offense or offenses for private financial gain.

**PROPOSED JURY INSTRUCTION NO. 33****INSTRUCTION NO. \_\_\_\_\_****KNOWINGLY—DEFINED**

[Model Instruction 5.6]

An act is done knowingly if the defendant is aware of the act and does not act through ignorance, mistake, or accident. You may consider evidence of the defendant's words, acts, or omissions, along with all the other evidence, in deciding whether the defendant acted knowingly.

Authority: *Manual of Model Criminal Jury Instructions for the District Courts of the Ninth Circuit* (2010 ed.), § 5.6.

**PROPOSED JURY INSTRUCTION NO. 34**

**INSTRUCTION NO. \_\_\_\_\_**

**ENCOURAGE - DEFINED**

Encourage means to instigate, to incite to action, to embolden, or to help.

Authority: *United States v. He*, 245 F.3d 954, 957 (7th Cir. 2001) (approving and upholding the district court’s supplemental jury instruction defining “encouraging,” which was taken from Black’s Law Dictionary).

**PROPOSED JURY INSTRUCTION NO. 35**

**INSTRUCTION NO. \_\_\_\_\_**

**INDUCE- DEFINED**

Induce means to knowingly bring on or about, to affect, cause or to influence to an act or course of conduct.

Authority: *United States v. He*, 245 F.3d 954, 957 (7th Cir. 2001) (approving and upholding the district court’s supplemental jury instruction defining “inducing,” which was taken from Black’s Law Dictionary).

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

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Case No. CR-10-00414 RMW

UNITED STATES OF AMERICA, PLAINTIFF

*v.*

EVELYN SINENENG-SMITH, DEFENDANT

---

Trial Date: June 24, 2013

Courtroom: 6-4th Floor

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**DEFENDANT'S OBJECTIONS TO GOVERNMENT'S  
PROPOSED JURY INSTRUCTIONS; DEFENDANT'S  
PROPOSED PRELIMINARY ELEMENTS  
INSTRUCTIONS**

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Judge: The Honorable RONALD M. WHYTE

Defendant Evelyn Sineneng-Smith, by and through her counsel, submits the following objections to the government's proposed jury instructions (Docket No. 94), exclusive of the government's proposed jury instructions on any bifurcated jury trial forfeiture issues (Docket No. 106).

**I. PRELIMINARY INSTRUCTIONS**

No. 1—No objection.

No. 2—partial objection, as follows—changes in brackets:

First Paragraph, line 2 should read, in relevant part: “charges the defendant with, for private financial gain,

encouraging and inducing illegal immigrants to reside in the United States . . . ”

Third Paragraph should read, in relevant part: “In order to prove that the defendant, for private financial gain, encouraged and induced illegal immigrants to reside in the United States, in violation of Title 8, United States Code, Sections 1324(a)(1)(A)(iv) and (B)(i), the government must prove each of the following elements beyond a reasonable doubt for a particular count:

*First*, the person identified in that count was an alien. An alien is a person who is not natural-born or naturalized citizens of the United States;

*Second*, the defendant encouraged or induced the alien to reside in the United States in violation of the law; [delete “and”]

*Third*, the defendant knew that the alien’s residence in the United States was or would be in violation of the law [; and - and delete “.”]

[*Fourth*, the defendant acted with the intent to violate immigration laws.]”

Fifth Paragraph should read, in relevant part:

*First*, the defendant knowingly devised and intended to devise a [deleted: “scheme or plan to defraud,”] scheme or plan to defraud for obtaining money by means of false or fraudulent pretenses, representations, or promises;

*Second*, the statements made or fact omitted as part of the scheme were material; that is, they had a natural tendency to influence, or were cable of influencing, a person or part with money;



*Third*, the defendant acted with the intent to defraud; that is, the intent to deceive or cheat and;

*Fourth*, the defendant used, or caused to be used, the mails to carry out or attempt to carry out an essential part of the scheme.

The reason for the change to the first paragraph is to conform to the statutory language.

The reason for the change to the third paragraph as to the elements of a § 1324(a)(1)(A)(iv) offense is the additional required element that the defendant acted with the intent to violate immigration law. *See United States v. You*, 382 F.3d 958, 965-66 (9th Cir. 2004) (finding an element of § 1324(a)(1)(A)(iii) harboring of aliens to be an intent to violate immigration law) (and other cases to the same effect for differing subparts of § 1324(a)(1)(A)). There is no logical reason to interpret § 1324(a)(1)(A)(iv) as not including this same element. That is the reason for the addition of the fourth element to the offense, as stated *supra*.

\* \* \* \* \*

#### No. 31—Partial Objection.

First Paragraph, line 2 should read: “[for private financial gain,] encouraging [and inducing illegal immigrants to reside in the United States] . . . ”

Third Paragraph should read: “In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt for a particular count:

*First*, the person identified in that count was an alien. An alien is a person who is not natural-born or naturalized citizens of the United States

*Second*, the defendant encouraged or induced the alien to reside in the United States in violation of the law; [delete “and”]

*Third*, the defendant knew that the alien’s residence in the United States was or would be in violation of the law[; and - and delete “.”]

[*Fourth*, the defendant acted with the intent to violate immigration laws.]

The changes and reasons for the changes are stated *supra* in regard to Govt. Proposed Instruction No. 2.

No. 32 [incorrectly labeled No. 33)—No objection.

No. 33—No objection.

No. 34—Objection. Overbroad definition of “encourage” in light of Ninth Circuit case law discussed *supra* in regard to Govt. Proposed Instruction No. 2.

No. 35—Objection. Overbroad definition of “induce” in light of Ninth Circuit case law discussed *supra* in regard to Govt. Proposed Instruction No. 2.

\* \* \* \* \*

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

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Case No. CR-10-00414 RMW

UNITED STATES OF AMERICA, PLAINTIFF

*v.*

EVELYN SINENENG-SMITH, DEFENDANT

---

June 25, 2013

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**DEFENSE OBJECTIONS TO GOVERNMENT'S  
REVISED PROPOSED JURY INSTRUCTIONS  
AND PROPOSED JURY INSTRUCTIONS**

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The defendant submits the following points in regard to the government's resubmitted proposed jury instructions (Docket No. 169) and verdict form (Docket No. 97).

The defense adopts and reaffirms its earlier objections (Docket No. 136) to the initial proposed jury instructions (Docket No. 94), which are the same as the government's resubmitted proposed jury instructions, except for new Proposed Instructions 46, 47, and 48.

**Proposed Immigration Counts Instructions**

The defense adopts and reaffirms its earlier objections to the immigration counts proposed instructions (Docket No. 136 at 2-3, 7-8) and argument on the preliminary jury instruction on the elements of the § 1326 offenses charged. The defense requests this Court to again review, as it said it would, the elements instruction

on § 1326 in regard to its intent to violate immigration law under the case of *United States v. You*, 382 F.3d 958, 965-66 (9th Cir. 2004). This Court should also consider the issue of how the rule of lenity would require any ambiguity in construction of that intent element to be resolved in favor of the proposed defense version previously submitted.

\* \* \* \* \*

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

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CR-10-00414 RMW  
San Jose, California

UNITED STATES OF AMERICA, PLAINTIFF

*v.*

EVELYN SINENENG-SMITH, DEFENDANT

---

June 24, 2013

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**Volume 1**  
**Pages 1-114**

**TRANSCRIPT OF PROCEEDINGS**  
**BEFORE THE HONORABLE RONALD M. WHYTE**  
**UNITED STATES DISTRICT JUDGE**

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APPEARANCES:

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UNITED STATES

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\* \* \* \* \*

[102]

\* \* \* \* \*

THE COURT: Have you had a chance to look at the preliminary instructions?

MR. COOK: Yes, I have. I don't see any issue with those and the proposed translator instruction I think is fine.

THE COURT: Okay.

MR. COOK: That you have in the brackets.

THE COURT: I put brackets around it because I wasn't sure.

MS. KNIGHT: I think it's fine.

THE COURT: How about the rest?

MS. KNIGHT: I think it's fine, your Honor.

[103]

Thank you.

THE COURT: Okay.

MR. COOK: I will just preserve the objections I made because I made some proposals that you didn't put in there.

THE COURT: The only proposal was the one pertaining to—

MR. COOK: A fourth element for the immigration offense.

THE COURT: I put something in to cover that, I thought.

MR. COOK: Oh, okay. Well, just for simplicity purposes, let me just preserve the record with whatever objection may be appropriate based on what I said.

THE COURT: The concern I have about that is if it's something I haven't thought about, it might be a little—

MR. COOK: Let me take a look at it again.

MS. KNIGHT: Your Honor, I think we just had one copy between the two of us.

THE COURT: I added to the second element of the—

Mr. COOK: Knowing that doing so was in violation of immigration laws. I see that, your honor. Okay.

THE COURT: That takes care of it.

MR. COOK: I think that does take care of that.

MS. KNIGHT: Your Honor, taking another look at this, this is just knowing that doing so was in violation of [104] immigration laws.

That's not part of the pattern instruction. We do have the knowingly element, we have the knowingly encouraging, knowingly inducing. So we object to this section being included in the instruction.

