

Subject: [DWN] 5-23-06 DOS Cable on "material support"

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<http://www.aila.org/content/default.aspx?docid=20160> Steve Yale-Loehr

UNCLASSIFIED STATE 00083289

R 231803Z MAY 06

SUBJECT: NEW GUIDANCE ON MATERIAL SUPPORT PROVISIONS

REF: 05 STATE 094882

1. SUMMARY. As reported in reftel, the REAL ID Act of 2005 (Section 103 of Title I of Division B of PL 109-13) amended INA 212(a)(3)(B) in several ways. Among other things, the Act added and revised grounds of inadmissibility, expanded the definitions of "terrorist organization" and "engaging in terrorist activities," and increased the burden on visa applicants with regard to certain knowledge requirements. As a result, more visa applicants may be ineligible because they cannot meet the increased burden or because the organization to which they are connected now falls within the definition of "terrorist organization." The Act also broadened provisions relating to endorsing or espousing terrorism. This Guidance sets out below the inadmissibility provisions, as amended by the REAL ID Act, in more detail. As directed by reftel, you MUST request a security advisory opinion (SAO) for any visa applicant who you believe may be ineligible under INA 212(a)(3)(B).

END SUMMARY.

2. The Real ID Act was signed into law on May 11, 2005, and since that date the Visa Office Coordination Division (CA/VO/L/C) has applied the amended INA in responding to posts' security advisory opinion (SAO) requests. Both the USA PATRIOT Act of 2001 and the REAL ID Act of 2005 broadened the scope of the INA's terrorist provisions. Key changes to the terrorism provisions of the INA attributable to these acts are summarized below. The updated text of INA 212(a)(3) is available as a link from 9 FAM 40.32 - Terrorist Activities, on the FAM site.

Terrorist Organizations and Membership

3. The USA PATRIOT Act of 2001 (effective October 26, 2001) amended INA

212(a)(3)(B) by, among other things, expanding the definition of terrorist organization. In addition to the Foreign Terrorist Organizations designated under section 219 of the INA, the Patriot Act created two new categories. One new category of terrorist organizations comprises organizations so designated by the Secretary of State on the basis of a finding that they engage in specified terrorist activities. This category is known as the "Terrorist Exclusion List" or "TEL." The second new category, known informally as Tier III organizations, includes any "group of two or more individuals, whether organized or not, which engages in" certain terrorist activities. Unlike the first two categories, the Tier III terrorist organizations are groups that the State Department has never designated and therefore never determined should be treated as terrorist organizations as a matter of U.S. foreign policy. Nevertheless, the Patriot Act brings Tier III organizations and association with them under the purview of INA 212(a)(3)(B).

4. The Real ID Act expanded the definition of a Tier III "terrorist organization" to include organizations that have a subgroup "which engages in terrorist activities." The Act also expanded the range of activities for which an organization meets the definition of a terrorist organization. An organization now can be a Tier III organization if the group "engages in terrorist activity" by soliciting funds or members, or knowingly, or reasonably should know, affords material support, for a terrorist activity or to a terrorist organization. This provision potentially captures a large number of aliens, who, for example, contribute to an organization that in turn provides funding to terrorist organizations. You must carefully review applications and conduct interviews with these new definitions in mind.

5. Section 212(a)(3)(B), as amended by the REAL ID Act, makes inadmissible:

- Any alien who has engaged in a terrorist activity (The types of activities that fall within "engage in terrorist activity" are discussed below in paragraphs 6 through 11);
- Any alien a consular officer, the Attorney General or the Secretary of Homeland Security has reasonable ground to believe is engaged in or is likely to engage after entry in any terrorist activity (See paragraphs 6 through 11);
- Any alien who has, under circumstances indicating an intention to cause death or serious bodily harm, incited terrorist activity (See paragraph 6, 7, 8, and 9);
- Any alien who is a representative of a terrorist organization, whether

designated or not, regardless of knowledge or intent;

- Representatives of a "political, social, or other group that endorses or espouses terrorist activity." (Note: Under the USA PATRIOT Act, the Secretary of State had to find that a group's public endorsement of acts of terrorism undermined U.S. efforts to reduce or eliminate terrorist activities. The REAL ID Act removed the requirement that such a finding be made as a prerequisite to an ineligibility finding.);

- Any alien who is a member of a designated terrorist organization (219 or TEL);

- A member of an undesignated terrorist organization (tier III), unless the alien can demonstrate "by clear and convincing evidence" that he or she did not know, and should not reasonably have known, that the organization is a terrorist organization;

