

## COMBATING THE TERRORISM BARS BEFORE DHS AND THE COURTS

by Anwen Hughes, Thomas K. Ragland & David Garfield\*

Since the passage of the USA PATRIOT Act of 2001,<sup>1</sup> and increasingly since the enactment of the REAL ID Act of 2005,<sup>2</sup> the U.S. government has been applying the terrorism-related provisions added to the Immigration and Nationality Act (INA)<sup>3</sup> by those two pieces of legislation—both intended as counter-terrorism tools—to large numbers of refugees, asylum seekers, and applicants for immigration benefits who in some cases are themselves victims of terrorism, and the overwhelming majority of whom are not believed to pose any threat to the national security of the United States. The legislative amendments of the past eight years built on, and drew attention to, the wild overbreadth of the INA's existing definition of “terrorist activity.” All of these statutory provisions, old and new, have also been the subject of very expansive readings by the U.S. Department of Homeland Security (DHS) and, in some cases, also the Board of Immigration Appeals (BIA).

The result has been that attorneys representing clients they would never have associated with the term “terrorism”—except perhaps as its victims—must now be alert to the potential impact of these changes in law and administrative interpretation on their cases.<sup>4</sup> This practice advisory is intended for advocates working with non-citizens affected by the application of these “terrorism” grounds as bars to asylum, withholding of removal, adjustment of status, or other immigration benefits, or as grounds of inadmissibility or deportability, and provides guidance on obtaining a discretionary “exemption” from the terrorism-related inadmissibility grounds.

Ironically, for many facing the terrorism bars, the very circumstances that form the basis of their refugee or asylum claim have been interpreted in a way that has made them ineligible for protection in the United States. For example, refugees, asylees, and asylum seekers who were coerced into giving goods or services to non-governmental armed groups are now being deemed “terrorists” by the U.S. government. For other refugees, their support of a group that is associated with armed resistance against a government—even when that government has repressed the refugee's ethnic or religious group and closed peaceful avenues to political change—has rendered them ineligible for protection under U.S. law.

---

\* **Anwen Hughes** is senior counsel for Human Rights First's refugee protection program where she helps oversee pro bono representation for indigent asylum seekers. Ms. Hughes provides training and support to volunteers from law firms in New York and New Jersey, and assists in Human Rights First's local and national advocacy on asylum issues. Before joining Human Rights First in 1999, Ms. Hughes was a staff attorney with Passaic County Legal Aid Society. She graduated from Yale College and Yale Law School.

**Thomas K. Ragland** is a partner in the immigration practice group at Duane Morris LLP in Washington, DC. He represents clients in all aspects of immigration-related litigation, including complex removal proceedings, administrative and federal court appeals, petitions for writ of mandamus, habeas corpus, and hearings on naturalizations, immigration consequences of criminal convictions, and defense against terrorism- and security-related bars to admission. Mr. Ragland is co-chair of the litigation committee, AILA DC chapter, and a frequent speaker on immigration issues.

**David Garfield** has been an AILA member in private practice for 25 years in Washington, DC. A primary focus of his practice is removal defense and federal litigation. He holds a bachelor's degree in African history from Wesleyan University in Middletown, Connecticut and is a graduate of Antioch Law School. He is a member of the DC Bar and is admitted to practice in six federal circuit court bars.

<sup>1</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272, §411(a)(1)(F).

<sup>2</sup> REAL ID Act of 2005 (REAL ID), Pub. L. No. 109-13, div. B, 119 Stat. 231, 302–23.

<sup>3</sup> Immigration and Nationality Act of 1952 (INA), Pub. L. No. 82-414, 66 Stat. 163, (codified as amended at 8 USC §§1101 *et seq.*).

<sup>4</sup> For a longer overview of this situation, see Human Rights First, *Denial and Delay: The Impact of the Immigration Law's “Terrorism Bars” on Asylum Seeker and Refugees in the United States* (Nov. 2009), available at <http://www.humanrightsfirst.info/pdf/RPP-DenialandDelay-FULL-111009-web.pdf>.

### What are the Terrorism-Related Inadmissibility Grounds (TRIG)?

INA §212(a)(3)(B) sets forth a long list of acts and associations related to “terrorism” that render a person inadmissible to the United States (and ineligible for adjustment of status). These inadmissibility grounds include not only those who have engaged in “terrorist activity,” but also members of “terrorist organizations,” persons who have received “military-type training” from such organizations, persons who endorse or espouse “terrorist activity” or persuade others to endorse or espouse a “terrorist organization,” along with the spouses and children of persons inadmissible under these provisions.