THE COURT: What's wrong with it?

MR. GUENERT: Your Honor, the request by the defendant to add the conduct was, the act was committed knowing it would be in violation of immigration laws is not the law of that statute and not part of the pattern. That would be an extremely unusual requirement. You would expect to see suggested somewhere in the statute, even willfully only requires that somebody act in violation of a legal duty. To know that you acted in violation of a specific group of laws, I think would be extraordinary. And there's no—willfully isn't even part of the statute.

The mens rhea required, according to the statute is that you know that the aliens in question are present in the United States illegally. Otherwise you simply have to encourage or induce. This is extra element is simply not found in the law

THE COURT: What's the extra element?

MR. GUENERT: The extra element is that the encouraging or inducing was done with the knowledge that the encouraging or inducing would be done in violation of [105] immigration laws. That is not part of the statute.

THE COURT: So how could someone encourage or induce someone to, an alien to reside in the—

MR. GUENERT: The third element is the mens rea required.



THE COURT: What's the difference between the second and third?

MR. GUENERT: You have to know that the aliens are present illegally. You don't have to know that to encourage them would be in violation of the immigration laws. I mean, that is an extra leap that is not suggested by the statute.

As I said, even willfully only requires that you account thinking that it's in possible violation of a legal duty. You don't have know that you are breaking the law by encouraging them to stay. All you have to know is they are present illegally.

\* \* \* \* \*

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

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CR-10-00414 RMW  
San Jose, California

UNITED STATES OF AMERICA, PLAINTIFF

*v.*

EVELYN SINENENG-SMITH, DEFENDANT

---

July 8, 2013

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**Volume 6**  
**Pages 1-97**

**PARTIAL TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE RONALD M. WHYTE  
UNITED STATES DISTRICT JUDGE**

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APPEARANCES:

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\* \* \* \* \*

[3]

\* \* \* \* \*

MS. KNIGHT: Yes, your Honor. The government wishes to call Hermansita Esteban, and she will be using the services of a tagalog interpreter, Dennis Castro.

THE CLERK: Do we have the interpreter? Okay. Come forward, please. Okay. I'm going to swear you in. Raise your right hand.

**(HERMANSITA ESTEBAN, PLAINTIFF'S WITNESS, SWORN.)**

THE WITNESS: Yes.

THE CLERK: Thank you. Take the stand, please.

For the record, please state your full name and spell your last name.

[4]

THE WITNESS: Hermansita Esteban, E-s-t-e-b-a-n.

**DIRECT EXAMINATION**

BY MS. KNIGHT:

Q. Good afternoon, Ms. Esteban.

A. Good afternoon.

Q. Ms. Esteban, where do you reside?

A. At 4101 Fairway Drive, Soquel, California.

Q. Okay. And are you employed?

A. Yes.

Q. Where are you employed?

A. Soquel Leisure Villa, Incorporated.

Q. And what is Soquel Leisure Villa?

A. Home care for the elderly.

Q. And what is your position?

A. Care giver

Q. Okay. And Ms. Esteban, were you born in the United States?

A. No.

Q. What country were you born in?

A. Philippines.

Q. And how long did you reside in the Philippines?

A. Forty-five years.

\* \* \* \* \*

[6]

Q. Okay. Did you decide to travel to the United States again?

A. Yes.

Q. When?

A. April, 2002.

Q. And, again, what steps did you have to take to be allowed into the United States?

A. I didn't get a tourist visa again because my visa was good [7] for ten years, so it was good to go back and forth.

Q. Okay. How long—how long were you admitted to the United States the second time you came?

A. Six months.

Q. Okay. And where did you arrive?

A. San Francisco.

Q. Okay. What did you do after you arrived?

A. We traveled.

Q. Okay. Now, after you arrived, what, if any, decision did you make about remaining in the United States?

A. I found out that Soquel Leisure Villa was petitioning workers, so I went to Soquel Leisure Villa accompanied by my sister-in-law and asked them if they would petition me.

Q. How did you learn that Soquel Leisure Villa was looking for workers?

A. From the church, when we went to church.

Q. Okay. And what does "petition" mean to you?

A. Petition for a green card.

Q. Okay. And you said you went to Soquel Leisure Villa to inquire about a job?

A. Yes.

Q. Who did you meet with?

A. The owner, Mrs. Felicidad Dizon.

Q. Okay. And where is Soquel Leisure Villa located?

A. 4101 Fairway Drive, Soquel, California.

[8]

Q. Okay. Now, at the time you went to Soquel Leisure Villa, were you aware of whether your visa had any restrictions regarding employment?

A. I didn't know.

Q. You didn't know.

When did you meet with Ms. Dizon?

A. Around the first week of May.

Q. Okay. Did you inform Ms. Dizon about your immigration status?

A. Yes.

Q. Okay. At the time you met with Ms. Dizon, did she offer you a job?

A. She said that I should consult with an attorney. There was a job available, but that I should consult with an attorney first.

Q. Okay. So what did you do?

A. She set up an appointment for me with Evelyn Sineneng-Smith.

Q. Okay. When you say “she,” who is that?

A. Mrs. Dizon.

Q. Okay. And what was the date of the meeting?

A. May 13, 2002.

Q. Okay. And what did you believe the purpose of the meeting was?

A. I was going to ask if Mrs. Dizon could petition me so that [9] I may work.

Q. Okay. So directing your attention to May 13th, 2002, you went to a meeting. And, again, where was it at?

A. At Evelyn Sineneng’s office in San Jose.

Q. Okay. Did anyone go with you?

A. There was.

Q. Who went with you?

A. Mrs. Dizon’s relative.

Q. Okay. And what did you observe when you arrived?

A. We saw other people there that were seeking—we saw other people there that were there to be petitioned by their employers as well.

Q. Okay. How many people?

MR. COOK: Objection. Move to strike unless that was said by Ms. Sineneng-Smith.

THE COURT: I think we ought to clear that up as to the source of that information.

BY MS. KNIGHT:

Q. How did you know those people in the room were there to apply for a petition?

A. I spoke with them.

Q. Okay. Now, did you bring anything with you?

A. They had me bring my passport.

Q. And what happened next?

A. We waited briefly, and then after a few moments, we were [10] told to enter a room. And then somebody arrived and that person introduced herself as Evelyn Sineneng and she introduced herself.

Q. Okay. Would you be able to identify Ms. Sineneng-Smith today?

A. Her appearance has changed. It's not the Evelyn Sineneng I knew. Her appearance has changed if she's in here today.

Q. Do you see her in the courtroom today?

A. I'm not sure. I'm not sure because the person I met 11 years ago doesn't look like that person now.

Q. Okay. Now, going back to the meeting in 2002, what happened after Ms. Sineneng-Smith introduced herself?

A. After she introduced herself, she told us to trust her because she studied law, and that her office was trustworthy, and that there were many people whose petitions had been approved.



Q. Okay. Did she say anything else?

A. And she said that the petition will take three to five years.

Q. Okay. While she was speaking, what, if any, aids did she use during her presentation?

A. There was a white board there and she wrote three to five years, it will take three to five years.

Q. Ms. Esteban, what will take three to five years?

A. The petition that she would apply for me.

[11]

Q. And what, again, do you mean by “petition”?

A. So that I would receive a green card.

Q. Okay. What, if anything, did Ms. Sineneng-Smith tell you about the Labor Certification process?

A. Nothing that I recall.

Q. Did Ms. Sineneng-Smith inform you that the law allowing you to obtain a green card through Labor Certification while you were present in the United States had expired?

A. She didn't say anything.

Q. What, if anything, did Ms. Sineneng-Smith tell you about your ability to work while your Labor Certification was pending?

A. That I was able to work once the petition was filed.

Q. Okay. What, if anything, did Ms. Sineneng-Smith tell you about your ability to remain in the United States while your Labor Certification application was pending?

A. I'm sorry. Can you repeat that?

Q. What, if anything, did Ms. Sineneng-Smith tell you about your ability to remain in the United States while your Labor Certification application was pending?

A. I was here in the U.S. and that I could stay here in the U.S.

Q. Did Ms. Sineneng-Smith tell you that?

A. Yes.

Q. Okay. Now, after listening to Ms. Sineneng-Smith, what [12] did you understand would happen at the end of the process?

A. That I would receive a green card.

Q. Okay. What happened next?

A. After the meeting?

Q. After Ms. Sineneng-Smith spoke to you, what happened next?

A. She turned me over to her assistant in a different room.

Q. Okay. Then what happened?

A. Then her assistant had me sign agreements.

\* \* \* \* \*

[15]

Q. Okay. Now, Ms. Burney, if you can go to the other document?

What is this document, Ms. Esteban?

A. Is this it?

Q. The document that's on the screen.

A. Philippine passport. Oh, visa, it's my visa.

Q. Okay. And I see a date stamped on it to the very right of April 13th, 2001.

A. I can't see it very well.

Q. If you could please refer to the one in front of you, it might be easier to see.

A. What's the question?

Q. What's the significance of April 13th, 2001?

A. That was my first trip here to America.

Q. Okay. I see another date stamped of April 13th, 2002.

A. My second trip.

Q. Okay. Thank you.

Next I'd like to—Ms. Burney, can you go to 17a? Ms. Burney, is it possible to enlarge that?

