

**"Material Support" and Related Bars to Refugee Protection**  
**Summary of Key Provisions of the Immigration and Nationality Act (INA)<sup>1</sup>**

**1. "Terrorist Activity"**

**Definition:** The current definition of "terrorist activity" under the Immigration and Nationality Act (INA) includes "the use of any 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 property damage." See INA § 212(a)(3)(B)(iii)(V).

**Legislative History:** The current broad definition of "terrorist activity" has not changed substantially since it was first introduced under the Immigration Act of 1990. The phrase "or other weapon or dangerous device" was added under the USA Patriot Act of 2001.

**2. "Terrorist Organization"**

**Definition:** Under current immigration law, there are three "tiers" of terrorist organizations, referring to the three subsections of the INA that define them. See INA § 212(a)(3)(B)(vi)(I)-(III).

*"Tier I" terrorist organizations* are known as "Foreign Terrorist Organizations" (FTOs) and must be designated as such by the Secretary of State under INA § 219. To be so designated, the Secretary of State must find: (1) that the organization is a foreign organization; (2) that it engages in terrorist activity or terrorism; and, (3) that the terrorist activity or terrorism threatens the security of United States nationals or the national security of the United States. INA § 219(a)(1). The phrase "national security" is defined as "the national defense, foreign relations, or economic interests of the United States." INA § 219(d)(2). The INA establishes procedures that must be followed prior to designation, including publication in the Federal Register. The consequences of a Tier I designation include freezing of organizational assets, criminal prosecutions for those found to have provided "material support" to an FTO, and inadmissibility to the United States for those who provide support to or are affiliated with an FTO. The Department of State maintains a list of FTOs, available on its website, at <<http://www.state.gov/s/ct/rls/fs/37191.htm>>.

*"Tier II" terrorist organizations* are groups that are "otherwise designated" by the Department of State, upon publication in the Federal Register, as a terrorist organization, after a finding that the organization engages in certain terrorist activities defined under the INA. The consequences of a Tier II designation is primarily inadmissibility to the United States for those who provide support to or are affiliated with the organization. The Department of State maintains a "Terrorist Exclusion List" (TEL) of all Tier II organizations, available on its website at <<http://www.state.gov/s/ct/rls/fs/2004/32678.htm>>.

A *"Tier III" terrorist organization* is defined as a "group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in, terrorist activity." Given the broad definition of "terrorist activity" (see above), essentially any resistance or rebel group that is engaged in armed conflict with its government would be considered a "Tier III" terrorist organization. The political purpose of the organization (*i.e.*, pro-democracy) and its

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<sup>1</sup> See attachment for text of relevant provisions.

conduct during the armed conflict (*i.e.*, compliance with the laws of war) are irrelevant to the determination that it is a terrorist organization. In contrast to the procedures for the designation of Tier I and Tier II terrorist organizations, there is no central government agency, such as the Department of State, that determines whether a Tier III determination is, in fact, appropriate or that acts as a central repository for all Tier III designations.

**Legislative History:** The definition of a "terrorist organization" has become much more refined over the past 15 years, with key years being 1996 and 2001. Under the Immigration Act of 1990, the phrase "engage in terrorist activity" was defined simply as committing an act that a person knows, or reasonably should know, provides material support to any "individual, *organization* or government in conducting terrorist activity." The Antiterrorism and Effective Death Penalty Act (AEDPA) established the definition of a "Foreign Terrorist Organization" (FTO) in 1996. The current three-tier terrorist organization structure was created under the USA Patriot Act in 2001, adding Tier II and III organizations to the existing FTO definition (now considered a Tier I organization). The REAL ID Act of 2005 expanded the Tier III definition by including groups that have a subgroup which engages in terrorist activity.