Before passage of the Real ID Act, the terrorism-related deportability ground at INA §237(a)(4)(B) was considerably narrower, limited to persons who “engaged in terrorist activity.” The REAL ID Act, however, amended §237(a)(4)(B) to make deportable “any alien who is described in” subparagraphs (B) or (F) of §212(a)(3)(B). This means that any non-citizen described in any of the long list of terrorism-related inadmissibility grounds at INA §212(a)(3)(B) is now deportable. Moreover, since the statutory bars to both asylum and withholding of removal—and to most other forms of relief from removal—refer to the deportability ground at §237(a)(4)(B), a secondary effect of the REAL ID Act changes is to bar anyone described in *any* of the §212(a)(3)(B) inadmissibility grounds from all forms of refugee protection.<sup>5</sup>

*Practice Pointer:* In any case in removal proceedings where there is a chance DHS will attempt to invoke a terrorism-related ground as a bar to asylum or other relief, it is critically important, if the applicant also has grounds to claim protection under CAT, to prepare and document that claim carefully. A grant of CAT deferral will at least prevent the applicant’s actual deportation, and allow the applicant eventually to gain work authorization and stabilize his or her situation, while pursuing appeals and possible exemptions to any terrorism-bar issues.

### How does the INA define “terrorist activity,” “terrorist organization,” “material support,” and other key terms, and how might these definitions impact my client?

**“Terrorist activity”:** The INA’s definition of “terrorist activity,” in addition to a list of unlawful acts more commonly associated with terrorism (the hijacking of aircraft, kidnapping, assassinations, etc.), also includes the following: use of an “explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.”<sup>6</sup> Because this provision lacks any explicit limitation with respect to either the targets or the purpose of the violence it covers (other than the exception for “mere personal monetary gain”), the DHS and BIA have interpreted it to apply even to ordinary combat against a government army.<sup>7</sup>

The result of the government’s position is that association with armed resistance against a government—even when that government’s repression has deprived citizens of the right to effect change through the ballot box—has rendered many applicants ineligible for protection in the United States. These have included Iraqis who rebelled against Saddam Hussein, Afghans who fought the Soviet invasion of their country (or supported those who did) or opposed the Taliban while they were in power, and Cubans who supported armed resistance to the government of Fidel Castro. Thousands in this situation who have already been admitted to the United States as refugees and asylees have been unable to obtain green cards as a result of these interpretations.

In addition to “terrorist activity,” the INA contains a separate definition of what it means to “engage in terrorist activity,” which, beyond engaging in the acts defined in the subsection referenced above, also includes acts that bear a much more indirect relation to actual violence.<sup>8</sup> These include soliciting funds for a “terrorist

<sup>5</sup> INA §208(b)(2)(A)(v) (bar to asylum); INA §241(b)(3)(iv) (bar to withholding). Such persons do, however, remain eligible for deferral of removal under the Convention Against Torture (CAT), as CAT’s prohibition against deporting individuals to face torture is not subject to any bars.

<sup>6</sup> INA §212(a)(3)(B)(iii)(V)(b).

<sup>7</sup> *Matter of S-K-*, 23 I.&N. Dec. 936 (BIA 2006).

<sup>8</sup> INA §212(a)(3)(B)(iv).

organization” or a “terrorist activity,” as well as providing “material support” to “terrorist activity,” to an individual “terrorist,” or to a “terrorist organization.” The “material support” bar is discussed in greater detail below.

**“Terrorist organization”:** The USA PATRIOT Act<sup>9</sup> created a three-part definition of “terrorist organization” for immigration-law purposes.<sup>10</sup> “Tier I” groups, also known as Foreign Terrorist Organizations (FTOs), must be designated by the Secretary of State under INA §219.<sup>11</sup> “Tier II” groups (listed on what is often referred to as the “Terrorist Exclusion List”) are also designated by the Secretary of State after a finding that the group engages in certain terrorist activities defined in the INA.<sup>12</sup> The lists of “Tier I” and “Tier II” groups are publicly available on the State Department’s website.<sup>13</sup>

Since the USA PATRIOT Act went into effect (with some amendments made in the REAL ID Act), the term “terrorist organization” also refers to any “group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in, terrorist activities.”<sup>14</sup> These groups are often referred to as “Tier III” groups. Any government adjudicator, such as a DHS asylum or refugee officer, a Service Center adjudicator, or an immigration judge, can determine on a case-by-case basis that a group is a “Tier III” group—no formal designation by any executive branch agency or other public process is required. Under the government’s interpretation, the purpose and tactics of a “terrorist” organization are irrelevant, which has resulted in many groups being labeled “terrorist organizations” even where the U.S. supports the goals of the group and non-combatants are not targeted.