[16]

Now, what is this document? What is the title?

A. A basic questionnaire about me.

Q. Okay. And who filled this out?

A. I did.

Q. Okay. And can you tell us, there's a line that says "date of entry into the United States."

A. April 13th, 2002.

Q. And there's a line that says "last day in the United States." What date is that?

A. October 12, 2002.

\* \* \* \* \*

[18]

Q. Okay. Now I'd like you to turn to page 3. What is the title of this document?

A. Retainer agreement.

Q. Okay. Can you please read the first line?

A. "This will acknowledge that Evelyn Sineneng-Smith has been retained by me, Hermansita Esteban, alien, for purposes of assisting me to obtain permanent residence through Labor Certification. An attorney who maintains—"

Q. Thank you. At the time you—do you know, at the time of this retainer agreement, did you know what "permanent residence" meant?

MR. COOK: Objection. That isn't something Ms. Sineneng said to her. It's hearsay or speculation.

THE COURT: Well, it certainly is if it's offered to say something that Ms. Smith said. I think she can testify as [19] to what her understanding of "permanent residence" was just for explaining her knowledge.

THE WITNESS: What?

THE COURT: At the time you filled out this form, did you know what "permanent residence" meant?

THE WITNESS: No.

MS. KNIGHT: Okay.

Q. Now, the second paragraph—Ms. Burney, if you could please highlight that—what was the retainer fee?

A. \$6,000.

Q. Okay. I see 5,900 listed on this form.

A. And then there was \$100 for miscellaneous fees.

Q. Okay. Now, did you—I see below the second paragraph that says “a \$500 retainer fee to be paid upon signing upon this agreement.”

Did you put down a \$500 retainer fee?

A. No, no, I didn't.

Q. Okay. How much did you, under this agreement, promise to pay Ms. Sineneng-Smith? I see some dates listed and some amounts.

A. Yes. 100 every 15th of the month. No, 15th and 30th.

Q. Okay. And how did you make those payments?

A. Through checks.

\* \* \* \* \*

[23]

Q. Okay. Now I'd just like to talk about your visa.

You had testified just a few moments ago that your visa expired on October 12th, 2002.

What, if any, steps did you take to extend your visa?

A. Nothing.

Q. Why not?

A. Because I thought that I had a petition that had been filed and that that was my way of being legalized.

Q. Okay. Now, during the time you were under the retainer agreement with Ms. Sineneng-Smith, did you receive anything from her?

A. Through the mail, through the mail she was sending me letters, receipts, receipts that were produced on the computer, prayers for leniency, and other things.

Q. Okay. Now I'd like to direct your attention to exhibit 17c, which is in front of you.

Ms. Burney, if you could pull up 17c?

Now, this is up on the screen. Do you recognize this document?

A. Yes.

[24]

Q. What is it?

A. Prayer for leniency that was—that I was told I needed to show any arresting officer.

Q. Who told you that?

A. Their office, the assistant when I called.

Q. Okay. I'd like to take a look at the letter that's on the screen right now.

Can you read the second to last paragraph?

A. "This alien is taking steps to legalize his/her immigration status in the United States. Unfortunately, the processing takes more than five years. However, the alien is showing good faith by complying with the regulations."

Q. Okay. Now, below that I see a date, an expiration date. Do you know what the purpose of the expiration date was?

MR. COOK: Objection, your honor, unless it was said by Ms. Sineneng-Smith.

THE COURT: Well, again, if you're going to ask what somebody told her, I think we need to know who it was that she was talking to.

MS. KNIGHT: Okay.

Q. Did Ms. Sineneng-Smith, or anyone from her office, explain what the meaning of the date at the bottom of the letter meant?

MR. COOK: Objection to "anybody from her office."

THE COURT: Okay. I'll let you ask the question, but I want it broken down.

[25]

MS. KNIGHT: Okay.

Q. Did Ms. Sineneng-Smith explain to you the meaning of the date at the bottom of this letter?

A. No.

Q. Did a staff member from Ms. Sineneng-Smith's office inform you about the meaning of the date?

MR. COOK: Objection, your Honor.

MS. KNIGHT: I'll move on.

THE COURT: All right.

By Ms. Knight:

Q. Now, I see that this—there's a signature at the bottom. Whose signature is that?

A. Mrs. Sineneng-Smith's.

Q. Okay. Now, in front of you, how many pages are contained in Government's Exhibit 17c?

A. Should I count?

Q. If you look to the last page.

A. 39.

Q. Okay. How often would you receive this type of letter?

A. Almost every month.

\* \* \* \* \*

[29]

Q. Okay. Now I'd like to turn now to Government's Exhibit 17e, page 1.

Do you recognize this document?

A. Yes.

Q. And what is it?

A. Retainer agreement for immigrant petition.

Q. Okay. And I see in the middle there is a—there are some numbers that say "cost of service."

A. Yes.

Q. What was the cost of service?

A. \$1,000.



Q. Okay. I see a cost of service of \$900.

A. Yes, and plus 100 for miscellaneous expenses.

Q. Okay. And if you go to the full document, I see a signature at the bottom. Whose signature is that?

[30]

A. My signature is there.

Q. Okay. And who else—what date do you have listed?

A. June 18th, 2007.

Q. Okay. And then I see a signature below. Do you know whose signature that is?

A. My employer's.

Q. Now, did you make a down payment?

A. Yes.

Q. How much?

A. 400.

Q. Okay. Turning to the next page, I see a signature at the bottom. Whose signature is that?

A. I—my signature is there.

Q. Okay. I'd like to go to page 3.

Do you recognize this document?

A. Yes.

Q. Okay. Can you please read the first line?

A. "Congratulations. Your patience has just been rewarded. Your application for alien employment certi-

fication was just approved. The next step is file a petition for you with the USCIS. Please send to our office the following.”

Q. Okay. And what did this letter direct you to do?

A. That I—that I would send a check to their office for the filing fee for \$195.

Q. Okay. And whose signature is at the bottom?

[31]

A. Evelyn Sineneng’s.

Q. Okay. And I see in the middle there it says “petition for alien worker.”

At the time that you received this letter, did you know what that was?

A. No.

Q. Did you ask?

A. No, because they just sent this in the mail.

Q. Okay. Now I’d like to turn to page 4. I see a signature on the right-hand side. Whose signature is that?

A. Mine.

Q. And what date is listed?

A. June 18th, 2007.

Q. Okay. And I see another signature on the left-hand side. Do you know whose signature that is?

A. My employer’s.

Q. Okay. Now I’d like to just turn to page 5.

Do you recognize this document?

A. Yes.

Q. And what is it?

A. A tagalog version of that agreement.

Q. Okay. And turning to page 6, is that a tagalog version?

A. Yes.

Q. Okay. Now if you could please turn to page 7.

Can you please read the title of this document?

[32]

A. "The road to obtaining permanent residence is a rocky and frustrating road."

Q. Okay. And I'd like to direct your attention to the language where it says "work permit/green card."

And Ms. Burney, if you can please highlight underneath "work permit/green card."

At the time that you received this document—well, let me—can you please read left to right where it says "if applicable"?

A. "If applicable, 245I effective here. Work permit approximate 1 year. Green card approximate 1 to 2 years."

Q. At the time that you received this document, were you aware of what "245I" meant?

A. No.

Q. Okay. I'd like to go to the full document.

At the bottom I see a signature.

A. Yes, that's my signature.

Q. And what date is next to it?

A. June 18th, 2007.

Q. So at the time you signed this agreement, did you not know what "245I" meant?

A. Yes.

Q. Okay. Why did you sign it if you didn't understand what it meant?

A. Because they said that their office was trustworthy, so I [33] trusted them. I trusted them to do everything that they needed to do for my position.

MR. COOK: Objection. Move to strike, your honor—

THE COURT: I think—

MR. COOK: —as to who is the "they."

THE COURT: Can you clear that up?

MS. KNIGHT: Yes.

THE COURT: Both time and who said anything, if they did.

BY MS. KNIGHT:

Q. Who's "they"?

A. Evelyn Sineneng.

\* \* \* \* \*

## [CROSS-EXAMINATION]

[74]

Q. And you knew it was a petition for a Labor Certification, [75] didn't you?

A. At first I didn't know it was for Labor Certification. I thought it was for a green card.

Q. Who told you that? Mrs. Dizon?

A. No. When I went to Evelyn Sineneng-Smith, my understanding was that she was filing for a green card for me.

Q. When you say "my understanding," is that based on what some employee of hers whose name you can't remember told you?

A. When she said that "we would be filing a petition for you," my understanding at that time was the petition was for a green card.

Q. What she told you was it was a petition for a Labor Certification; isn't that correct? Step one of a three-step process?

A. She did not explain it.

Q. So it's your testimony that Evelyn Sineneng-Smith said, with one application that's approved, you get your green card? Is that correct?