### 3. "Material Support"

**Definition:** Under current immigration law, a person has "engaged in terrorist activity" if he or she "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. INA § 212(a)(3)(B)(VI). The phrase "material support" is not defined under the statute, but includes a list of examples, including a safe house, transportation, communication, funds, transfer of funds, false documentation, weapons, explosives or training. Litigation is pending as to whether the statute contemplates a *de minimis* amount of support for it to be considered "material" support and whether the statute includes an implied duress exception for those who are forced to provide assistance under threat of harm to themselves or others. DHS and DOJ take the position that there is no *de minimis* amount of support and that there is no duress exception.

**Legislative History:** The "material support" ground of inadmissibility has remained largely unchanged since it was first introduced in 1990. The only significant change related to an individual's required knowledge of a Tier III organization's "terrorist activity." Under the USA Patriot Act (2001), which created the Tier III definition, an individual would not be subject to the material support bar if s/he could show that s/he "did not know, and should not reasonably have known, that the act would *further the organization's terrorist activity.*" This exception was narrowed under the REAL ID Act of 2005 to require that the person show by "*clear and convincing evidence*" that he did "did not know, and should not reasonably have known, that the organization was a *terrorist organization.*" Since most of those who provide assistance to pro-democracy "Tier III" terrorist organizations are aware of the groups' activities, and actively support them, this exception has done little to mitigate the effects of the statutory bar.

**Bar to Refugee Status and Asylum:** Under the INA, individuals who are inadmissible to the US are generally not eligible for refugee resettlement (there exist a few exceptions, for example with regard to the public charge ground of inadmissibility) absent a waiver of the inadmissibility ground by the Executive Branch. Given that the "material support" ground of inadmissibility has existed since 1990, refugees subject to it have been legally ineligible for the US resettlement program since that time. However, the term "terrorist organization" was not defined as broadly in the early 1990s as under current law. The impact of the material support bar grew as a matter of law with the expansion of the "terrorist organization" definition itself. Under AEDPA in 1996, any person who provided "material support" to an FTO or to an "organization engaged in terrorist

activity" was barred from resettlement, asylum and withholding of removal. In 2001, with the creation of the Tier II and, more notably, Tier III terrorist organization definitions, the material support bar to resettlement, asylum and withholding of removal was expanded most significantly, capturing assistance to any armed group. It was only recently, however, since 2004, that the Administration began to apply this and related provisions in earnest, interpreting them very restrictively where possible.

#### **4. Membership in Resistance Movements**

**Definition:** Any person who is a member of a Tier I or Tier II terrorist organization is inadmissible to the United States. INA § 212(a)(3)(B)(i)(V). There is no stated exception for people who are forcibly conscripted into such groups, such as child soldiers forcibly conscripted into rebel groups. Any person who is a member of a Tier III terrorist organization is inadmissible to the United States unless the person "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." INA § 212(a)(3)(B)(i)(VI). Since most members of pro-democracy groups that fall within the Tier III definition are aware of, and actively support, the organization's goals and activities, the statute's limited exception has had little impact in mitigating the impact of this provision. In addition, the person's spouse and children are inadmissible to the US if the person was a member of the Tier III organization within the past five years. INA § 212(a)(3)(B)(iii)(IX).

**Legislative History:** Membership in a terrorist organization was not a separate ground of inadmissibility until 1996, when it was included under AEDPA for members of Foreign Terrorist Organizations (FTOs) (Tier I organizations). This ground of inadmissibility was extended to spouses and children of members of FTOs in 2001 under the USA Patriot Act. It was further expanded to include members of Tier II and Tier III organizations and their spouses and children under the REAL ID Act (2005).

**Bar to Refugee Status and Asylum:** Members of FTOs have been legally ineligible for refugee resettlement since 1996, and their spouses and children (if membership within the past five years) since 2001. Members of Tier II and Tier III organizations, and their spouses and children, have been ineligible for resettlement since 2005. "Arriving" asylum-seekers (*e.g.*, those who request asylum at an airport or land border) who were members of FTOs have been barred from asylum since 2001. The bar to asylum was extended to all asylum-seekers, and their spouses and children (if membership within the past five years), who were members of a Tier I, Tier II, or Tier III organization under the REAL ID Act in 2005.