*Practice Pointer:* The definition of “terrorist organization” is phrased in the present tense—a Tier III organization is a group that “engages in,” or has a subgroup that “engages in” terrorist activity. Although DHS has been applying this definition to groups that ceased to exist or ceased to engage in “terrorist activity” long before the statute that so defined them was enacted, in any case where you are dealing with a group that is no longer engaged in the use of armed force, you can document that fact and argue that the Tier III definition, by its plain terms, does not cover that group. Where your client’s acts predated the enactment of the statutory provisions that are the basis for the government’s characterization of the group as a Tier III terrorist organization, you can also argue that applying this present-tense definition backwards in history makes it very difficult to give meaning to the statute’s knowledge requirements.<sup>15</sup> Moreover, in any case where the group was not engaged in the use of armed force *at the time your client was involved with it*, the “terrorist organization” definition should not be relevant to your client’s case. DHS has indicated that it agrees with this second point. Be sure to document your client’s case in a way that makes these distinctions clear.

Note that DHS has until now been interpreting the notion of “subgroup” in the Tier III definition very broadly—or, in the absence of consensus as to how that term should be interpreted, has been placing large numbers of cases on hold that might be affected by the broadest possible interpretation of that term (and, from the applicant’s standpoint, the effect is the same). This has led persons associated with entirely peaceful political parties to see their cases placed on hold because the party they belong or contributed to was itself part of a broader political coalition (an electoral coalition, an opposition umbrella group, etc.) that included another party that included an armed wing. This interpretation is under review within DHS at the time of this writing.

**“Member of a terrorist organization”:** The INA as amended by the REAL ID Act bars from admission (and makes ineligible for virtually all forms of immigration status or protection) anyone who “is a member of a terrorist organization,” regardless of whether the organization in question falls within Tier I, II, or III of the INA’s “terrorist organization” definition. Members of alleged Tier III organizations can escape this subclause

<sup>9</sup> USA PATRIOT Act, *supra* note 1.

<sup>10</sup> INA §212(a)(3)(B)(vi)(I), (II), and (III).

<sup>11</sup> INA §212(a)(3)(B)(vi)(I).

<sup>12</sup> INA §212(a)(3)(B)(vi)(II).

<sup>13</sup> <http://www.state.gov/s/ct/list/>.

<sup>14</sup> INA §212(a)(3)(B)(vi)(III).

<sup>15</sup> The statute places the burden on the donor/solicitor to a Tier III group to show by clear and convincing evidence that he did not know, and should not reasonably have known, that the organization was a terrorist organization. INA §212(a)(3)(B)(iv)(VI)(dd).

only if they can show by clear and convincing evidence that they did not know, and should not reasonably have known, that the organization was a terrorist organization.<sup>16</sup>

*Practice Pointer:* This is also a present-tense definition (“is a member”), and even DHS agrees that it does not apply to former members, as does the Department of State. In any case where your client was formerly a member of a group that arguably falls with some subset of the INA’s definition of a “terrorist organization,” however, you will want to make clear in filings and testimony what made your client a member before, and how he/she is not member now. Be careful also with the term “member,” whose meaning can vary from one political group to another and also in the minds of individual clients.

*Another Practice Pointer:* Form I-485 includes (on page 2) a very broad question asking applicants for adjustment of status to list their past or present memberships in a very broad range of groups or associations in the U.S. or abroad. Interview clients carefully about this—and not just refugees and asylees. If your adjustment applicant is an asylee, however, try to obtain a copy of the person’s asylum application, in order to vet any potential terrorism-bar issues.)

**“Material support” to terrorism:** An individual has “engaged in terrorist activity” if he or she commits, incites, prepares, plans, gathers information, or solicits funds or members for terrorism, or “commits an act that the actor knows, or reasonably should know, affords material support” to a person engaged in terrorist activity or to a terrorist organization.<sup>17</sup> Under the INA, “material support” includes, but is not limited to, provision of “[a] safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training.”<sup>18</sup> With respect to “material support” provided to Tier III organizations only, the statute allows a person to avoid liability if he/she can show that he/she “did not know, and should not reasonably have known, that the organization was a terrorist organization.”<sup>19</sup>

*Practice Pointer:* For purposes of determining whether a case should be found to involve material support to a Tier I, a Tier II, or a Tier III organization, what ought to matter is the group’s categorization *at the time the support was provided*. DHS and the BIA (judging from unpublished decisions) both agree with this point.

DHS has read the definition of “material support” extremely broadly, to encompass forms of assistance that bear no logical connection to violence, and even including peaceful political activity (distribution of literature, etc.). The U.S. Court of Appeals for the Third Circuit took a similar view (with respect to tangible contributions, not political activity) in *Singh-Kaur v. Ashcroft*,<sup>20</sup> although the dissent in that case provides a good articulation of the contrary view.

