

Terrorism-Related Grounds of Inadmissibility

CIS Ombudsman's Second Annual
Conference

The Terrorism-Related Grounds of Inadmissibility
(TRIG) - Interagency Challenges

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Issues Covered

- Terrorism-Related Grounds of Inadmissibility (TRIG) under INA 212(a)(3)(B) including definitions of Tiers
- Exemption Authority under INA 212(d)(3) including duress exemptions
- USCIS Adjudication of Exemptions and Hold Categories with Statistics
- TRIG in Removal Proceedings
- Procedures for cases on hold

Inadmissibility Under TRIG

- INA 212(a)(3)(B) lists the categories of individuals who are inadmissible for activities/associations related to "terrorist activity"
- In general, the TRIG bars cover those who:
 - “Engaged in ‘Terrorist Activity’”(both terms of art under the INA)
 - Are engaged or likely to engage in terrorist activity after entry;
 - Incited terrorist activity with intent to cause serious bodily harm or death;
 - Are representatives or current members of a terrorist organization;
 - Endorsed or espoused terrorist activity;
 - Received military-type training from or on behalf of a terrorist organization; or
 - Are spouses or children of anyone who has engaged in terrorist activity within the last five years (with certain exceptions)

Statutory Evolution of TRIG

- 1990 Immigration Act: Added new ground of inadmissibility for terrorist activity, including “engaging in terrorist activity”; “material support” was a form of engaging in terrorist activity
- 1996 AEDPA: Expanded TRIG grounds; created process of designating Foreign Terrorist Organizations under INA 219 (Tier I terrorist organizations)
- 1996 IIRIRA: Further expanded TRIG grounds
- 2001 USA PATRIOT Act: Expanded TRIG grounds; created Tier II, Tier III terrorist organizations; created exemption provision for material support at INA 212(a)(3)(B)(iv)(VI) (later supplanted)

Statutory Evolution of TRIG

- 2005 REAL ID Act: Expanded TRIG grounds; narrowed exceptions for activity relating to Tier IIIs
- 2007 CAA: Created INA 212(d)(3)(B)(i) exemption provision, which allowed Sec DHS, Sec State to exempt material support, being a representative of a group that endorses or espouses terrorist activity, endorsing or espousing terrorist activity, or a Tier III determinations based on activities of a subgroup; named 10 groups not to be considered Tier IIIs; Taliban to be considered Tier I

Terrorist Inadmissibility Provisions

“[T]he statutory language is breathtaking in its scope.”

Matter of S-K-, 23 I&N Dec. 936, 948 (BIA 2006) (Osuna, concurring)

“Congress’s definition of ‘terrorist activity’ sweeps in not only the big guy, but also the little guy who poses no risk to anyone.”

McAllister v. Attorney General, 444 F.3d 178, 191 (3d Cir. 2006) (Barry, J., concurring)

“Terrorist Activity”

Terrorist activity is defined as activity that is unlawful under laws where committed or would be unlawful in the United and which involves any of the following:

- Hijacking or sabotage of aircraft, vessels, or other vehicles;
- Kidnapping/hostage-taking *in order to compel a third party to do or abstain from doing an act*;
- Violent attack on "internationally protected person" (generally government officials outside country or diplomats);
- Assassinations;
- Use of biological, chemical, or nuclear weapons;
- **Use of any other weapon or dangerous device with intent to endanger the safety of individuals or to cause substantial property damage;** and
- A threat, attempt, or conspiracy to commit any of the actions listed

“Terrorist Activity”

In the definition of “Terrorist Activity there is:

- No requirement that the use of weapons be targeted at civilians to be terrorist activity; and
- No exception for repelling an attack
 - May be an exception for self-defense in limited circumstances

The definition includes resistance groups as terrorist organizations, including those the US has supported or does support

“Engaging in ‘Terrorist Activity’”

- Even where the individual hasn't committed a terrorist activity, they may be inadmissible for "engaging..."
- The term "engaging in terrorist activity" means, in an individual capacity or as a member of an organization, an applicant:
 - Incited terrorist activity;
 - Prepared or planned terrorist activity;
 - Gathered information on potential targets;
 - Solicited funds for terrorist activities or organizations;
 - Solicited individuals for membership in a terrorist organization or to engage in terrorist activity; and/or
 - **Committed an act that affords "material support" for a terrorist activity, a person engaged in terrorist activity, or to a terrorist organization**

Material Support

Important points to remember regarding the provision of material support include:

- There is no requirement that the support benefits terrorist activity (Matter of S-K-)
- A small amount is sufficient – no “de minimus” exception;
- It covers “virtually all forms of assistance”
- There is no duress exception in the statute itself; and
- The provision of material support is simply one way to engage in terrorist activity, although it is the most common

Exception to “Engaging in Terrorist Activity”

An applicant is not barred for activities/associations with a Tier III group that fall within the engaging in terrorist activity definition, if s/he can demonstrate, by clear and convincing evidence, that he s/he did not know, and should not reasonably have known that the organization was a terrorist organization.