#### **5. Active Participants in Armed Resistance Movements**

**Definition:** As noted above, the definition of "terrorist activity" is extremely broad, and includes the use of a "firearm or other weapon" with the intent to endanger the safety of a person or to cause substantial property damage. INA § 212(a)(3)(B)(iii)(V). Any person who has actually taken up arms in support of, or received military training from, an organization that falls within this definition, even if a pro-democracy group that respects the laws of war, is barred from refugee protection on the grounds that he or she has personally "engaged in terrorist activity" or received military training from a terrorist organization. INA § 212(a)(3)(B)(i)(I) & (VIII). In addition, the person's spouse and children are also inadmissible to the United States if the person took up arms or received training within the past five years. INA § 212(a)(3)(B)(iii)(IX).

**Legislative History:** The ground of inadmissibility for any person who has personally "engaged in a terrorist activity" has existed under the INA since at least 1990. As noted earlier, the broad definition of "terrorist activity" has remained largely unchanged since 1990. The expansion of the ground of inadmissibility to include spouses and children occurred under the USA Patriot Act (2001). The ground of inadmissibility for any person who has received military training from a terrorist organization was added by the REAL ID Act (2005).

**Bar to Refugee Status and Asylum:** As a matter of law, refugees who fought with pro-democracy groups, such as the Lao H'mong and the Vietnamese Montagnards, have been legally ineligible for resettlement since at least 1990 given that they have "engaged in terrorist activity" under the INA. Their wives and children have been legally barred from refugee resettlement since 2001. Again, this bar has only been applied, however, to these refugees and their families since 2005. Asylum-seekers who fought with pro-democracy groups have been ineligible for asylum if subject to this ground of inadmissibility since 1996, but it has only been applied to them recently. The REAL ID Act extended this bar to asylum to the person's spouses and children and to those who received military training from a Tier III terrorist organization (and their spouses and children) in 2005.

## **6. Waivers**

### **a. Material Support Waiver**

Definition: INA § 212(d)(3)(B)(i) provides that the Secretary of State or the Secretary of Homeland Security, after consultation with each other and the Attorney General, may conclude in such Secretary's "sole, unreviewable discretion" that the material support ground of inadmissibility "shall not apply with regard to any material support an alien afforded to an organization or individual that has engaged in a terrorist activity." Only the Secretary of Homeland Security has the authority to waive the material support ground of inadmissibility for persons placed in regular removal proceedings (INA § 240) in the United States.

Legislative History: The material support waiver was introduced under the USA Patriot Act (2001), when the three-tiered system of terrorist organizations was first created. The waiver was moved from INA 212(a) to INA 212(d) under the REAL ID Act (2005), although the substance of the waiver did not change.

Impact on Refugee Status and Asylum: A waiver of the material support ground of inadmissibility results in a waiver of the underlying bar to asylum and refugee resettlement. To date, the Secretary of State has exercised this waiver authority only three times, for Burmese Karen refugees in the Tham Him refugee camp in Thailand (May 2006), for Burmese Karen refugees in six other designated camps in Thailand (August 2006), and for Burmese Chin refugees living in Malaysia, Thailand, and India (October 2006). The waiver authority has not been exercised for any asylum-seeker in the United States.

### **b. Waiver of Tier III Determination Based on Activities of Subgroup**

Definition: INA § 212(d)(3)(B)(i) also provides that the Secretary of State or the Secretary of Homeland Security, after consultation with each other and the Attorney General, may conclude in such Secretary's "sole, unreviewable discretion" that the determination that a group is a Tier III terrorist organization (INA § 212(a)(3)(B)(vi)III) "shall not apply to a group solely by virtue of

having a subgroup within the scope of that subsection." This waiver authority has not been exercised to date.

Legislative History: The Tier III terrorist organization waiver was first introduced under the REAL ID Act (2005).

