



National Headquarters
700 Light Street • Baltimore, Maryland 21230
410/230-2700 • fax: 410/230-2890 • lirs@lirs.org

Legislative Affairs Office
122 C Street, N.W., Suite 125 • Washington, D.C. 20001
202/783-7509 • fax: 202/783-7502 • dc@lirs.org

www.lirs.org

To: Refugee Resettlement Affiliates

From: Access to Justice, Lutheran Immigration and Refugee Service (LIRS)

Date: April 21, 2008 (updated August 13, 2008¹)

Re: Q & A on Terrorism-Related Bars to Admission in INA §212(a)(3)(B), DHS Waiver Authority, and Exemptions Currently in Place²

This memo, presented in question and answer format, provides an overview of the current state of the terrorism-related bars to admission in §212(a)(3)(B) of the Immigration and Nationality Act (INA) and explains the changes that have been made to the application of these bars, either through specific waivers issued by the administration or through legislative action. Advocacy on this issue continues and future changes are likely; therefore, it is important to note *this memo is only current to August 13, 2008*.

1. What are bars to admission, generally? When are they an issue?

In addition to qualifying for whatever benefit an immigrant is requesting, such as meeting the refugee definition, immigrants must also be “admissible,” meaning that even though they otherwise qualify for the immigration benefit, they also have not committed acts that would “bar” them from being admitted to the U.S. These grounds of inadmissibility are outlined in INA §212(a). INA §212(a)(3)(B) specifically covers the terrorism-related grounds. Anytime an individual submits an application that requires her/him to be admissible to the U.S., this section is relevant. For example, the following applications require a showing of admissibility: application for refugee status, application for asylum, and application for adjustment of status. Even after an initial finding of admissibility, anytime an immigrant seeks to reenter the U.S. after a trip abroad they must continue to be admissible.

2. What is “terrorist activity”?

“Terrorist activity,” includes i) hijacking or sabotage of aircraft, vessels, or other vehicles; ii) kidnapping; iii) violent attack or detention of government officials or diplomats; iv) a violent attack on an internationally protected person; vi) assassination; vii) use of biological, chemical, or nuclear weapons, or of conventional weapons (other than for mere personal monetary gain) with intent to endanger the safety

¹ Michael Aytes, Acting Deputy Director of U.S. Citizenship and Immigration Service (USCIS) issued a memo on July 28, 2008 entitled, “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.” The Aytes memo did not make any substantive changes to the law or implementation of the law regarding terrorism-related inadmissibility, rather it served to clarify the process by which USCIS will be adjudicating (or not adjudicating) applications that raise terrorism-related concerns. This memo, as updated, reflects the process articulated in the July 28, 2008 Aytes memo.

² Special thanks to the analysis by UNHCR and the memo and analysis provided by Human Rights First regarding the impact of the amendments passed in late December 2007.

of individuals or to cause substantial property damage; or v) threat, attempt, or conspiracy to commit any of the above actions. This list can be found in INA §212(a)(3)(B)(iii).

3. An individual is barred from admission to the United States if s/he “engaged in terrorist activity.” What does it mean to “engage in terrorist activity”? Who do these laws apply to?

Understanding what it means to “engage” in “terrorist activity” first requires knowing what activities fall into the scope of “engagement” under §212(a)(3)(B)(iv). What constitutes “engagement?” A person can engage in acts as an individual for acts that they themselves commit or for the acts of others, if those people happen to be members of their organization. A person can be engaged in terrorist activity if they i) commit or incite to commit terrorist activity; ii) prepare or plan terrorist activity; iii) gather information on potential targets; iv) solicit funds for terrorist activities or organizations; v) solicit individuals for membership in a terrorist organization or to engage in terrorist activity; or vi) provide any type of “material support” for the commission of terrorist activity, to an individual who plans to commit terrorist activity, or to a terrorist organization.

4. What is a “terrorist organization”?

INA §212(a)(3)(B)(vi) defines three different “Tiers” of terrorist organizations. Tiers I and II are designated organizations, meaning that there is a public list of which organizations the U.S. government classifies as “terrorist organizations.” Tier III organizations are not designated and there is not a specific list of organizations that fit within this category. Rather, understanding what a Tier III organization is requires an analysis of the activities of the group. However, please note that a Tier III “organization” can be made up of just two people, whether or not they are officially organized.