DHS has also taken the position that any amount of support will constitute “material” support, even a *de minimis* level of support such as one-time provision of food, shelter, or minimal amounts of money. This is an issue the BIA has not yet addressed in any published decision at the time of this writing.<sup>21</sup>

DHS has also taken the position that medical care falls within the definition of “material support,” with the result that medical professionals who have provided medical care to persons who have “engaged in terrorist activity” have found themselves barred from admission to or status in the United States. The BIA sided with DHS in at least one unpublished case, but has yet to issue a precedential decision on the issue.

---

<sup>16</sup> INA §212(a)(3)(B)(i)(V), (VI).

<sup>17</sup> INA §212(a)(3)(B)(iv)(VI).

<sup>18</sup> INA §212(a)(3)(B)(iv)(VI).

<sup>19</sup> INA §212(a)(3)(B)(iv)(VI)(dd).

<sup>20</sup> *Singh-Kaur v. Ashcroft*, 385 F.3d 293 (3d Cir. 2004).

<sup>21</sup> However, in an unpublished decision, *Matter of L-H-* (July 10, 2009), the BIA held that where the items taken from the respondent “consisted of one packed lunch and the equivalent of about \$4 U.S. dollars,” such a *de minimis* contribution did not qualify as “material support.” (Decision on file with the authors.)

### What if my client engaged in prohibited acts because of duress or coercion?

DHS argues that the material support bar does not require that “support” be provided voluntarily, and is applying this bar to persons who acted under duress, as children, or under other circumstances generally recognized as exculpatory.<sup>22</sup> There is good legal support for the contrary position, that this provision of the INA, like criminal law and analogous civil law provisions, contains an implicit defense of duress. The BIA has not issued a precedential decision on this issue as of the date of this writing, but has issued several unpublished decisions agreeing with DHS’s position. The material support bar—and other terrorism-related bars—have also been applied to former child soldiers forcibly conscripted into rebel armies. Again, this raises issues on which there is as yet no precedential decision from the BIA.

*Practice Pointer:* Beware of characterizing—or encouraging adjudicators to characterize—as “material support” interactions your client may have had with an armed person or group that are more accurately described as armed robbery. If rebels invaded your client’s farm (or burst into your client’s store) and made off with his cows (or the contents of the till) without any action on your client’s part (voluntary or otherwise), you should describe those facts in filings and testimony in a way that makes that clear. Similarly, be thorough and exact in interviewing your client, so as to catch other possible situations where the bar clearly should not apply (e.g., a family member made a payment to an armed group which the client did not authorize).

### Are there exemptions or waivers of the TRIG grounds that my client can apply for?

When Congress expanded the terrorism definitions, it included provisions in both the USA PATRIOT Act and the REAL ID Act to allow exclusion of some individuals from the broad scope of the terrorism bars in cases where those provisions “should not apply.”<sup>23</sup> This discretionary authority was expanded by the Consolidated Appropriations Act of 2008 (CAA),<sup>24</sup> and may now be exercised in nearly all cases involving the terrorism-related bars, with some exceptions as described below.

This discretionary authority may be exercised by either the Secretary of the Department of Homeland Security (DHS) or the Secretary of the Department of State (DOS) after consultation with one another and the Attorney General.<sup>25</sup> Practically speaking, because of DHS’s role in refugee adjudications abroad as well as asylum and immigration benefits granted in the U.S., the ultimate authority to issue an exemption for an individual seeking admission to the U.S. rests with DHS. Within DHS, U.S. Citizenship & Immigration Services (USCIS) is responsible for exemption adjudications, including in cases in (or formerly in) removal proceedings.

Because this authority is discretionary, judicial review of a determination to grant or revoke a favorable exercise of this discretionary authority is limited to that provided at INA §242(a)(3)(D) (allowing judicial review of questions of law or constitutional claims).

*Practice pointer:* Due to the discretionary nature of this exemption authority, the limitations on review, and the extreme slowness with which it is being implemented by DHS, advocates must be sure to argue and

<sup>22</sup> In support of this position, DHS has cited to the Supreme Court’s decision in *Fedorenko v. United States*, 449 U.S. 490 (1981), which the government (meaning both DHS and the BIA) had understood to control the interpretation of the INA’s persecutor bar. With respect to the persecutor bar, however, the Supreme Court recently clarified that *Fedorenko* is not controlling, and has remanded that issue to the BIA. *Negusie v. Mukasey*, No. 07-499 (Mar. 3, 2009). Although the interaction of these provisions is beyond the scope of this advisory, practitioners dealing with issues of duress (or other common-law defenses) in connection with the terrorism bars should keep track of developments in the *Negusie* case.