Impact on Refugee Status and Asylum: If an individual is barred from refugee resettlement or asylum under a provision of the INA specifically relating to material support to or membership in a Tier III terrorist organization, then the waiver of the Tier III determination would result in a waiver of the bar to refugee protection. If the person personally participated in armed resistance, however, and is inadmissible for having engaged in "terrorist activity," then this waiver would not result in a lifting of the bar to refugee protection.

**c. Waivers for Members of Resistance Movements and Those Who Take Up Arms in Support of Them**

There is **no** specific waiver authority for those who are barred from refugee resettlement or asylum based on their membership in a resistance organization that is considered a Tier III terrorist organization or based on their active participation in a legitimate armed struggle.

**IMMIGRATION AND NATIONALITY ACT (INA)**

**INA: ACT 212 - GENERAL CLASSES OF ALIENS INELIGIBLE TO RECEIVE VISAS AND INELIGIBLE FOR ADMISSION; WAIVERS OF INADMISSIBILITY**

(a) Classes of Aliens Ineligible for Visas or Admission.-Except as otherwise provided in this Act, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

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(3) Security and related grounds.-

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(B) Terrorist activities-

(i) IN GENERAL.-Any alien who-

(I) has engaged in a terrorist activity,

.....

(V) is a member of a terrorist organization described in subclause (I) or (II) of clause (vi);

(VI) is a member of a terrorist organization described in clause (vi)(III), unless the alien can demonstrate by clear and convincing evidence that the alien did not know, and should not reasonably have known, that the organization was a terrorist organization;

.....

(VIII) has received military-type training (as defined in section 2339D(c)(1) of title 18, United States Code) from or on behalf of any organization that, at the time the training was received, was a terrorist organization (as defined in clause (vi)); or

(IX) is the spouse or child of an alien who is inadmissible under this subparagraph, if the activity causing the alien to be found inadmissible occurred within the last 5 years,

is inadmissible.

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(ii) .....

(iii) **TERRORIST ACTIVITY DEFINED.**-As used in this Act, the term "terrorist activity" means 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:

.....

(V) The use of any-

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(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.

(iv) **ENGAGE IN TERRORIST ACTIVITY DEFINED-** As used in this chapter, the term "engage in terrorist activity" means, in an individual capacity or as a member of an organization-

(I) .....

.....

(VI) to commit an act that the actor knows, or reasonably should know, affords material support, including 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--

(aa) for the commission of a terrorist activity;

(bb) to any individual who the actor knows, or reasonably should know, has committed or plans to commit a terrorist activity;

(cc) to a terrorist organization described in subclause (I) or (II) of clause (vi) or to any member of such an organization; or

(dd) to a terrorist organization described in clause (vi)(III), or to any member of such an organization, unless the actor can demonstrate by clear and convincing evidence that the actor did not know, and should not reasonably have known, that the organization was a terrorist organization.

**INA: ACT 212 - GENERAL CLASSES OF ALIENS INELIGIBLE TO RECEIVE VISAS AND INELIGIBLE FOR ADMISSION; WAIVERS OF INADMISSIBILITY**

(d) Temporary Admission of Nonimmigrants

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(B)(i) The Secretary of State, after consultation with the Attorney General and the Secretary of Homeland Security, or the Secretary of Homeland Security, after consultation with the Secretary of State and the Attorney General, may conclude in such Secretary's sole unreviewable discretion that subsection (a)(3)(B)(i)(IV)(bb) or (a)(3)(B)(i)(VII) shall not apply to an alien, **that subsection (a)(3)(B)(iv)(VI) shall not apply with respect to any material support an alien afforded to an organization or individual that has engaged in a terrorist activity**, or that subsection (a)(3)(B)(vi)(III) shall not apply to a group solely by virtue of having a subgroup within the scope of that subsection. The Secretary of State may not, however, exercise discretion under this clause with respect to an alien once removal proceedings against the alien are instituted under section 240.