A. My understanding is that that petition, the petition that was filed, was for a green card.

Q. One-step process; right?

A. Yes.

\* \* \* \* \*

[77]

\* \* \* \* \*

MR. COOK: Can we bring up 17e? Could you highlight the bottom half of it? Yeah, that's fine.

Q. This is your application for an immigrant petition for an alien worker, isn't it? This is the contract for that?

A. I can't read that.

Q. Well, let me—why don't you look at it—I think you have 17e in front of you in one of the—I'm not sure which one it is. Ah (Indicating).

That's your signature down at the bottom, isn't it?

A. Yes.

Q. June 18th, 2007; right?

[78]

A. Yes

Q. Well, you certainly knew by then that one petition getting approved wasn't going to get you a green card, didn't you?

A. Yes.

Q. Did you ask Ms. Sineneng-Smith about that?

A. No.

\* \* \* \* \*

[80]

Q. And Ms. Sineneng-Smith told you that if the Labor Certification was approved, there was a second step you had to go through, didn't she?

A. I don't recall that.

Q. She told you about having to go through the process of an I-140 Application as the second step in the process, didn't she?

A. No.

Q. She never said anything about an I-140, immigrant petition for an alien worker, in that first meeting?

A. I don't recall.

Q. And she told you if the I-140 petition was approved, there was a third step, which was the step to try and get a green card, didn't she?

A. She didn't say that.

[81]

Q. She didn't say anything to you about a third step to this process?

A. From my recollection, none.

Q. And she told you, because of when you had entered the country, you weren't eligible to take that third step unless the law changed, didn't she?

A. If she had said that to me, I would not have stayed here.

\* \* \* \* \*

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

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CR-10-00414 RMW  
San Jose, California

UNITED STATES OF AMERICA, PLAINTIFF

*v.*

EVELYN SINENENG-SMITH, DEFENDANT

---

July 23, 2013

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**Volume 12**  
**Pages 944-1148**

**TRANSCRIPT OF PROCEEDINGS**  
**BEFORE THE HONORABLE RONALD M. WHYTE**  
**UNITED STATES DISTRICT JUDGE**

---

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\* \* \* \* \*

[1011]

\* \* \* \* \*

**ANTHONY VILLACORTA,**

Being called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

THE WITNESS: I do.

THE CLERK: Thank you. Take the stand, please.

For the record, if you can please state your full name and spell your last name.

[1012]

THE WITNESS: Anthony James Villacorta. Villacorta is spelled v-i-l-l-a-c-o-r-t-a.

**DIRECT-EXAMINATION BY MR. GUENTERT**

BY MR. GUENTERT:

Q. Where are you employed?

A. I'm employed with Immigration Customs Enforcement.

Q. Is that also known by the acronym ICE?

A. Yes, sir.

Q. And what's your current title there?

A. Special Agent.

\* \* \* \* \*

[1013]

\* \* \* \* \*

Q. Now specifically speaking about April 16th of 2008, did you conduct an interview of Evelyn Sineneng-Smith as part of that investigation?

[1014]

A. Yes, I did.

Q. What else was happening that day as part of the investigation?

A. That day teams of other agents and investigators were assigned to conduct functions such as interviews of associates of Ms. Sineneng, employees, as well as conduct a search of her business.

Q. Now directing your attention to approximately 8:00 a.m. On April 16th, where did you go?

A. I went to Ms. Sineneng's residence on Mount SHAM Ton Road in San Jose.

\* \* \* \* \*

[1016]

\* \* \* \* \*

Q. At the beginning of the interview did you ask the defendant some background questions?

A. Yes, I did.

Q. Where did she tell you she was born?

A. The Philippines.

Q. When did she first come to the United States?

A. Around 1967.

Q. Did she give you any information on her professional education?

A. Yes. She told me she attended Peninsula Law School and Lincoln Law School in San Jose.

Q. What was her area of concentration at law school?

A. Immigration law.

Q. When did she tell you she received her degree?

A. I can't remember exactly.

Q. Was it approximately in 1990?

A. Yes.

Q. What professional experience, in any, does she have in immigration, according to her statement to you?

A. She told me she worked for Sea Gate Technology as an Immigration Clerk.

Q. And what did she do there?

[1017]

A. She processed documents for employees coming from over seas.

Q. What did the defendant tell you about the start of her own business?

A. She said she started her own immigration consulting business in San Jose in approximately 1990.

Q. Where was it located at first?

A. It was located on North First Street in San Jose.

Q. Now at this point in the interview what did you do?

A. I read Ms. Sineneng her rights from the statement of rights form.

Q. And did you also discuss with her the execution of a search warrant?

A. Yes, I showed Ms. Sineneng a copy of the search warrant and explained to her the violations stated in the search warrant warrant and then I showed her a copy.

Q. Now if the defendant wasn't under arrest, what caused you to advise her of her rights?

A. I wanted to make it clear that it was a voluntary consensual interview and she had the right to stop at any time.

Q. And what did she say to you after you advised her of her rights?

A. That she wanted to continue.

Q. Did she discuss, at that point did she mention her clients?

A. Yes. She said she receives a lot of complaints from her [1018] clients.

Q. And what did she say about who she works with when she mentioned her clients?

A. She said she works primarily with individuals involved in the home health care nursing industry.

Q. What, if anything, did she tell you about how she attracted clients?

A. She said she advertises in newspapers in the San Francisco Bay area as well as cities such as San Diego and New York.

Q. What kind of newspapers?

A. Filipino newspapers.

Q. Did she engage in any other kind of marketing?

A. Yes, she told me she advertises in ethnic restaurants as well.

Q. And what about mailings?

A. Yes. She told me she would mail flyers to residential care facilities and she identified those facilities through a state community care licensing agency.

Q. Now with respect to the clients who were employees at residential care facilities, how did she describe them?

A. She said most of them were from the Philippines.

Q. Present in the United States in what way?

A. Some of them entered as a tourist. She mentioned crew man, also.

Q. Then did she say they were here legally or illegally?

[1019]

A. She said most of them were here illegally.

Q. Now according to her statement, how did she know about the immigration status of her clients?

A. She said that she would look at their passports which contains their visa and she would make copies of them for her file.

Q. What was one means by which she would meet an alien worker?

A. She would be introduced to a worker by their employer, the owner of a residential care facility who she had prior dealings with, usually.

Q. And what, if anything, did she say about whether the alien was already working for the employer when they came to see her?

A. She said most of them were already working.

Q. And what, if anything, did she say about how she would assist the employer and the employee?

A. She explained to me that they were coming to her for service and she would assist them with the Labor Certification process.

Q. Did she say whether or not she knew that they should be working?

A. She knew they should not be working.

Q. So what was her explanation for doing this if she knew they weren't supposed to be working?

A. She explained that it was up to the employee and the employer and it was their decision to go with the process.

[1020]

Q. During the interview, what if anything did the defendant say about whether her clients could adjust their status through Labor Certification?

A. She knew that they could not adjust status through Labor Certification.

Q. And according to the defendant, did she tell her clients this?

A. She told me that she would tell them this.

Q. Now, during the interview did you also discuss a law known as section 245(I) of the Immigration and Naturalization Act?

A. Yes, we did.

Q. And what did the defendant say about it?

A. She said that 245(I) once allowed an alien to adjust status up until the date of April 30th of 2001 based on the Labor Certification process, and then once—or after that begin nothing May 2001, aliens could no longer adjust status.

Q. Adjust status in the United States?

A. Yes, sir.

Q. Did you discuss the fees that she charged her clients?

A. Yes, we did.

Q. And what did she charge initially for the beginning of the process with the Labor Certification?

A. She charged \$5,900 for the Labor Certification process.

Q. And did she describe to you how that was paid?

A. Yes. She stated that she would receive a down payment [1021] initially and then monthly installment payments.

Q. What did she say, if anything, about what would happen to the fees if the client was arrested or deported?

A. She said they would not be refunded.

Q. When the clients came to her, what was the first step for an alien worker?

A. She explained that the first step would be for the employee and the employer to complete a questionnaire.

Q. And according to the defendant, what was another step in the process for Labor Certification?

A. Another step would be to advertise the position at the health care facility.

Q. Advertise the position in what manner for what purpose?

A. The purpose would be to advertise to open the position up for U.S. workers agreeing to take that position at the prevailing wage.

Q. And what did she tell you the cost for the advertising was, typically?

A. It's over a thousand dollars, between 1,000 to \$2,000.

Q. What did she say about whether the employers ever hired an American worker as a result of this advertising?

A. She said in all instances the employer hired the alien worker.

Q. Now you said they wound up hiring the alien worker. When were those alien workers hired and how often?



[1022]

A. They were hired most of the time when the alien worker came to Ms. Sineneng with the employer.

Q. So hired before they actually came to retain her?

A. Yes, sir.

Q. And what did the defendant say about the legality of employing the alien worker right away?

A. She knew that she told me she knew that they weren't allowed to work until they were approved.

Q. And what if anything did she tell you of whether it was legal for clients to work even after a Labor Certification was granted and even after the petition for immigrant worker was approved?