<sup>23</sup> INA §212(d)(3)(B).

<sup>24</sup> Pub. L. 110-161, \_\_\_ Stat. \_\_\_ (enacted Dec. 26, 2007) (CAA). Section 691 of Division J of this bill made amendments to the inadmissibility grounds of INA §212(a)(3)(B) related to “terrorism,” and to the authority codified at INA §212(d)(3)(B)(i) that gives the Secretaries of State and Homeland Security (in consultation with the Attorney General) discretionary authority not to apply certain of these grounds in particular cases. The CAA also provides that “the Taliban shall be considered to be a terrorist organization described in subclause (I)” of INA §212(a)(3)(B), i.e., a “Tier I” terrorist organization, one that would otherwise be designated as a foreign terrorist organization according to the procedure laid out in INA §219.

<sup>25</sup> INA §212(d)(3)(B)(i). See also USCIS Memoranda, “Implementation of Section 691 of Division J of the Consolidated Appropriations Act, 2008, and Updated Processing Requirements For Discretionary Exemptions to Terrorist Activity Inadmissibility Grounds” (July 28, 2008).

preserve their factual and legal claims with respect to the terrorism bars, in parallel to whatever exemption consideration their clients may receive. Although INA §212(d)(3)(B) provides broad authority to DHS to grant exemptions from most of the terrorism-related inadmissibility grounds, DHS has implemented this authority in a piecemeal and centralized fashion, requiring announcements from the DHS Secretary before adjudicators can grant exemptions to a particular category of applicants.

The following categories may be exempted from the terrorism-related bars to admission under the statutory provisions of INA §212(d)(3)(B):

- Persons who provided material support under duress to a Tier I, II, or III group;<sup>26</sup>
- Persons who “engaged in terrorist activity” on behalf of a Tier I or Tier II group but did not do so knowingly or voluntarily (this would include, for example, child soldiers and persons acting under duress or other circumstances that would negate *mens rea* or offer them a defense);<sup>27</sup>
- Member and representatives of Tier III groups;<sup>28</sup>
- Persons who have voluntarily “engaged in terrorist activity” (*e.g.*, fought, received military training, solicited funds, recruited members) as long as they did not do so on behalf of a Tier I or Tier II group;<sup>29</sup>
- Spouses and children of persons inadmissible under INA §212(a)(3)(B) who are not covered by the statutory exception of subclause (IX) (*i.e.* spouses and children who knew about their family member’s activity that triggered the bar and did not “renounce” it).<sup>30</sup>

The following categories are ineligible for an exercise of discretionary authority under INA §212(d)(3)(B):

- Members or representatives of Tier I or Tier II groups;
- Persons who voluntarily and knowingly engaged in (or endorsed or espoused or persuaded others to endorse or espouse or support) “terrorist activity” on behalf of a Tier I or Tier II organization;
- Persons who voluntarily and knowingly received military training from a Tier I or Tier II group.

In addition to expanding the government’s exemption authority, the CAA abolished the characterization of certain Burmese and other insurgent groups as “terrorist organizations” based on any conduct that occurred before December 26, 2007. The CAA provides that the following groups, which had been characterized as “Tier III” terrorist groups under INA §212(a)(3)(B)(vi)(III), shall not be considered “terrorist organizations” “on the basis of any act or event occurring before the date of enactment of this section.”

- the Karen National Union/Karen Liberation Army (KNU/KNLA)
- the Chin National Front/Chin National Army (CNF/CNA)
- the Chin National League for Democracy (CNLD)
- the Kayan New Land Party (KNLP)
- the Arakan Liberation Party (ALP)
- the Karenni National Progressive Party

<sup>26</sup> In May 2007, USCIS issued a memorandum announcing that a separate intelligence analysis of each Tier I or Tier II group would have to be completed before any individual waivers could be issued for people who provided material support under duress to one of these groups. *USCIS Fact Sheet on Concerning Exercise of Authority under Sec. 212(d)(3)(B)(i)* (May 10, 2007). USCIS said that when the intelligence panel clears a Tier I/Tier II group (*i.e.*, determines that waivers may be issued to individuals coerced into providing support to one of these groups), USCIS will publish the name of the group on its website, presumably so that refugees and asylum seekers will know whether they are eligible to be considered for a waiver. Only the FARC, ELN and AUC (all operating in Colombia) have been “cleared” for purposes of issuing the waivers. DHS announced informally in December 2008 that these preliminary intelligence assessments for Tier I and Tier II groups would no longer be required before USCIS could issue an exemption, effective immediately, and a formal announcement followed on February 13, 2009.