- Knowledge exception only for involvement with Tier III groups
- Requires both actual lack of knowledge (subjective) and that a reasonable person would not have known (objective)
- Turns on what the applicant knows or should know of the organization’s activities, not whether he or she subjectively considers the actions to be terrorism

Terrorist Organizations

There are three categories of terrorist organizations defined in the INA (Section 212(a)(3)(B)(vi)):

- Tier I: Foreign Terrorist Organizations (designated by the Secretary of State under INA Section 219)
<http://www.state.gov/s/ct/rls/other/des/123085.htm>
- Tier II: Terrorist Exclusion List (designated by the Secretary of State in consultation with or upon the request of the AG or Secretary of DHS)
<http://www.state.gov/s/ct/rls/other/des/123086.htm>
- Tier III: A group of two or more individuals, whether organization or not, which engages in, or has a subgroup which engages in, terrorist activity

Tier III Organizations

Important point to remember in regard to Tier III organizations include:

- There is no name required (unorganized);
- There is no need for organization to endanger US national security;
- The organizations are called “undesigned” terrorist organizations because they do not appear on a published list;
- With broad definition of terrorist activity, armed resistance groups and guerillas fall within the Tier III terrorist organization definition; and
- There is no exception for “freedom fighters”

Statutory Group Exclusion from Tier III Definition

- Dec. 2007, Congress declared the following groups not to be terrorist organizations based on their activities prior to Dec. 26, 2007 (Consolidated Appropriations Act of 2008):
 - Karen National Union / Karen liberation Army
 - Chin National Front / Chin National Army Chin National League for Democracy Kayan New Land Party
 - Arakan Liberation Party
 - Karenni National Progressive Party
 - Appropriate groups affiliated with the Hmong
 - Appropriate groups affiliated with the Montagnards
 - Cuban Alzados
 - Tibetan Mustangs
- These are the groups for which material support exemptions had been previously issued in late 2006 and early 2007

TRIG Exemption Authority

- Under INA Section 212(d)(3)(B), the Secretaries of State and Homeland Security, in consultation with the Attorney General and each other, can grant exemptions from the terrorism-related inadmissibility grounds
- Decisions on how to exercise this statutory authority are made through the interagency consultation process
- Statutory authority extends to allow exemption of undesignated Tier III groups, with important limitations.
- To be considered for an exemption from the TRIG provisions an applicant must be meet the threshold requirements for the exemption and warrant the exemption based on the totality of the circumstances

TRIG Exemption Limitations

- Statutory exemption authority covers all TRIG except the following:
 - Persons for whom reasonable grounds exist to believe they are engaged in or likely to engage in “terrorist activity”;
 - Members and representatives of Tier I and II groups;
 - Persons who voluntarily and knowingly engaged, endorsed or espoused "terrorist activity" on behalf of a Tier I or II group; and
 - Persons who voluntarily and knowingly received military training from a Tier I or II group
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- Only the Secretary of Homeland Security, not the Secretary of State, may exercise the exemption with respect to a person in removal proceedings

Duress Exemptions

The Secretary of Homeland Security, in consultation with the Secretary of State and Attorney General, authorized exemptions for applicants who, under duress:

- Provided **material support** to Tier I/II (4/27/07) and Tier III (2/26/07) terrorist organizations;
- **Solicited members or funds** for a terrorist organization (1/7/2011); or
- **Received military-type training** on behalf of a terrorist organization (1/7/2011).