Tier I: Foreign Terrorist Organizations (FTOs)	Tier II: “Terrorist Exclusion List (TEL)”	Tier III: Undesignated; defined in INA §212(a)(3)(B)(v)(III)
<p>FTOs are foreign organizations that are designated by the Secretary of State in accordance with § 219 of the Immigration and Nationality Act (INA).</p> <p>A list of FTOs can be found at: http://www.state.gov/s/ct/rls/fs/37191.htm</p>	<p>§411 of the USA PATRIOT ACT of 2001 (8 U.S.C. § 1182) authorized the Secretary of State, in consultation with or upon the request of the Attorney General or Secretary of DHS, to designate terrorist organizations for immigration purposes. This is known as the “Terrorist Exclusion List (TEL).”</p> <p>Organizations on the TEL can be found at: http://www.state.gov/s/ct/rls/fs/2004/32678.htm</p>	<p>INA §212(a)(3)(B)(v)(III) defines a terrorist organization as “two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in,” [terrorist activity].”</p> <p>See INA §212(a)(2)(B)(iv) (I)-(VI) and question #2 and 3 above for an explanation of what it means to “engage in terrorist activity.”</p>

5. Under the “Tier III” definition, there are some groups that may fit within that definition but are not threats to the United States’ foreign policy interests. Which groups has the U.S. government decided to exempt from being considered a “terrorist organization”? What impact does this exemption have upon members or representatives of those groups?

Individuals who were members of, representatives of, solicited funds on behalf of, or provided material support to the groups listed below, prior to December 26, 2007, will not be barred from admission to the United States because of that activity. Please note that other acts an individual may have engaged in that are considered “terrorist activities” will still render him/her inadmissible. See INA §212(a)(2)(B)(iv)(I)-(VI) and question #2 and #3 above for further explanation of what it means to “engage in terrorist activity.”

Individuals will receive “automatic relief” from inadmissibility based upon their membership in, representation of, solicitation of funds on behalf of, or provision of material support to the following groups:

- i. Karen National Union/Karen National Army (KNU/KNA);
- ii. Chin National Front/Chin National Army (CNF/CNA);
- iii. Chin National League for Democracy (CNLD);
- iv. Kayan New Land Party (KNLP);
- v. Arakan Liberation Party (ALP);
- vi. Tibetan Mustangs;
- vii. Cuban Alzados;
- viii. Karenni National Progressive Party (KNPP); or
- ix. “Appropriate groups affiliated with the H’mong;”
- x. “Appropriate groups affiliated with Montagnards.”³

By virtue of being granted “automatic relief” from the grounds listed above, applicants for admission do not have to request a waiver based upon their associations with the 10 specified groups. Such relief will be evaluated by USCIS automatically; there is not a separate waiver that an applicant will need to submit in order to be considered for the exemption.

6. An individual is barred from admission to the United States if s/he “afforded material support” to a terrorist organization. What is considered “material support”?

“Affording material support” under INA §212(a)(3)(B)(iv)(VI) means to provide any of the following for the commission of terrorist activity, to a terrorist organization, or to any individual who has committed or plans to commit terrorist activity: i) safe house; ii) transportation; iii) communications; iv) funds; v) transfer of funds or other material financial benefit; or vi) false documentation or identification; vii) weapons (including chemical, biological, or radiological weapons); viii) explosives; or ix) training.

If that support was provided to a Tier III (undesignated) terrorist organization, the statute allows for an exception for an individual who can demonstrate by clear and convincing evidence that s/he did not know or should not reasonably have known that the organization was a terrorist organization (i.e. two or more individuals, whether organized or not, who engages in “terrorist activities”). If USCIS plans to deny the application on the basis of providing material support to a Tier III organization without evidence of the

³ USCIS specified in its March 26, 2008 memo that “appropriate groups affiliated with H’mong or Montagnards” consist of ethnic H’mong individuals or groups, provided there is no reason to believe that the relevant activities of the recipients were targeted against noncombatants; or the Montagnard affiliated group, the Front Unifie de Lutrte des Races Opprimees (FULRO). Jonathan Scharfen, Deputy Director of 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,” March 26, 2008.

individual being aware of the group's activities, the individual should have the opportunity to rebut the finding of inadmissibility on this ground if, in fact, the individual did not know and should not reasonably have been expected to know that the group they provided support to was engaged in terrorist activities. USCIS may issue a request for evidence (RFE) to determine whether the knowledge requirement is met or, if the case is denied, the individual may appeal or file a motion to reopen/reconsider on this basis.