A. She stated she knew they were still not able to work at that point.

Q. Not work legally?

A. Not work legally at that point.

Q. Did she tell you that she knew what the proper procedure was?

A. Yes. She explained to me that she knew what the proper procedure was.

Q. And that meaning the proper procedure for adjusting their status?

A. Yes, sir.

Q. What did she tell you the proper procedure for adjusting their status was?

[1023]

A. She told me she knew the alien worker would have to wait in their home country.

Q. Until what happened?

A. Until they were approved for a work visa to enter the U.S.

Q. And what did she say about what the employer and the worker and she were doing when they tried to adjust in the United States?

A. She told me they were bypassing that step.

Q. Did she tell you that other people were following the proper procedure?

A. Yes, she did.

Q. Who was that, who did she refer to?

A. Employees from companies such as Microsoft, Cisco.

Q. And what was her justification for participating in the improper procedure?

A. She told me that she was just merely providing the service to the employee and the employer.

Q. What if anything did the defendant say to you about what the effect would be to her business if the clients followed the proper procedure?

A. They wouldn't come to her if they did things properly.

Q. What did she tell you her business was based on?

A. She told me her business was based on the foreign Labor Certification process.

Q. In the United States?

[1024]

A. In the United States.

Q. And for her clients what did she say the proper process would involve?

A. That they would have to wait in their home country and wait to get approved.

Q. And in most cases we are talking about the Philippines?

A. Yes, sir.

Q. What did she say to you that she told her alien clients about going back to the Philippines?

A. She said they could either go back and wait to be approved or if they went back, they may not be allowed to come back to the United States.

\* \* \* \* \*

[1031]

\* \* \* \* \*

**[CROSS-EXAMINATION]**

Q. You asked Ms. Sineneng-Smith about 245(I); isn't that correct?

A. That's correct.

Q. And she told you what her understanding was about 245(I), correct?

A. That's correct.

Q. And she told you that although the alien workers were not supposed to work, that she would assist the employer if the employer wanted to do a Labor Certification application, correct?

A. That's correct.

Q. And you understood at the time, did you not, that Labor [1032] Certification application had to be filed by the employer, correct?

A. Correct.

Q. And Ms. Sineneng-Smith told you that she would tell her clients that they could eventually adjust if they followed procedure and did not work under the table, only if the United States Congress passes a law to allow them to stay in the future, didn't she?

A. Yes, that's what she told me.

Q. Right. She told you for her applicants that weren't 245(I) eligible, that Congress would have to pass a law to allow them to become eligible again, correct?

A. Yeah, that's essentially what she told me.

Q. Right. And she told you that she would advise the clients about 245(I) and whether they were in her opinion eligible or ineligible, correct?

A. Correct.

\* \* \* \* \*

[1034]

\* \* \* \* \*

Q. That wasn't my question. And you also discussed to her what she would advise her clients in regard to the

I-140 process if the Labor Certification had been approved, correct?

A. I just don't recall specifically if we got that detailed about the I-140.

Q. But you do recall you got that the specific about the Labor Certification, correct?

A. Correct.

Q. And she explained that though her clients might not be 245(I) eligible now, at the time of the interview to adjust, that one day they might be able to, if new laws were passed by Congress, correct?

A. Yeah, that's what she told me.

Q. And that my submitting an application now the alien worker would get what's called a priority date, correct?

A. Correct.

Q. And you understand what that is, don't you?

A. Yes.

Q. If you file a Labor Certification application, the day the Labor Department receives it you get a priority date, correct?

A. A priority date establishes some time around then.

\* \* \* \* \*

[1035]

\* \* \* \* \*

Q. And Ms. Sineneng-Smith told you that an alien worker by submitting a Labor Certification application, would get an early priority date in the event Congress

passed a new law allowing alien workers to adjust their status, didn't she?

A. I don't know if she used those exact words.

Q. You prepared a report of your interview with Ms. Sineneng-Smith, didn't you?

A. Yes, I did.

Q. Let me show you page, page three bates number 202 at the bottom. And I would like you to read from paragraph three that I've highlighted.

A. Starting here? And read all the way to the end?

Q. Read it to yourself, please.

A. Okay. Yes, that's what she told me.

Q. And that's accurate what's stated in your report; is that correct?

A. That's correct.

[1036]

Q. Then it's correct then that Ms. Sineneng-Smith further explained if any of her clients are not eligible to adjust, but one day they may be able to if new laws are passed by Congress, correct?

A. That's what she told me.

Q. And that by submitting an application now the alien worker would have an early priority date in the event Congress passes a new law allow being alien workers to adjust their status?

A. Yes, that's what she told me.

Q. Now Ms. Sineneng-Smith also told you that she would tell the employer and the worker there was no

guarantee that the alien worker could stay in the United States if confronted by law enforcement officers about the immigration status, didn't she?

A. Yes, that's what she told me.

\* \* \* \* \*

[1039]

\* \* \* \* \*

Q. Ms. Sineneng-Smith explained to you that the—there was—you asked her about whether or not it is been called here leniency letters; do you know what I'm talking about?

A. Yes, that topic came up.

Q. And she stated that she had provided those letters because sometimes alien workers were not clear in explaining to Immigration officials or law enforcement officers their current status, correct?

A. Yes.

Q. And she told you it was simply a plea for mercy, didn't she?

A. Yeah, that's what she told me.

Q. And the decision whether to accept it or not is ultimately up to the discretion of the law enforcement officer, correct?

A. Yes, that's what she said.

[1040]

Q. And she further explained to you that section 245(I), her understanding of 245(I) is it allowed aliens to adjust

their status if they filed a Labor Certification on or before April 30th, 2001, correct?

A. That's correct.

Q. And she told you that after that date unless the law changed, they were not eligible to adjust their status under 245(I), correct?

A. Yes, that's what she said.

\* \* \* \* \*

[1043]

\* \* \* \* \*

Q. And Ms. Sineneng-Smith further told you in the interview that she was aware the employer was not supposed to hire an alien worker who was here unlawfully and told them that, correct?

A. Yes, that's what she said she tells them.

Q. And it was up to the employer and the alien whether they wanted to hire her under those circumstances, correct?

A. Yes, that's correct.

Q. And Ms. Sineneng-Smith told you that even if the I-140 is approved, the alien worker who was not 245(I) eligible still could not work in the United States legally?

A. Yes, that's correct.

\* \* \* \* \*



UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

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CR-10-00414 RMW  
San Jose, California

UNITED STATES OF AMERICA, PLAINTIFF

*v.*

EVELYN SINENENG-SMITH, DEFENDANT

---

July 25, 2013

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**Volume 14**  
**Pages 1291-1366**

**TRANSCRIPT OF PROCEEDINGS**  
**BEFORE THE HONORABLE RONALD M. WHYTE**  
**UNITED STATES DISTRICT JUDGE**

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\* \* \* \* \*

[1330]

\* \* \* \* \*

**DANIELLE SINGLETON,**

Being called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

THE WITNESS: I do.

THE CLERK: Thank you. Please be seated. Please state your full name and spell your last name for the record.

THE WITNESS: Danielle Singleton. S-i-n-g-l-e-t-o-n.

**DIRECT-EXAMINATION BY MR. GUENTERT**

BY MR. GUENERT:

Q. Good morning, Ms. Singleton. Can you tell us how you are employed?

A. Yes, I'm a special agent for the internal revenue service, IRS, Criminal Investigation.

\* \* \* \* \*

[1338]

Q. And so what ultimately was your calculation for the fees collected by the defendant from clients who had applications filed after the, after April 30th, 2001?

[1339]

A. It was \$3,396,329.

\* \* \* \* \*

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

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CR-10-00414-RMW  
San Jose, California  
USA, PLAINTIFF

*v.*

SINENENG-SMITH, DEFENDANT

---

July 26, 2013

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**Volume 15**  
**Pages 1490-1518**

**TRANSCRIPT OF PROCEEDINGS**  
**BEFORE THE HONORABLE RONALD M. WHYTE**  
**UNITED STATES DISTRICT JUDGE**

---

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[1491]

\* \* \* \* \*

THE COURT: How I like to do the jury instructions is to first ask the government and then the defense if there are any instructions that I am giving that you object to, and then tell me if there are any instructions that you propose that I give that I haven't that aren't in the set. And then the defense will do the same thing.

So Mr. Guenert.

MR. GUENERT: Yes, your Honor.

With respect to the instructions that you are giving, you just have one observation about instruction number 15 which is the elements instruction for the immigration charges.

And I would like to direct your attention to the very last sentence, which is, an alien enters the United States in violation of the law if not duly admitted by an immigration officer.

That sentence does appear in the pattern for 1324(A)(1)(A)(3), I believe.

It is true that 1324—

[1492]

THE COURT: What you are saying is it's really not applicable to this case. I agree with you.

MR. GUENERT: It wasn't charged. You can encourage and induce entry, but she wasn't charged with that in this indictment.

THE COURT: Okay.

I will hear from the defense, but my tentative conclusion would be to take that out.

MR. COOK: I think it should come out.

