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**NEWLY ENACTED AMENDMENTS TO THE “TERRORISM BARS” AND
RELATED WAIVERS UNDER THE
IMMIGRATION AND NATIONALITY ACT**

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On December 26, 2007, the Consolidated Appropriations Act of 2008, Pub. L. 110-161, ___ Stat. ___, was signed into law. Section 691 of Division J of this very large appropriations bill made amendments to the inadmissibility grounds of INA § 212(a)(3)(B) related to “terrorism,” and to the authority codified at section 212(d)(3)(B)(i) of the Immigration and Nationality Act (INA) 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. A copy of the text of these amendments is attached.

This memorandum is intended for advocates working with refugees, asylees, and asylum seekers 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. It seeks to provide you with an overview of the new legislation and what it will mean for your clients. Please note that this legislation raises some questions of interpretation and implementation that are not yet resolved. Please note also that there are still gaps in the implementation of the discretionary authority available under the prior version of INA § 212(d)(3)(B), and that effective implementation of this new legislation will depend on the resolution of these outstanding issues. We will circulate updated information as this becomes available.

Overview of these amendments

The legislation makes three main changes to existing law:

- The existing “waiver” authority is extended to all of the terrorism-related bars contained within § 212(a)(3)(B), with a couple of exceptions discussed below.
- Certain specified groups will no longer be considered to be “terrorist organizations” for purposes of § 212(a)(3)(B) based on any act or event occurring before the enactment of this legislation.
- The Taliban are to be considered a “Tier I” terrorist organization for purposes of § 212(a)(3)(B).¹

¹ Throughout this document, the terms “Tier I,” “Tier II,” and “Tier III” will be used to refer to groups defined as “terrorist organizations” within the meaning of INA § 212(a)(3)(B)(vi)(I), (II), and (III), respectively. The lists of groups classified as “Tier I” or “Tier II” organizations are posted on the website of the Department of State at <http://www.state.gov/s/ct/list/>. A “Tier III” group is one that is not listed or designated as a “terrorist organization” through any public process, but is considered to be a “terrorist organization” for purposes of the

(The legislation also corrects a drafting error incorporated into the INA by earlier legislation, and connects the exception to inadmissibility at INA § 212(a)(3)(B)(ii) (for innocent spouses or children of persons inadmissible under the terrorism bars) to the corresponding ground of inadmissibility for spouses and children contained in subclause (IX) of section 212(a)(3)(B)(i), rather than to the unrelated subclause (VII).)

I. Expansion of discretionary “waiver” authority under INA § 212(d)(3)(B)

It is important to emphasize that this “waiver” authority remains discretionary, and that 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). Regardless of the level of the system at which you may find yourself and of how hopeful you are that your client will benefit from a favorable exercise of this discretion, you should also be sure to make and preserve any arguments available, based on the specifics of your client’s case, that particular bars do not apply at all (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 one-time donation of 12 textbooks does not constitute “material support” because it was completely unrelated to terrorist activity and 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 a waiver, but you should be sure to keep all his legal options open in case that 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 look at in adjudicating “waivers.” See, for example, USCIS guidance on the exercise of waiver authority, available here: http://www.uscis.gov/files/pressrelease/MaterialSupport_24May07.pdf.

(a) New categories of people eligible for “waivers”

Before the passage of this legislation, INA § 212(d)(3)(B) gave the Secretary of Homeland Security (in consultation with the Attorney General and the Secretary of State) and the Secretary of State (in consultation with the Attorney General and the Secretary of Homeland Security) the authority to decline to apply some—but not all—of the terrorism-related grounds of inadmissibility in particular cases.² This legislation broadens the “waiver” authority to all of INA § 212(a)(3)(B), with a couple of exceptions noted below.

This means that the following categories of people, who were previously ineligible for waivers, may now be granted waivers under 212(d)(3)(B):

INA because it “is a group of two or more individuals, whether organized or not, which engages in, or has a subgroup that engages in” the INA’s definition of what it means to “engage in terrorist activity” (INA § 212(a)(3)(B)(iv)).

² Although it is commonly referred to as “waiver” authority, and this memo (like the legislative text itself) uses that term for the sake of convenience, what INA § 212(d)(3)(B) allows for is not actually a “waiver” in the usual sense in which that term is used in immigration law. The text of the statute does not require that there be a prior finding that a person falls under the scope of § 212(a)(3)(B) in order for there to be a determination under 212(d)(3)(B) that 212(a)(3)(B) should not apply, nor is there an application procedure (or particular government forms) for applicants to use to request that such authority be exercised in their favor.

- Member and representatives of Tier III groups;
- Persons who have themselves “engaged in terrorist activity” (e.g. fought, solicited funds) as long as they did not do so on behalf of a Tier I or Tier II group;
- 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);
- Spouses and children of persons inadmissible under section 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).

The following categories of people remain ineligible for an exercise of discretionary authority:

- 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.