There is not an exception based on knowledge for support provided to Tier I or Tier II organizations. If an individual voluntarily provided support to a designated Tier I or Tier II organization, s/he will be barred from admission to the U.S. These are designated organizations and, therefore, knowledge is presumed. If an individual did not actually know that the organization they provided support to was engaged in terrorist activities, the logic is that s/he should reasonably have known it was a terrorist organization because the organization is listed on either the FTO or TEL. Please see question 4 and the chart above for further explanation of the difference between Tier I, Tier II and Tier III terrorist organizations and links to the published lists of designated organizations.

7. *What exemptions are in place for the bar to admission based upon "affording material support"?*

There are two categories of exemptions in place for the provision of material support.

- 1) The act of providing material support to the following Tier III organizations is exempt from barring an individual from admission to the U.S.:
 - i. Karen National Union/Karen National Army (KNU/KNA);
 - ii. Chin National Front/Chin National Army (CNF/CNA);
 - iii. Chin National League for Democracy (CNLD);
 - iv. Kayan New Land Party (KNLP);
 - v. Arakan Liberation Party (ALP);
 - vi. Tibetan Mustangs;
 - vii. Cuban Alzados;
 - viii. Karenni National Progressive Party (KNPP); or
 - ix. "Appropriate groups affiliated with the H'mong;"
 - x. "Appropriate groups affiliated with Montagnards."

- 2) The act of providing material support under *duress* is exempt from barring an individual from admission to the U.S. In order to be eligible for a duress exception the applicant must first establish s/he is otherwise eligible for the benefit sought. Then, s/he must pass all background and security checks, fully disclose in all applications and interviews the "nature and circumstances of each provision of material support," and establish that s/he poses no danger to the safety and security of U.S. Once s/he passes this threshold, the adjudicator will decide if the applicant is eligible for a favorable exercise of a discretionary exemption for duress. DHS Secretary Chertoff delegated authority to U.S. Citizenship and Immigration Services (USCIS) to determine whether an individual meets the criteria for the exercise of a discretionary exception.

In applying the discretionary exception, USCIS will first assess what category the organization that received the support fits within – Tier I, Tier II or Tier III. All Tier III's are eligible for an assessment of whether the duress exception should apply, while only specified Tier I and II organizations are eligible. Currently, the only Tier I cases benefiting from the duress exception are for involuntary support provided to the *Fuerzas Armadas*

Revolucionarias de Colombia (FARC), the *Ejército Liberación Nacional* (ELN) or the *Autodefensas Unidas de Colombia* (ACU) of Colombia. The duress exception for support provided to other Tier I or Tier II organizations have not yet been implemented. USCIS is still in the process of evaluating which other Tier I and Tier II groups should be included for eligibility.

Next, the adjudicator will evaluate the *totality of the circumstances*. At a minimum, material support has to be provided “in response to a reasonably-perceived threat of serious harm.” However, additional factors will be considered, including i) whether applicant reasonably could have avoided, or took steps to avoid, providing material support; ii) the severity and type of harm inflicted or threatened; iii) to whom the harm/threat was directed; iv) the perceived imminence of the harm threatened; v) the perceived likelihood that the threatened harm would be inflicted; and vi) any other relevant factors regarding the circumstances under which the applicant felt compelled to provide material support.

In some cases, USCIS may issue a request for evidence (RFE) while evaluating whether or not the support was provided under duress or may specifically ask questions to that effect in an asylum, refugee, or adjustment interview. In other cases, the existence of duress will be clearly based upon the information provided by the applicant, particularly if the support provided under duress is directly related to the individual’s claim to refugee or asylee status. Either way, there is not a separate waiver application that the individual must submit in order to qualify for the duress exception.⁴

8. *How do these bars for terrorist activity affect the spouses and children of individuals who have engaged in terrorist activity?*

Generally, spouses and children of individuals who have committed terrorist activity within the past five years are barred from admission. However, there are two specific exceptions for those spouses or children who a) either did not know or should not reasonably have known of the activity or b) renounced the activity. Even if one of these specific exceptions does not apply, the spouse or child may still be eligible for other available waivers.