THE COURT: Okay. Then that takes care of that.

What else do you have?

MR. GUENERT: I don't think we have anything else to say about the other instructions that you propose, your Honor.

THE COURT: Okay. Are there any additional ones that you—

MR. GUENERT: For the record, we stand by the additional instructions that we proposed with respect to the mail fraud and the definition of encouraging and inducing, but I've got nothing else to say about these instructions.

THE COURT: Okay.

I will just mention the inducing or encouraging, the cases you cited all were ones where there was a question coming from the jury after they had been deliberating, I believe.

And my feeling, generally, is not to use a whole string of words that is more confusing, and those are pretty [1493] straightforward words.

MR. GUENERT: Yes, your Honor.

\* \* \* \* \*

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

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CR-10-00414-RMW  
San Jose, California  
UNITED STATES, PLAINTIFF

*v.*

SINENENG-SMITH, DEFENDANT

---

July 29, 2013

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**Volume 16**  
**Pages 1367-1461**

**TRANSCRIPT OF PROCEEDINGS**  
**BEFORE THE HONORABLE RONALD M. WHYTE**  
**UNITED STATES DISTRICT JUDGE**

---

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[1369]

\* \* \* \* \*

**CLOSING ARGUMENTS BY MS. KNIGHT**

MS. KNIGHT: Good afternoon, ladies and gentlemen.

You sat through this case for several weeks, and we appreciate your time.

Now this is a case very straightforward case. This is a case about greed. The defendant operated an immigration consultation business in San Jose where she promoted Labor Certification as a path towards permanent residency.

Now as you heard the law regarding aliens who are able to obtain permanent residency through Labor Certification had changed.

As of April 30th, 2001, that was no longer than option for aliens who were in the United States after December 21st, 2000, and had not applied for a DOL Labor Certification after [1370] April 30th, 2001.

The defendant knew this. She was well aware of the requirements. What did she continue to do? .

The evidence will show she continued to enter into retainer agreements and promoted Labor Certification as a path towards permanent residency.

In fact, you will see the retainer agreements have language first line, that the alien signed permanent residence through Labor Certification, or in some instances there were contracts that said Labor Certification.

She also gave her clients leniency letters that they could show to law enforcement if they were stopped. She gave them status letters that urged them to be patient and cooperated while she worked to obtain their permanent residency.

And the entire time, she knew that the proper procedure was for the alien to return home and wait in his home country to obtain a green card through Labor Certification.

She continued to promote this process. Aliens did not receive a green card, they over stayed their visas and worked illegally and she made a lot of money.

Now she's charged with encouraging and inducing three aliens, specifically Oliver Galupo, Hermacita Esteban and Amelia Guillermo with encouraging and inducing them to reside in the United States.

[1371]

And we alleged a contract date, a retainer date. Even though this case is larger than the retainer date, that's what we alleged.

She's also charged with mail fraud, that she used the mails to promote her scheme. And I would like to review the evidence and supports her conviction on all counts.

Now I would like to first start out with the encouraging and inducing. Ms. Burney, can you please bring up the elements.

Now as you can see there are three elements to this offense. First the person identified in the count was an alien.

Second, the defendant encouraged or induced the alien to reside in the United States in violation of the law, and third, the defendant knew that the alien's residence in the United States was or would be in violation of the law.

Now before I turn to the elements, let's talk about how the government started this case. You heard from Curt Gooselaw from USCIS and he told you about how aliens in the United States can obtain permanent residence through Labor Certification. He told you about the three steps and you've heard about the three steps now for weeks.

Number one, the alien—the employer files on behalf of the alien for a Labor Certification with the Department of Labor. Once that is approved the next step is go to CIS. You [1372] file for what's called an eye one porte immigrant petition for alien worker and the employer files that.

The third step is, which the alien files for lawful permanent residence. He also told you about an obstacle, that aliens who were not present in the United States before December 21st, 2000, and had not applied for a Labor Certification before April 30th, 2001, could not become lawful permanent residents. He told you about that obstacle.

Now the first element, the person identified in the count was an alien. We have satisfied that count. You sat here, you listened to the witnesses tell you how they obtained tourist visas from the Philippines and travelled to the United States. You heard that from Ms. Esteban Mr. Esteban Ms. Guillermo Ms. Sandalo Miss Escarez you heard about that. You heard and saw their documents.

You also from Special Agent Wendell Wright who told you that Oliver Galupo obtained's visa and you saw it on the screen and entered the United States on March 27, 2005. You.

You also heard from Special Agent Wright who went over the record of deportable alien. That is the document, he told you that's what they use, ICE uses to initiate deportation proceedings. And you saw those records, they are in evidence. For Mr. Galupo, Mr. and Mrs. Esteban, Ms. Guillermo, Ms. Escarez, Ms. Das West. You have them. We've satisfied that count; that allegation.

[1373]

Now the third element is the defendant knew that the alien's residence in the United States was or would be in violation of the law.

Well, we've satisfied that count because you heard Special Agent Villacorta tell you that he interviewed the defendant on April 16th, 2008. And what did she tell him? She knew that her clients over stayed the amount of time they were allowed to be in the United States.

She also told him that she obtained copies of their passports for her files. So she knew what the status of her clients were, satisfied that count.

What this case is really about is the second element. The defendant encouraged or induced the alien to reside in the United States in violation of the law.

How did she do it? How did she encourage her clients to remain? Well, first of all, she promoted a program that she knew was no longer available to them. She knew that the aliens who signed retainer agreements with her that were not present by the dates I just mentioned were ineligible. By supervising into retainer agreements with them, she kept them here. She kept them in the United States.

And again, we have alleged three counts. We've alleged Oliver Galupo's retainer date which was June 5th, 2005. We've alleged Ms. Guillermo's reattorney agreement that was may if I have 2007. We've alleged Ms. Esteban's retainer agreement [1374] which was June 18, 2007.

Now it shows those dates and the retainer agreements but this case is larger than just the retainer agreements. The retainer agreements show the beginning of a relationship. But much more happened. This case is not limited to what happened to those people on those three days.

MR. COOK: Objection, your Honor.

That misstates the charge.

THE COURT: I think the first three charges are involving encouraging the three individuals named.

Is that your concern

MR. COOK: That and charged on a specific single day.

THE COURT: I think the facts taking place on other days are relevant to whether or not the charges in the first three counts are met.

MS. KNIGHT: So let's talk about those retainer agreements. You've heard from Amelia Guillermo. She told you how she first entered into a retainer agreement in April 2002. What did her agreement say? The first line? The agreement is for purposes of assisting me, alien, to obtain permanent residence through Labor Certification.

You heard how she agreed to pay \$200 a month, that she made \$850 a months and she agreed to pay the defendant \$200 a month.

You also heard she subsequently entered into another [1375] retainer agreement with the defendant that was signed May 5th, 2007. This was the agreement that was mailed to her and she signed. For purposes of assisting me to obtain by immigrant petition for alien worker approval.

What did she tell us on redirect? When I asked her why did you stay, she stayed—stated because she wanted to get her green card that if she could not have obtained her green card she would have gone home.

Miss Esteban you heard from her about the retainer agreements, exactly the same situation, May '02, signs the retainer agreements for purposes of obtaining permanent residence through Labor Certification. She paid \$200 a month. I think she testified she made 1,000 to \$1,200 a month.

She then again, five years later in June of 07, signed another retainer agreement for the I-140 approval.

After that, just like with Ms. Guillermo, lots of leniency letters lots of status letters.

Then you will see in evidence there's Oliver Galupo. You are going to see that he sign aid contract on June 2nd, 2005. Now this contract was for purposes of assisting him to obtain his Labor Certification through perm. He signed the retainer agreements you are going to see he agreed to a payment plan.

Now it's reasonable to expect that despite whatever language the defendant had in her contracts, that aliens once they signed the contracts, they were staying and they were [1376] working and they were paying her. They were obtaining tax ID numbers. It is reasonable to assume that's what happened.

Another aspect of the encouraging inducing is what you saw a lot of. It's these leniency letters. Now you heard from Oliver Galupo. He's the owner of the Golden Years Castle Group Home in Reno and he told you—

MR. COOK: Excuse me, your Honor. I believe you misspoke.

MR. COOK: Castillo.

THE COURT: You said Oliver Galupo.

MS. KNIGHT: I'm sorry. Getting ahead of myself.

You heard from Mr. Castillo and he told you that he went to the defendant for advice. He sought her out he drove all the way from Reno to meet with her and he retained her to assist him for two of his employees.

And what did the defendant tell him? That his employees could work. They could work. And he specifically told you that he could work that Ms. Sineneng-Smith told him his employees could work. And what was important? The leniency letters.

He testified and I'm going to quote him, that it was assuring to me that I have leniency that if somebody comes to our facility we will show that to them.

He also testified about making payments and what did he get in return for those payments? He got the leniency letters.

[1377]

That's what he relied on. This was another tool that the defendant had in her tool box to keep people here, the leniency letters.

Ms. Sandalo, do you remember her, she testified about sending letters to the defendant and you saw them, there's three of them in evidence. She would send a payment and request a leniency letter. And you are going to see thee of those letters in evidence.