<sup>27</sup> Eligible since the enactment of the CAA on December 26, 2007.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

- the Mustangs (a Tibetan group)
- the Alzados (short for the Alzados en Armas, an anti-Castro movement in Cuba)
- “appropriate groups affiliated with the Hmong and the Montagnards”<sup>31</sup>

The provisions of the CAA are retroactive, applying to “removal proceedings instituted before, on, or after the date of enactment” of this legislation, and to “acts and conditions constituting a ground for inadmissibility, excludability, deportation, or removal occurring or existing before, on, or after” that date.

The categories of people for whom exemption announcements have been made by the DHS Secretary, however, are considerably narrower. Some individuals, while eligible for an exemption under the INA, will not be considered for an exemption until the Administration institutes procedures for adjudicating them, and their cases, if pending with DHS, will likely remain “on hold” until that time. These include:

- Individuals who are inadmissible under the terrorism-related grounds based on voluntary activities on behalf of a Tier III group that has not been listed by the government,<sup>32</sup>
- Individuals who engaged in “terrorist activity” under duress other than material support (for example, child soldiers forced to receive military training and individuals who were forced to solicit funds or members);
- Individuals who voluntarily provided medical care to a terrorist or terrorist group pursuant to ethical requirements for medical professionals;
- The spouse or child of anyone in one of these categories who is subject to inadmissibility under INA §212(a)(3)(B)(i)(IX) and not covered by the exceptions at INA §212(a)(3)(B)(ii).

#### **What factors are considered in deciding whether to grant an exemption?**

In February 2007, DHS Secretary Michael Chertoff issued a statement that material support provided under duress would no longer apply to individuals who provided support to Tier III terrorist groups under duress “if warranted by the totality of the circumstances.”<sup>33</sup> In April 2007, Secretary Chertoff decided to permit adjudicators to make exceptions to the material support bar for individuals who provided material support under duress to groups that the U.S. government has listed as “terrorist organizations” (“Tier I” and “Tier II” groups).<sup>34</sup> The factors for consideration of these exemptions are the same.

In determining whether the material support was provided under duress, USCIS will consider whether the applicant “reasonably could have avoided” providing material support, the “severity and type of harm inflicted or threatened,” and other factors. USCIS will also consider the “amount, type, and frequency” of the

<sup>31</sup> All of these groups had previously been the subject of exemption announcements from DHS and DOS that allowed persons who provided support to these groups, whether voluntarily or involuntarily, to be granted a discretionary exemption from the material support bar. The passage of the CAA, however, means that any person who might formerly have been inadmissible or deportable based on any ground that depended on the characterization of these groups as “terrorist organizations”—as a member or representative of one of these groups, as one who provided “material support” to one of these groups, or as one who solicited funds or members for these groups or persuaded others to support them—is no longer subject to those grounds of inadmissibility or deportability as a matter of law, without needing any “exemption” from DHS. This is true as long as the material support or other relationship to the group took place before the date of enactment of this legislation. Persons who solicit funds for these groups, provide them with material support, are members, etc., after December 26, 2007, are not automatically exempted from the terrorism bars, although they remain eligible for a discretionary waiver.

<sup>32</sup> In October 2009, DHS announced that it had authorized exemptions a month earlier for persons associated with three Iraqi groups, the Kurdish Democratic Party (KDP), the Iraqi National Congress (INC), and the Patriotic Union of Kurdistan (PUK). An implementing memorandum with respect to these three groups (authorizing DHS adjudicators to process cases related to them) was finally issued on January 23, 2010.

<sup>33</sup> Michael Chertoff, Secretary of Homeland Security, *Exercise of Authority under Sec. 212(d)(3)(B)(i) of the Immigration and Nationality Act* (Apr. 27, 2007).

<sup>34</sup> *Id.* Although this exemption process for duress cases involving Tier I/II groups initially required an intelligence assessment of the Tier I/II group involved, at the end of 2008 Secretary Chertoff eliminated that requirement, so duress exemptions involving Tier I/II groups are now processed in the same manner as those involving Tier III groups. On February 13, 2009, DHS issued a memorandum revising its “hold” policy for pending cases that are potentially eligible for exemptions that have not yet been implemented, available at [http://www.uscis.gov/files/natedocuments/terror-related\\_inadmissibility\\_13feb09.pdf](http://www.uscis.gov/files/natedocuments/terror-related_inadmissibility_13feb09.pdf).

support provided, the “nature of the activities committed by the terrorist organization,” and the length of time since the support was provided when deciding whether to admit an individual who was forced to support a Tier III group.<sup>35</sup>