9. *What authority does the Department of State or the Department of Homeland Security have to issue additional waivers to allow for certain groups or individuals to be admitted to the United States?*

The waiver authority in INA §212(d)(3)(B)(i) that previously was only applicable to the provision of material support to a terrorist organization was expanded at the end of 2007 to be available for most of the terrorism bars in §212(a)(3)(B). The chart below indicates which of the terrorism bars are not waivable by administrative action and provides examples of grounds that potentially may be waived by administrative action. Please note that the list below includes bars that the Secretary of DHS, in consultation with the Attorney General and Secretary of State, has discretionary waiver authority over; however, this authority must be exercised in specific instances in order to be applied to individual or group cases. Individual adjudicators at USCIS do not have the authority to issue waivers unless delegated that authority by the Secretary of DHS after an exercise of discretionary waiver.

⁴ Jonathan Scharfen, Deputy Director of USCIS, “Processing the Discretionary Exemption to the Inadmissibility Ground for Providing Material Support to Certain Terrorist Organization,” May 24, 2007.

<p align="center"><u>Terrorism bars that cannot be waived</u> <i>(there is <u>no administrative authority</u> to take action in issuing waivers for the bars below; legislative changes are required)</i></p>	<p align="center"><u>Terrorism bars that may be waived by DHS</u> <i>(<u>administrative action required</u>; these are <u>NOT</u> waivers currently in place)</i></p>
<ul style="list-style-type: none"> • Individuals 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; • Representatives and members of Tier I or Tier II organizations; and • Individuals who voluntarily and knowingly received military training from a Tier I or Tier II organization. 	<ul style="list-style-type: none"> • Representatives and members of Tier III organizations; • Material support provided under duress to a specified Tier I or Tier II organization; • Individuals who voluntarily and knowingly received military training from a Tier III organization; • Individuals who involuntarily or unknowingly received military training; from a Tier I or Tier II organization; • Individuals who solicited funds or recruited members for a Tier III organization; • Individuals who have “engaged in terrorist activity” related to a Tier I or Tier II group but did not do so “knowingly and voluntarily;” or • Individuals who engaged in (or endorsed or espoused or persuaded others to endorse or espouse or support) “terrorist activity” on behalf of a Tier III organization or in an individual capacity.

10. What will happen to the cases that may benefit from a future exercise of waiver authority by DHS but for which a waiver is not currently in place (categories in the right column of the chart in question #9)?

Since the passage of the December 26, 2007 legislation that provided the Secretary of DHS with expanded waiver authority, the Secretary has not exercised this discretion. However, as the DHS Secretary considers additional groups or categories of cases to exempt, USCIS, in anticipation of such changes, will be placing cases on hold that fit into the following categories:⁵

- 1) Applicants who are associated with following exempt groups whose individual activities may still bar them from admission to the U.S:
 - i. Karen National Union/Karen National Army (KNU/KNA);
 - ii. Chin National Front/Chin National Army (CNF/CNA);
 - iii. Chin National League for Democracy (CNLD);
 - iv. Kayan New Land Party (KNLP);
 - v. Arakan Liberation Party (ALP);
 - vi. Tibetan Mustangs;
 - vii. Cuban Alzados;
 - viii. Karenni National Progressive Party (KNPP); or
 - ix. “Appropriate groups affiliated with the H’mong;”
 - x. “Appropriate groups affiliated with Montagnards.”

⁵ See note 3.

- 2) Applicants who are inadmissible under the terrorist-related provisions based on voluntary activities associated with Tier III terrorist organizations who are not currently exempt groups. An exercise of discretion in this category may benefit a number of the refugee or asylee adjustment applications whose cases were denied in February 2008, such as Southern Sudanese members of the Sudanese People's Liberation Army (SPLA) or Iraqis who took part in attempts to overthrow Saddam Hussein's government in the 1990s or Afghans who provided support to the various mujahideen groups that were fighting the Soviet invasion in the 1980s;
- 3) Applicants who are inadmissible under the terrorist-related provisions of the INA, other than material support, based on any activity or association that was engaged in *under duress* related to a designated, Tier I or Tier II, terrorist organization;
- 4) Applicants who voluntarily provided medical care to any terrorist or terrorist organization; and
- 5) Spouses or children of any of any individual listed above.