- Any alien who "endorses or espouses terrorist activity or persuades others to endorse or espouse terrorist activity or support a terrorist organization." (Note: Under the USA PATRIOT Act, a person had to have used his or her position of prominence to endorse or espouse terrorist activity or to support a terrorist organization in a manner the Secretary of State determined undermined our efforts to reduce or eliminate terrorist activities. The REAL ID Act removed the requirement that the alien hold a position of prominence, and the requirement of a Secretarial finding.);

- Any alien who has "received military-type training," as defined in 18 USC 2339D(c)(1), from or on behalf of an organization that, at the time the training was received was a terrorist organization (whether designated or not);

- A spouse or child of alien inadmissible above, if the activity causing the alien to be found inadmissible occurred within 5 years; with the exception that the inadmissibility would not apply if the spouse or child has satisfactorily renounced the activity or the spouse or child did not know, or should not reasonably have known, of the activity. [NOTE: The above-described exception to spouse and child inadmissibility derives from INA 212(a)(3)(B)(ii). That provision contains a clerical error, in that it should reference subclause (IX) as the provision to which it makes the exception, but instead references subclause (VII). The provision should be read as if it references subclause (IX).]

Material Support and Employment

6. INA 212(a)(3)(B) also makes inadmissible any alien providing material support to a terrorist organization. The scope of the provision is very broad. For example, any alien who knowingly or who should have reasonably known provides material support to a designated (either under section 219 or the TEL) foreign terrorist organization, or to a member of a designated terrorist organization, is inadmissible. Any alien who affords material support to an undesignated terrorist organization, or to a member of an undesignated terrorist organization, is inadmissible unless the alien can demonstrate "by clear and convincing evidence" that he or she did not know, and should not reasonably have known, that the organization was a terrorist organization.

7. Examples of "material support," provided in INA 212(a)(3)(B)(iv)(VI), include (but are not limited to) the 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.

8. In addition to the specific items written into the statute, other activities may constitute material support and you must request a SAO for any case in which you believe the alien may have supplied any form of goods or services to a terrorist organization, including services provided as an employee or agent of the organization. CA/VO/L/C is reviewing a handful of cases based on applicants' employment by Tier III organizations, including financial institutions and trading companies. With respect to either a designated or undesignated terrorist organization, it does not matter whether donations are dedicated to the organization's social welfare activities or terrorist activities.

9. Under the provisions of INA 212(a)(3)(B), aliens are inadmissible if they commit an act that they know, or reasonably should have known, affords material support under any of the following circumstances:

- for the commission of a terrorist activity;
- to an individual who the actor knows, or reasonably should know, has committed or plans to commit a terrorist activity;
- to any designated terrorist organization (either under section 219 or the TEL), or to a member of such organization;
- to any undesignated terrorist organization, or to a member of an

undesigned terrorist organization, unless the actor can demonstrate by clear and convincing evidence that he did not know, and should not reasonably have known, that the organization was a terrorist organization.

Terrorist Activity Defined

10. INA 212(a)(3)(B)(iii) defines "Terrorist Activity" as any activity which is unlawful under the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the laws of the United States or any State) and which involves any of the following:

- The hijacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle);
- The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained;
- A violent attack upon an internationally protected person (as defined in section 1116(b)(4) of title 18) or upon the liberty of such a person;
- An assassination;
- The use of any (a) biological agent, chemical agent, or nuclear weapon or device, or (b) 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;
- A threat, attempt, or conspiracy to do any of the foregoing.

11. In addition to the topics discussed above (i.e., material support), INA 212(a)(3)(B)(iv) defines "Engage in Terrorist Activity" to mean, in an individual capacity or as a member of an organization: (a) to commit or to incite to commit, under circumstances indicating an intention to cause death or serious bodily injury, a terrorist activity; (b) to prepare or plan a terrorist activity; (c) to gather information on

potential targets for terrorist activity; (d) to solicit funds or other things of value for a terrorist activity, a designated terrorist organization, or a Tier III organization, unless the solicitor can demonstrate by clear and convincing evidence that he did not know, and should not reasonably have known, that the organization was a terrorist organization; or (e) to solicit an individual to engage in conduct otherwise described INA 212(a)(3), for membership in a designated terrorist organization, or for membership in a Tier III organization, unless the solicitor can demonstrate by clear and convincing evidence that he did not know, and should not reasonably have known, that the organization was a terrorist organization.

12. Any doubts post has regarding a specific case and whether an identified activity falls under INA 212(a)(3)(B) should be resolved by submitting a SAO request. Officers in CA/VO/L/C are available to assist either via e-mail or by phone.

13. Minimize considered.