The prior version of section 212(d)(3)(B) provided discretionary authority to determine that a *group* should not be considered a Tier III group simply by virtue of the fact that it had a subgroup that engaged in “terrorist activity.” This authority is preserved and broadened in the current version, which gives the relevant Secretaries discretion to determine that the “Tier III” definition shall not apply to any group that would otherwise fall within its scope, except that no waiver may be extended to a group that “has engaged terrorist activity against the United States or another democratic country or that has purposefully engaged in a pattern or practice of terrorist activity that is directed at civilians.” In the past, the Secretaries of State and Homeland Security had declined to use their earlier waiver authority to remove groups or organizations from the definition of a “terrorist organization,” preferring instead to exercise their discretion in favor of individuals who had provided assistance to specified groups.³ It remains to be seen whether the new version of this group waiver authority will actually be exercised.

All these legislative changes 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.

³ In other words, in order to provide relief to refugees who had made contributions to the Chin National Front (CNF), for example, the Secretaries of State and Homeland Security announced that they would grant waivers on a case-by-case basis to individual applicants who gave to the CNF, rather than exercising their discretion not to apply the definition of a “Tier III” terrorist organization to the CNF.

(b) Implementation issues and consequences for individuals seeking protection or immigration benefits

Although the new legislation broadens the existing waiver authority under 212(d)(3)(B), and allows waivers to be granted to persons previously ineligible for them, how much relief this brings to needy applicants—and how quickly—will depend on how it is implemented. The waiver authority available under the prior version of 212(d)(3)(B)—which this version retains and broadens—has been only partially implemented to date. Thus far, the Secretaries of State and Homeland Security have implemented their existing waiver authority piecemeal, and have required preliminary announcements of their decision to exercise their authority with respect to particular classes of people before the individual people falling into those classes may be considered for waivers on a case-by-case basis.⁴ Moreover, in the case of persons who were made to provide “material support” to Tier I and II groups under coercion, DHS and DOS have required preliminary assessments of the coercing terrorist organizations before waivers could be granted to their victims. The only group to clear this preliminary assessment so far has been the Colombian FARC rebel group, although DHS has indicated that it is in the process of reviewing other Colombian groups (the ELN guerrillas and the AUC paramilitaries) and hopes to move on to other Tier I and II groups in the foreseeable future. One key question is how DHS and DOS plan to proceed with their newly expanded waiver authority—for example, how will this be implemented with respect to people who were combatants?—and whether the exercise of the new authority will follow the same model of implementation as the old.

In addition, persons who are eligible for waivers under the announcements already made (persons who gave under duress to Tier III groups, for example), but who are in removal proceedings, have not yet been able to receive such waivers due to the lack of a process to grant waivers in cases before the Immigration Court or farther along in the removal process. There is agreement by both DHS and DOJ that people already placed in removal proceedings can and should be considered for waivers, and it is expected that the Asylum Division of USCIS will be administering this process in coordination with ICE and with the EOIR. DHS has indicated repeatedly that it is close to having a process in place to grant waivers in removal proceedings, but until this actually happens, no one in removal proceedings can benefit either from the former waiver authority or from the new, expanded version.

That said, if you are representing a person who was formerly ineligible for an exercise of discretion under 212(d)(3)(B) but who has become eligible for a “waiver” under this new legislation, you should take steps to ensure that nothing irreparable happens to your client’s case—e.g. that your client is not deported—before he or she can be considered for a waiver. The same applies to persons who have been eligible for a “waiver” all along, but have not been considered for one due to the lack of a process to implement this authority in the removal context. This is particularly critical for cases in removal proceedings, because although USCIS (the Asylum Office and the Service Centers) appears to have a good grip on its caseload and has been tracking which cases currently pending before it would be affected by what portions of this and prior legislation, the same is not true for cases in removal proceedings. We would recommend notifying the Immigration Judge or the BIA

⁴ Copies of the DHS/DOS waiver announcements to date and of other relevant documents related to their implementation are available here: <http://www.rcusa.org/index.php?page=refugee-waivers>. The Secretary of State has authority to issue waivers to persons overseas; the Secretary of Homeland Security exercises this authority over those present in the U.S. INA § 212(d)(3)(B).

(depending on where your case is pending) of the passage of this new legislation and its impact on your case, and reaching out to DHS counsel to discuss how best to handle it. In some cases, it may make sense to ask the IJ or the BIA to hold a case in abeyance pending implementation of the waiver authority. The best approach will vary case by case. If you are representing persons in removal proceedings (or persons who have already received a final order of removal) who would be eligible for waivers under 212(d)(3)(B) and would like to discuss your options, please contact Anwen Hughes at HughesA@humanrightsfirst.org with your name and contact information.

