The Problem of Terrorism-Related Inadmissibility Grounds (TRIG) and the Implementation of the Exemption Authority for Refugees, Asylum Seekers, and Adjustment of Status Applicants

MARCH 2009 UPDATE

Background

For five years, the U.S. government has been applying overly-broad and far-reaching counter-terrorism provisions of the 2001 USA PATRIOT Act and the 2005 REAL ID Act to thousands of refugees, asylum seekers, and applicants for green cards, making them inadmissible to the U.S. Ironically, for many of the individuals 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 U.S. protection. For example, refugees, asylees, and asylum seekers who were coerced into giving goods or services to terrorist groups are considered "terrorists" by the U.S. government under provisions of the Immigration and Nationality Act ("INA"). For others, 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 in the U.S. 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"—either under duress or pursuant to the Hippocratic Oath—are barred from admission to the United States as terrorists.

The Government's Exemption Authority and the 2008 Consolidated Appropriations Act (CAA)

When Congress expanded the terrorism definitions, it included provisions to allow the government to exclude some individuals from the broad scope of the terrorism bars in cases where those provisions "should not apply." This discretionary authority was expanded by the Consolidated Appropriations Act of 2008, and may now be exercised in nearly all cases involving the terrorism-related bars, with the exception of those involving individuals who voluntarily and knowingly supported a designated terrorist group. As of March 2009, more than 9,600 exemptions have been granted, mostly in cases of refugees being resettled in the US from abroad.

Current Problems with the Government's Exercise of Exemption Authority

While the law provides broad authority to grant exemptions from most of the terrorism-related inadmissibility grounds, DHS has implemented this authority in a very slow, piecemeal, and centralized fashion. Hundreds of refugees and asylum seekers have had their cases put "on hold" and thousands of applicants for adjustment of status (who have already been admitted to the U.S. as refugees and asylees) have not been able to obtain green cards or reunite with family members as a result of these overly broad laws and unnecessarily restrictive legal interpretations. Asylum seekers in removal proceedings have remained in detention while the government decides how to process these cases. Due to fear of widespread denials or placing cases on hold, in some circumstances the

UN High Commissioner for Refugees does not refer otherwise qualified refugees to the U.S. Refugee Program for resettlement.

Current Status of Implementation of Exemption Authority

The following categories of people may be exempted from the terrorism-related bars to admission under current law, and procedures have been implemented that allow USCIS to consider and grant exemption in these cases:

- Individuals who provided material support under duress to a Tier I, II, or III group;
- Spouses and children of these individuals

In addition to expanding the government's exemption authority, the CAA abolished the characterization of certain insurgent groups as "terrorist organizations." Therefore, individuals who provided material support or engaged in other activity in support of these groups are no longer barred from admission and do not need exemptions:

- 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"

Cases "On Hold"

The following categories of people may be exempted from the terrorism related bars to admission under current law, but *no procedures* have been implemented that allow USCIS to consider and grant exemptions in these cases. Until the Administration institutes procedures for adjudicating them, their case will likely remain "on hold." As of March 2009, there are more than 6,000 adjustment of status (I-485) and family reunification (I-730) cases and approximately 180 asylum cases in this category. 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;
- 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.

Cases Ineligible for Exemptions
The following categories of people are ineligible for an exercise of discretionary authority under the law:

- Members or representatives of Tier I or Tier II groups;
- Persons who voluntarily and knowingly engaged in "terrorist activity" on behalf of a Tier I or Tier II organization.

Exemptions in Removal Proceedings
On October 23, 2008, DHS announced its process for implementing its exemption authority in removal cases. The announcement applies to non-detained cases that have orders of removal that became administratively final on or after September 8, 2008 and for detained cases, the applicable date is that which is written on their orders. DHS has not announced procedures for non-detained cases with final orders of removal that predate September 8, 2008. Immigration and Customs Enforcement (ICE) does not track these cases, so it is unclear whether any exemptions have been granted in the context of removal proceedings or whether any asylum seekers have been removed without being considered for an exemption. DHS announced that it would not consider a case for an exemption until after an order of removal is administratively final.

Recommendations
The INA's terrorism bars were enacted to protect the national security of the United States. The government's approach to applying the terrorism bars threatens refugee protection without enhancing national security.

- Congress should amend the overly broad definition of "terrorism" to make it consistent with the rest of the U.S. Code and with the common understanding of the term "terrorism."
- Congress should include a duress exception in the law that would recognize that being forced to comply with the demands of terrorists does not constitute support of terrorism.
- The Administration, with guidance from Congress if necessary, should implement procedures to consider exemptions in all cases where they are available under the law. Individuals who have already been admitted to the US as refugees and asylees should be presumed to be eligible for an exemption.
- The Administration should ensure that asylum seekers in removal proceedings have the opportunity to be considered for exemptions expeditiously and without having to choose between pursuing administrative appeals or having an exemption considered in their case. The administration should ensure that DHS/ICE and DOJ/EOIR track all cases where an exemption is available under the law and ensure that no asylum seeker is removed until an exemption is considered.