Factors Considered in Duress Determination

- Whether the applicant reasonable could have avoided, or took steps to avoid, providing material support
- The severity and type of harm inflicted or threatened
- To who the harm or threat of harm was directed
- The perceived imminence of the harm threatened
- The perceived likelihood that the threatened harm would be inflicted
- Any other relevant factor regarding the circumstances under which the applicant felt compelled

Voluntary Medical Care Exemption

The Secretary of Homeland Security, in consultation with the Secretary of State and Attorney General, authorized exemptions for applicants who provided medical care voluntarily to a terrorist organization or members of a terrorist organization (10/13/2011)

“Provided Medical Care” includes both:

- Services provided by and in the capacity of a medical professional; and
- Related assistance by non-medical professionals providing, for example, emergency first aid services

*Note that the medical care is not exemptible when it is provided voluntarily and **on behalf of** a Tier I or II Organization*

Limited General Exemption

- The Secretary of Homeland Security, in consultation with the Secretary of State and the Attorney General, authorized an exemption for certain aliens with existing immigration benefits who are currently inadmissible under INA section 212(a)(3)(B)(i) (8/10/12)
- Applies to only select voluntary, non-violent, associations or activities with certain undesignated terrorist organizations
- Applies to aliens who **currently possess lawful status in the United States** (i.e., asylee or refugee status, temporary protected status, or adjustment of status under the Nicaraguan Adjustment and Central American Relief Act or Haitian Refugee Immigration Fairness Act, or similar immigration benefit other than a non-immigrant visa), and to beneficiaries of an I-730 Refugee/Asylee Relative Petition filed at any time by such an asylee or refugee.

Group Exemptions

The Secretary of Homeland Security in consultation with the Secretary of State and the Attorney General, authorized exemptions for applicants that:

- Have **certain activities and associations** that occurred after December 27, 2007 with the **ten named groups in the CAA** (6/2/2008);
- Have **certain activities and associations** involving the **Iraqi National Congress (INC), Kurdish Democratic Party (KDP), and the Patriotic Union of Kurdistan (PUK)** (9/21/2009);
- Have **voluntary associations or activities** with the **All Burma Student's Democratic Front (ABSDF)** (12/16/2010)
- Provided **material support** to the **All India Sikh Students Federation- Bittu Faction (AISSF-Bittu)** (10/18/2012);
- Have **certain activities and associations** with the **Kosovo Liberation Army (KLA)** (6/4/2012); or
- Participated in **certain activities** related to the **Iraqi uprisings** against the government of Saddam Hussein in Iraq from March 1 through April 5, 1991 (8/17/2012).

Threshold Requirements

In order to be considered for an exemption from the TRIG provisions, the applicant must:

- Establish that he or she is **otherwise eligible** for the immigration benefit
- Undergo and pass all required **background and security checks**;
- **Fully disclose**, in all relevant applications and interviews with USG representatives and agents, the nature and circumstances of each provision of material support; and
- Establish that he or she **poses no danger** to the safety and security of the United States.

Exemption Statistics

(as of September 1, 2012)

Total Exemptions Granted	14,885
Refugees	11,1466
Group Exemptions	6,7478
Burmese cases	6,410
Cuba	280
Iraq	88
Medical Care	20
Tier III Duress Exemptions	4,301
Tier I/II Duress Exemptions	367
Adjustment of Status/I-730 SCOPS	2,851
Group Exemptions	773
Duress Exemptions	2,056
Individual Exemptions	15
Medical Care	7
Adjustment of Status-Field Offices	24
Asylum	459
Tier III Duress Exemptions	175
Tier I/II Duress Exemptions	257
Group Exemptions	9
NACARA	85

TRIG Exemptions in Removal Proceedings

- Removal cases may be referred by ICE to USCIS for exemption consideration only after there is a final order of removal in place (when BIA issues order or time to appeal to BIA has expired).
- ICE only refers cases if relief from removal was denied solely on basis of a TRIG ground for which an exemption is currently available.
- Persons detained by ICE at time of final removal order must file an application for stay of removal in order to have their case considered by USCIS for exemption.

USCIS Hold Policy

- USCIS holds adjudication of cases in the following categories because the exemption authority could cover their activities, but there has yet to be an interagency decision to exercise authority for these cases. The hold categories include apply to applicants who are:
 - Inadmissible under TRIG based on voluntary activities for a Tier III group not covered by an exemption;
 - Inadmissible for activity or association (other than material support, solicitation, MTT) with a Tier I or II organization where the activity or association was *under duress*; or
 - The spouse or child of an individual in either one of these categories
- This general hold policy was recently amended to allow for denials in cases in which an exemption would not be granted based on the totality of the circumstances even if an exemption were available

Cases on Hold

(As of September 1, 2012)

Total Cases on Hold	4,170
Refugee	376
Service Center Operations	3,641
I-485	3,286
I-730	307
I-821	48
Asylum Division	111
Asylum (I-589)	104
NACARA (I-881)	7
Field Offices	42

Questions?



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