II. Abolition of the characterization of certain Burmese and other insurgent groups as “terrorist organizations” based on anything they did before December 26, 2007

The legislation provides that the following groups, which have been characterized as “Tier III” terrorist groups under INA §212(a)(3)(B)(vi)(III), shall not be considered to be “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
- 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”

With the exception of the Hmong and the Montagnards, all of the groups listed above had previously been the subject of waiver announcements from both DHS and DOS that allowed persons who provided support to these groups, whether voluntarily or involuntarily, to be granted a discretionary waiver of the material support bar. The passage of this new legislation, 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*, automatically, as a matter of law, and without needing any “waiver” from DHS or DOS. 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, should not count on an automatic exemption from the terrorism bars, although they would remain eligible for a discretionary waiver.

Also, this legislative change does not automatically remove the bar for anyone affiliated with one of these groups who is subject to a bar that does not depend on the definition of the group as a “terrorist organization.” So a member of the KNPP, for example, who provided material support to the KNPP but also himself engaged in “terrorist activity” as defined in the I.N.A. (e.g. used unlawful armed force for any purpose other than mere personal monetary gain, with intent to endanger people

or cause substantial damage to property, engaged in any of the other forms of violence that fall under the INA's terrorism definition (hijacking, kidnapping, assassination, etc.) gathered information on potential targets for "terrorist activity," solicited funds for the commission of "terrorist activity" (rather than for the KNPP as an organization), or provided material support to an individual "terrorist," would no longer be subject to a bar based on membership (at least based on anything the KNPP did prior to December 26, 2007) or material support to the KNPP, but would remain subject to a bar for having engaged in terrorist activity. As noted above, however, the new legislation makes this bar waivable.

These changes 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.

If you are representing anyone in removal proceedings in a case where ICE has invoked a "terrorism bar" that is based on the characterization of one of the above groups as a "terrorist organization," you should file with the Immigration Judge (for cases pending in immigration court) or the Board of Immigration Appeals (for cases at the BIA level) a letter alerting the IJ/BIA to this new legal authority. We would recommend that you reach out to your local ICE Office of Chief Counsel about filing such letters jointly. In cases that have not yet been decided on the merits, this should allow the case to proceed to adjudication without further terrorism-bar problems (assuming, again, that your client did not engage in any conduct that would trigger a bar independent of the group's status as a terrorist organization). If you encounter any obstacles, please contact Anwen Hughes at HughesA@humanrightsfirst.org. We are trying to track these cases and may be able to assist in addressing them.

In cases where your client has already been denied relief based on the fact that one of the above groups is a terrorist organization:

--if the case was denied by the IJ based on the material support bar (for example) but the IJ determined that your client would be eligible for asylum and/or withholding of removal (or whatever other relief you were seeking) but for the material support bar, you should make a motion to the BIA to reopen (if the case was already denied by the BIA) or simply to grant relief (if DHS is not contesting that the person is otherwise eligible), remanding to the IJ if necessary for updated security and biometrics checks. ICE should be willing to join in or not oppose such motions in cases where it is clear that the material support bar was the only basis for denial, and has filed such a motion itself in at least one case.

--if the case was denied by the IJ based on the material support bar (or any other bar that depends on the characterization of one of the above groups as a terrorist organization) but the IJ did not make findings with respect to whether your client had otherwise established eligibility for relief, if the case is pending before the BIA you will need to move for remand to the IJ for such findings to be made; if the case has already been denied by the BIA but you are still within the deadline to file a motion to reopen, you can follow a motion to reopen on these grounds. If there is already a final order of removal in place that was issued more than 90 days ago, you can ask ICE to join in such a motion.

Again, please contact Anwen Hughes at HughesA@humanrightsfirst.org if you have any cases in this category that have already been denied by the IJ.

If you are representing such clients before USCIS, you should flag the passage of this legislation for the USCIS adjudicator in order to ensure that these bars do not become an issue. Shortly before the enactment of this legislation, USCIS service centers denied some applications for adjustment of status by asylees and refugees who were deemed to be subject to a bar that depended on the characterization of one of the above groups as a terrorist organization and was not “waivable” under the prior version of 212(d)(3). An example of such a case would be a person who solicited funds for the CNF—the CNF was deemed to be a “terrorist organization” based on its use of armed force against the Burmese military, and soliciting funds for a terrorist organization was one of the bars for which no waiver was available before this legislation was enacted. We are going to advocate with USCIS for USCIS to reopen any such cases as service motions and/or to approve motions to reopen with requests for fee waivers from applicants in this situation. If you have such a case, we recommend that you file a motion to reopen right away, while your client’s application and medical exam results are still current. Please alert Melanie Nezer at the Hebrew Immigrant Aid Society at Melanie.Nezer@hias.org to any such cases you come across, so that we can work with USCIS to ensure that none of them fall through the cracks.

III. Definition of the Taliban as a “Tier I” terrorist organization

The new legislation 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. This change is subject to the same effective date as the rest of the amendments in this section, 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.