She also testified or is in evidence, there's a list of services form that the defendant gave her. And what are those services for? Tax ID February number, for a fee. You have a problem with social security, there's a fee. List of services, all designed to help aliens remain in the United States.

Now let's talk about these leniency letters. You've seen them. And I just want to point out some language in them. You heard witnesses testify what they did with them. They all have various ideas of what the purpose was. Some kept them in their purse in their car.



Let's take a look at what the defendant told her clients in these letters. "The alien is taking steps to legalize his or her immigration status in the United States. Unfortunately the process takes more than five years. However the alien is showing good faith by complying with the regulations. Please grant this alien your consideration and leniency and allow his her to remain in the United States at least during the process [1378] of the application for Labor Certification".

What is she telling her clients through these leniency letters? She's telling them to stay. Give this letter to law enforcement, stay in the country.

The next letter you heard a lot about was the status letters. Now what did the defendant tell her clients in the status letters. You heard the clients there's stacks of these, they got these for years at a timement.

Second paragraph in the middle, just be patient and be thankful that you are here in the United States under the mercy of the INS again, please be patient and cooperate with us so that we will be successful in obtaining your permanent residency in the United States. The state and federal governments will reward your patience later.

She doesn't tell her clients in these letters you need to go home. She doesn't say that she tells them to stay, it is just the opposite. Stay, your patience is going to be rewarded, what's the reward? Permanent residency.

The defendant made it likely for her clients including Mr. Galupo, Ms. Esteban, and Mrs. Guillermo to stay in the United States and assisting them. But let's look further into these leniency letters. You heard the tape from August 22nd, 2007. The undercover tape that was

played for you. And what did the defendant tell a group of people, perspective clients? What did she tell them? She told them this “if the state or [1379] Federal Government or licensing or county officials, please department questions you, we will give you a letter explaining your status. Okay. And they, in my experience for the last 16 years, they accept that letter from us. My clients are not arrested. Other than that during this time they are compassionate as long as we could explain to them your status. And in order to do that I need your employer petition for you”.

That’s what she’s telling perspective clients.

Again, the leniency letter will protect you, my clients aren’t getting arrested. Another tool to keep people here, keep her clients here so they could pay her.

But let’s go further, what else did she say during that meeting? You will recall that she told Special Agent Villacorta in April of 08 that it was the worker’s decision to remain, that it was the employer and the employee, they came to her and she assisted them with the process.

But contrast that statement to Villacorta with what she said to perspective clients in August of 2007. I need to tell you that so if I were you since you guys are here, I’m not supposed to tell you to stay, stay in the United States, because the immigration told me I’m not supposed to tell people that, why do you tell people that they should stay in the U.S. and live and work. I said, because I know that’s what they like. I don’t tell them, I know that’s what they like. You know, any way if you ask me if I were in your place I like [1380] being in America. I will do everything so I can stay. That’s just me. Okay. Anything else?.

That's what she's telling people.

The bottom line, the bottom line is the effect of the defendant's conduct. Entering into retainer agreements leniency letters and status letters along with her many services were all designed to keep people, her clients aliens in the United States.

That satisfies the second element.

Ms. Burney could you turn to private financial gain.

Now as part of the encouraging inducing count there's a separate standard that the government must meet. If you find the defendant guilty of encouraging and inducing illegal immigration as alleged in Counts 1 through 3 you must then determine for each count whether or not the government has proven beyond a reasonable doubt that the defendant committed the offense for private financial gain.

Ladies and gentlemen, this case there's no doubt we've satisfied that element. You heard from the witnesses including Ms. Guillermo, Ms. Esteban, Ms. Sandalo, you heard from all of them how they paid the defendant, how much they paid her per months how much they paid for retainer agreements I-140's, you saw the checks.

Through Special Agent Wendell Wright you saw portions of checks that they wrote to the defendant. You also saw [1381] Mr. Galupo's checks. Checks that were written with his name in the memo line. If you recollect more, you also heard from IRS Special Agent Danielle Singleton who showed you the chart of the defendant's client payments from August 2008 through 2007 of over \$3.3 million. We have satisfied that element.

\* \* \* \* \*

[1426]

\* \* \* \* \*

MR. GUENERT: Trust me, in this case those were probably the most dangerous words of all. The defendant Evelyn Sineneng-Smith, through her words and her deeds, directed at the people she saw on the witness stand, her victims, she said trust me. You heard it from the clients, her victims, you saw it in the documents.

\* \* \* \* \*

[1435]

\* \* \* \* \*

Now defense counsel spent a lot of time talking about what she did say in these documents. Keep in mind the law of fraud allows you to consider not just material misrepresentations but factual omissions. And we've talked about that during the trial. Not just the omission of pointing out these people the critical effect they could not get a green card anymore. But in fact what she knew and they didn't know is that actually there was a proper way to adjust. It's called counselor processing, Mr. Gooselaw testified about it. If you go back to the Philippines, and apply for the Labor Certification and wait for your visa.

Now when—can we take a look, Ms. Burney at 53 A. When she had clients who were eligible for 245(I) she felt free to point out there was this alternative means but that it wasn't [1436] as desirable. In fact she points out in this particular exhibit that if you went back for

counselor processing, you might not be allowed back because of that debarment. That's the ten-year reference there.

But you know what, after 245(I) disappears, so does the document like this. None of those clients got that. She couldn't afford to tell them that there was another way to adjust that required them going home.

And why is that, she told Agent Villacorta why? She told Agent Villacorta the proper procedure was for the alien worker to wait in the Philippines until their visa was approved for coming to the U.S. She pointed it out other companies do it properly.

She said her clients would not come to here if she did things properly. She stated her business was based on the Labor Certification process and that she knew her clients would have to go back to the Philippines to just their status.

She stated she explained to her clients that if they leave the U.S. they may not be able to go back and it's up to the immigration officer if they are allowed back in the United States.

Of course you would say that. Of course you would say you might not be able to come back if you go home. Why is that in because her business depended upon it. She wasn't going to get that \$5,900 over and over and over again if somebody goes [1437] back to the Philippines. That's why she had to encourage and induce them to reside here in the United States.

\* \* \* \* \*

[1439]

\* \* \* \* \*

THE COURT: All right, ladies and gentlemen.

I will now give you the legal instructions that apply to the case. As I think is obvious, the instructions you are being passed now are copies for you to keep. So if you want to [1440] make notes on them as I read them you may.

\* \* \* \* \*

[1446]

\* \* \* \* \*

Ms. Sineneng-Smith is charged in Counts 1 through 3 of the indictment with encouraging or inducing illegal immigrants to reside in the United States for her private financial gain in violation of a provision of the United States Code.

[1447]

Specifically the indictment alleges that Ms. Sineneng-Smith for personal financial gain, encouraged or induced three aliens to reside in the United States knowing or in reckless disregard of the fact, that such evidence violated the—such residence violated the law on the dates and as to the aliens as follows: .

Count One, deals with Oliver Galupo. And the date of his retainer agreement June 5, 2005.

Count Two Amelia Guillermo with the date of retainer agreements of May 5th, 2007.

Count Three, Hermacita Esteban and her retainer agreements with a date of June 18, 2007.

In order for the defendant to be found guilty of any count the government must prove each of the following elements beyond a reasonable doubt as to that particular count.

First, the person identified in the count was an alien. Second, the defendant encouraged or induced the alien to reside in the United States in violation of the law.

And third, the defendant knew the alien's residence in the United States was or would be in violation of the law.

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

If you find the defendant guilty of encouraging or inducing illegal immigration as alleged in Counts 1 through 3, you must then determine for each count whether or not the [1448] government has proved beyond a reasonable doubt that the defendant committed the offense for private financial gain.

An act is done knowingly if the defendant is aware of the act and does not act through ignorance mistake or accident.

You may consider evidence of the defendant's words, acts or omissions along with all the other evidence in deciding whether the defendant acted knowingly.

\* \* \* \* \*

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

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Case No. CR-10-00414-RMW  
UNITED STATES OF AMERICA, PLAINTIFF  
*v.*  
EVELYN SINENENG-SMITH, DEFENDANT

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[Filed: July 30, 2013]

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**VERDICT FORM**

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WE, THE JURY, in this case find the following:

**COUNT ONE—On or About June 5, 2005, Encouraging  
or Inducing an Alien Identified by the Name Oliver Galupo  
to Reside in the United States**

1(a). As to Count One of the Superseding Indictment,  
WE FIND defendant Evelyn Sineneng-Smith:

\_\_\_\_\_ Not Guilty

  ✓   Guilty

*If you find Ms. Sineneng-Smith not guilty of Count 1  
in question 1(a), skip question 1(b) and go directly to  
Count Two. If you find Ms. Sineneng-Smith guilty of  
Count 1 in question 1(a), please answer question 1(b).*



1(b). Has the government proven beyond a reasonable doubt that defendant Evelyn Sineneng-Smith committed the offense in Count One for private financial gain?