Secretary Chertoff’s April 2007 announcement stated that the government will consider the following factors when deciding to issue a waiver: (1) whether the individual could have avoided, or took steps to avoid, providing material support; (2) the severity and type of harm inflicted or threatened; (3) to whom the harm was directed; and (4) in cases of threats alone, the perceived imminence of the harm threatened and the perceived likelihood that the harm would be inflicted. In addition to the duress-related factors, the U.S. government will also consider (1) the amount, type, and frequency of the support provided; (2) the nature of the activities committed by the terrorist organization; (3) the individual’s awareness of those activities (4) the length of time since the support was provided; (5) the individual’s conduct since that time; and (6) other factors.<sup>36</sup>

### **What are the procedures for obtaining an exemption in cases pending before USCIS?**

USCIS has been placing “on hold” cases pending before it where the applicant faces a terrorism-related ground of inadmissibility, is not believed to pose a threat to the United States, is otherwise eligible for the benefit sought, and is eligible for a potential exercise of discretionary authority under INA §212(d)(3)(B), but that authority has not yet been implemented by the Secretary of Homeland Security. The indefinite hold period has been challenged.<sup>37</sup>

As the secretaries of DHS and DOS began implementing exemption authority for certain categories of cases, USCIS began to process the cases once an exemption became available. There was (and is still) no formal procedure for “applying” for an exemption; USCIS determined that it was capable of identifying and adjudicating exemption-eligible cases on its own, and this remains the procedure. This does not mean that advocates cannot submit formal requests for waiver consideration, or—often more important—documentation in support of waiver consideration. This can be particularly useful in cases where the probable basis for the perceived inadmissibility problem stems from old applications filed long before any of these issues were viewed as potential problems, where there are new facts, where prior counsel (or the applicant pro se) did not flesh out important facts, etc.

In early 2008, after the enactment of the CAA, USCIS began to deny asylee and refugee adjustment applications (as well as some asylee/refugee relative petitions) based on the terrorism-related provisions of INA §212(a)(3)(B). USCIS denied cases where DHS perceived an issue of inadmissibility under §212(a)(3)(B), where waiver authority was available under §212(d)(3)(B)(i), but where that waiver authority had not yet been implemented through an announcement by DHS Secretary Chertoff. The refugees who received these denial letters included Iraqi refugees and asylees who took part in failed attempts to overthrow Saddam Hussein in the 1990’s; asylees from Afghanistan who in the 1980’s provided support to the various mujahidin groups that were then fighting the Soviet invasion—groups to which the U.S. government was itself providing support; and South Sudanese Christians resettled in the United States as refugees who had provided support to the Sudan People’s Liberation Army (SPLA). In nearly all these cases, the facts that formed the basis for the USCIS Service Centers’ denial had been voluntarily disclosed on the applicant’s refugee or asylum application.

Following a public outcry, USCIS announced in March 2008, that it would no longer deny cases for which statutory waiver authority exists but had not yet been implemented. USCIS also reviewed all denials of this kind issued since the enactment of the CAA on December 26, 2007, and reopened nearly all of them.<sup>38</sup> To date, however, the majority of these cases remain on hold.

---

<sup>35</sup> M. Chertoff, Secretary of Homeland Security, *Exercise of Authority under Sec. 212(d)(3)(B)(i) of the Immigration and Nationality Act* (Apr. 27, 2007).

<sup>36</sup> *Ibid.*

<sup>37</sup> See, e.g., *Ahmed v. Mayorkas*, No. 08-1680 (N.D. Cal. filed Mar. 27, 2008); *Al-Karim v. Mukasey*, No. 08-671 (D. Colo. filed Apr. 2, 2008). In both cases, the plaintiffs have survived government motions to dismiss and the litigation is ongoing.

<sup>38</sup> J. Scharfen, Deputy Director, USCIS, Withholding Adjudication and Review of Prior Denials of Certain Categories of Cases Involving Association With, Or Provision of Material Support To, Certain Terrorist Organizations or Other Groups (Mar. 26, 2008), available at [http://www.uscis.gov/files/natedocuments/Withholding\\_26Mar08.pdf](http://www.uscis.gov/files/natedocuments/Withholding_26Mar08.pdf).

*Practice Pointer:* Attorneys must be sure to make and preserve any arguments available, based on the specifics of your client's case, that particular bars do not apply (*e.g.*, your client did not know, and should not reasonably have known, that the group to which he donated elementary school textbooks was a “terrorist organization”; his onetime donation of 12 textbooks does not constitute “material support” because it was unrelated to terrorist activity and was also *de minimis*, etc.) or that your client had a legal defense for doing what he did (*e.g.*, your taxi-driver client who was hijacked at gunpoint by Colombian FARC guerrillas and made to drive his hijackers into the mountains should not be subject to the “material support” bar because he was acting under duress—he should also be granted an exemption, but you should be sure to keep all his legal options open in case an exemption should, for some reason, be denied). In many cases, the same facts that give rise to these legal arguments will be factors that DHS will consider in exercising its exemption authority.

### **What are the procedures for obtaining an exemption in removal proceedings?**

On October 23, 2008, DHS announced its process for implementing its authority under INA §212(d)(3) to grant exemptions from the terrorism bars in cases that are or have been pending before the Executive Office for Immigration Review (EOIR).<sup>39</sup> The announcement applies to non-detained cases that have orders of removal that became administratively final on or after September 8, 2008, and in detained cases with orders of removal whatever the date of those orders. DHS has not announced procedures for non-detained cases with final orders of removal that predate September 8, 2008. Moreover—and this is a very significant limitation—the announced waiver process for removal cases only allows a case to be referred for waiver consideration if it falls into one of the categories of cases for which exemption authority has already been implemented.

In addition, DHS will not consider a case for an exemption until after an order of removal is administratively final. DHS explained that this procedure was established to ensure that all issues were fully litigated and that the possible exemption was the only issue remaining in the individual's case. However, for those whose eligibility for asylum or other form of relief, but for the terrorism bar, is undisputed, and who assert factual or legal claims that they are not in fact subject to the terrorism bars (for example, because what they gave was not “material support,” because they showed they could not reasonably have known that the group in question was a “terrorist organization,” because the group they gave to did not in fact become involved in violence until several years after the applicant's involvement in it had ended, because the applicant was a child at the time), will be forced to wait until the BIA issues its decision before USCIS can consider the case for an exemption that might render a decision on that appeal unnecessary.

The result of all these limitations is that only about three cases with final orders of removal have been referred to USCIS pursuant to these procedures at the time of this writing, and only one or two have been granted waivers. The other consequence of this waiver scheme is that it offers no relief to the large category of individuals in removal proceedings who are alleged to fall under an inadmissibility ground for which exemption authority exists under the statute but has not yet been implemented, notably people who had voluntary connections to Tier III groups.

DHS indicated that it would mail a “notice of referral” to non-detained individuals and personally serve detained individuals who were being considered for an exemption. There is no process to apply affirmatively for an exemption. Detained individuals must file for a stay of removal with U.S. Immigration and Customs Enforcement (ICE), Detention and Removal Office (DRO), within 7 days of being served with the notice of referral in order to be considered for an exemption. If USCIS decides to grant the exemption, USCIS will notify ICE, which will notify the individual and ask him or her to join a Joint Motion to Reopen to be filed with the Immigration Court or the BIA, so that relief can be granted and the case can be closed.

*Practice Pointer:* Although USCIS (the Asylum Office and the Service Centers) has been carefully tracking and “holding” or, where it deems possible, adjudicating pending cases subject to the terrorism bars, the same is not true for EOIR. If you are representing a client in removal proceedings who may be eligible for a discretionary exemption under the INA—even where procedures to adjudicate exemptions are not yet in

---

<sup>39</sup> See Fact Sheet, Department of Homeland Security Implements Exemption Authority For Certain Terrorism-Related Inadmissibility Grounds For Cases With Administratively Final Orders of Removal (Oct. 23, 2008), available at <http://www.uscis.gov/files/article/FACT%20SHEET%20DHS%20Exemption%20Authority%2020081023.pdf>.

place, such as cases where an individual voluntarily engaged in activities on behalf of a Tier III group not yet listed for exemptions—you should notify the Immigration Judge or the BIA (depending on where your case is pending) and DHS counsel to discuss how best to ensure that your client's exemption is considered and that your client is not removed before this can be done.

## CONCLUSION

The INA's terrorism bars are grounds of inadmissibility and deportability applicable to non-citizens generally, which also act as bars to asylum and withholding of removal provisions. Since their enactment and even more since their recent expansion, the INA's terrorism-related inadmissibility grounds have been applied overwhelmingly to refugees and asylum seekers, but in recent months have also arisen in a small but growing number of other categories of cases: applications for adjustment of status pending with USCIS field offices, cases undergoing consular processing, etc.

Practitioners should be prepared for DHS asylum officers, trial attorneys, and Immigration Judges to closely examine the circumstances of any affiliation their clients may have had, or goods or services they may have provided, to groups that may be engaged in "terrorism" as broadly defined by the INA, and should expect that DHS trial attorneys will oppose asylum on the material support ground in cases where it can arguably be applied. Practitioners should also be aware of the possibility that the material support bar could present an obstacle when other types of relief are requested in immigration court, or when adjustment of status applications (particularly those of asylees and refugees) are filed.