Yes

No

**COUNT TWO—On or About May 5, 2007, Encouraging or Inducing an Alien Identified by the Name Amelia Guilermo to Reside in the United States**

2(a). As to Count Two of the Superseding Indictment, WE FIND defendant Evelyn Sineneng-Smith:

Not Guilty

Guilty

*If you find Ms. Sineneng-Smith not guilty of Count 2 in question 2(a), skip question 2(b) and go directly to Count Three. If you find Ms. Sineneng-Smith guilty of Count 2 in question 2(a), please answer question 2(b).*

2(b). Has the government proven beyond a reasonable doubt that defendant Evelyn Sineneng-Smith committed the offense in Count Two for private financial gain?

Yes

No

**COUNT THREE—On or about June 18, 2007, Encouraging or Inducing an Alien Identified by the Name Hermansita Esteban to Reside in the United States**

3(a). As to Count Three of the Superseding Indictment, WE FIND defendant Evelyn Sineneng-Smith:

\_\_\_\_\_ Not Guilty

  ✓   Guilty

*If you find Ms. Sineneng-Smith not guilty of Count 3 in question 3(a), skip question 3(b) and go directly to Count Four. If you find Ms. Sineneng-Smith guilty of Count 3 in question 3(a), please answer question 3(b).*

3(b). Has the government proven beyond a reasonable doubt that defendant Evelyn Sineneng-Smith committed the offense in Count Three for private financial gain?

  ✓   Yes

\_\_\_\_\_ No

**COUNT FOUR—Mail Fraud: On or About December 2, 2005, Using the United States Postal Service to Send and Deliver a Letter Transmitting a Department of Labor Application for Permanent Employment Certification on Behalf of Oliver Galupo**

4. As to Count Four of the Superseding Indictment, WE FIND defendant Evelyn Sineneng-Smith:

\_\_\_\_\_ Not Guilty

  ✓   Guilty

**COUNT FIVE—Mail Fraud: On or About July 12, 2007, Using the United States Postal Service to Send and Deliver a Letter Accompanying “Form I-140 Immigrant Petition for Alien Worker” on Behalf of Amelia Guillermo**

5. As to Count Five of the Superseding Indictment, WE FIND defendant Evelyn Sineneng-Smith:

Not Guilty

Guilty

**COUNT SIX—Mail Fraud: On or About October 22, 2007, Using the United States Postal Service to Send and Deliver a Letter from Ms. Sineneng-Smith to Hermansita Esteban Entitled “Prayer for Your Mercy & Leniency on Behalf of Hermansita Esteban”**

6. As to Count Six of the Superseding Indictment, WE FIND defendant Evelyn Sineneng-Smith

Not Guilty

Guilty

DATED:  [7/30/13]

/s/  JENNIFER [ILLEGIBLE]   
FOREPERSON

FILED on  [7/30/13] , at  [11]  o'clock and  [19]  minutes  [a] .m.

BY: /s/  [ILLEGIBLE]   
COURTROOM DEPUTY CLERK

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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No. 15-10614  
DC No. 5:10 cr-00414 RMW  
ND Cal., San Jose

UNITED STATES OF AMERICA,  
PLAINTIFF-APPELLEE

*v.*

EVELYN SINENENG-SMITH,  
DEFENDANT-APPELLANT

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[Filed: Sept. 18, 2017]

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**ORDER**

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Before: REINHARDT, TASHIMA, and BERZON, Circuit Judges.

Defendant was convicted of violations of 8 U.S.C. § 1324(a)(1)(A)(iv). The case has been fully briefed, argued and taken under submission. Subsequent to submission, however, the panel has determined that the decision of the issues raised by this case would be significantly aided by further briefing. The court therefore invites the Federal Defender Organizations of the Ninth Circuit (as a group), and the Immigrant Defense Project and the National Immigration Project of the National Lawyers Guild to file *amicus* briefs on the following issues:

1. Whether the statute of conviction is overbroad or likely overbroad under the First Amendment, and if so, whether any permissible limiting construction would cure the First Amendment problem?

2. Whether the statute of conviction is void for vagueness or likely void for vagueness, either under the First Amendment or the Fifth Amendment, and if so, whether any permissible limiting construction would cure the constitutional vagueness problem?

3. Whether the statute of conviction contains an implicit *mens rea* element which the Court should enunciate. If so: (a) what should that *mens rea* element be; and (b) would such a *mens rea* element cure any serious constitutional problems the Court might determine existed?

*Amici* are, of course, not restricted to briefing the above-specified topics and may brief such further issues as they, respectively, believe the law and the record calls for.

Any invited *amicus* brief shall be filed within 30 days of the date of this order.

Counsel for the parties may, but are not required to, file supplemental briefs limited to responding to any and all *amicus/amici* briefs. Any supplemental brief shall be filed within 21 days after service of the *amicus/amici* brief(s). Requests by the parties for extensions of time will not be viewed favorably by the Court.

All briefs filed under this order shall comply with the length requirement of Fed. R. App. P. 29(a)(5).

The Clerk shall serve this order on each of the *amicus* organizations named in this order and shall furnish each

organization with a copy of all Excerpts of Record and copies of the parties' Briefs.

This order shall not preclude any other interested organizations or groups from filing amicus or amici briefs on either side. Any such filings shall be subject to the same conditions as applied to the amici specified above.

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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No. 15-10614  
DC No. 5:10 cr-00414 RMW  
UNITED STATES OF AMERICA,  
PLAINTIFF-APPELLEE

*v.*

EVELYN SINENENG-SMITH,  
DEFENDANT-APPELLANT

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Argued and Submitted: Apr. 18, 2017  
San Francisco, California  
Reargued and Resubmitted: Feb. 15, 2018  
Pasadena, California  
[Filed: Dec. 4, 2018]

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Appeal from the United States District Court  
for the Northern District of California  
Ronald M. White, District Judge, Presiding

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**MEMORANDUM\***

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Before: TASHIMA, BERZON, and HURWITZ,\*\* Circuit  
Judges.

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\* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

\*\* Judge Reinhardt, who was originally a member of this panel, died after this case was reargued and resubmitted for decision.

Evelyn Sineneng-Smith appeals her conviction on two counts of mail fraud in violation of 18 U.S.C. § 1341.<sup>1</sup> She contends that the evidence was insufficient to uphold the verdict. We affirm.

Sineneng-Smith operated an immigration consulting firm in San Jose, California. Her clients were mostly natives of the Philippines, unlawfully employed in the home health care industry in the United States, who sought authorization to work and adjustment of status to obtain legal permanent residence (green cards). One of Sineneng-Smith’s main “services” was to assist clients with applying for a “Labor Certification,” and then for a green card. The problem was that Sineneng-Smith’s clients, Amelia Guillermo and Hermansita Esteban, were not eligible to adjust their statuses to legal permanent residents through the Labor Certification program. Sineneng-Smith told investigators that she knew that her clients were ineligible to adjust their status through Labor Certification. Sineneng-Smith’s mail fraud convictions stem from her sending through the U.S. mail retainer agreements to Guillermo and Esteban, stating that Sineneng-Smith would help them obtain legal permanent residence.

“To allege a violation of mail fraud under [18 U.S.C.] § 1341, it is necessary to show that (1) the defendants formed a scheme or artifice to defraud; (2) the defendants used the United States mails or caused a use of the

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Judge Hurwitz was randomly drawn to replace him. Judge Hurwitz has read the briefs, reviewed the record, and watched video recordings of the oral arguments.

<sup>1</sup> Sineneng-Smith was also convicted of violating of 8 U.S.C. § 1324(a)(1)(A)(iv). We address those convictions in a concurrently-filed opinion.



United States mails in furtherance of the scheme; and (3) the defendants did so with the specific intent to deceive or defraud.” *Miller v. Yokohama Tire Corp.*, 358 F.3d 616, 620 (9th Cir. 2004) (internal quotation marks omitted). Sineneng-Smith only contests the sufficiency of the evidence as to the first and third elements.

To satisfy the first element, the government must offer “[p]roof of an affirmative, material misrepresentation,” *United States v. Benny*, 786 F.2d 1410, 1418 (9th Cir. 1986), or proof of “deceitful statements of half truths or the concealment of material facts,” *United States v. Woods*, 335 F.3d 993, 998 (9th Cir. 2003). The retainer agreements that Sineneng-Smith signed with Esteban and Guillermo demonstrate her misrepresentations. The agreements stated that Sineneng-Smith’s clients hired her “for purposes of assisting [them] to obtain permanent residence through Labor Certification.” Because Guillermo and Esteban had no chance of obtaining permanent residence through Labor Certification, these statements were at least deceitful half truths that concealed material facts. The facts were material because Esteban and Guillermo testified that they would have left the country if Sineneng-Smith had told them that they were not eligible for green cards.

As to the third element, Sineneng-Smith admitted that she knew that her clients could not adjust their status through Labor Certification. She further admitted that if she informed her clients of that fact, they would not have hired her. This evidence is sufficient to support a finding that Sineneng-Smith intended to defraud her clients.

. • .

With respect to the mail fraud convictions, Counts 5 and 6, the judgment of the district court is **AFFIRMED**.