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USCIS IMPLEMENTS NEW POLICY ON EXEMPTIONS FROM CERTAIN TERRORISM-RELATED BARS TO ADMISSIBILITY

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by
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On March 26, 2008, USCIS deputy director Jonathan Scharfen issued an important memorandum regarding implementation of the government's new exemption authority with respect to certain terrorism-related bars.[1] Previously, many otherwise deserving adjustment applicants, including a number of asylees, had been denied their green cards because of their support for or membership in a "terrorist organization" – even if the support was provided under duress to the very organization that the applicant had fled from in order to seek asylum in the United States, or the so-called "terrorist organization" was fighting for freedom against an oppressive dictatorship and supported by the United States itself. Now, according to the Scharfen memorandum, many cases that would otherwise have been denied will be held while the Department of Homeland Security determines whether to use its new authority to grant exemptions from these bars, and many cases that were denied after December 27, 2007 will be reopened.

To explain the significance of the Scharfen memorandum, it is necessary to begin with some background regarding the terrorism bars contained in the Immigration and Nationality Act (INA). Section 212(a)(3)(B) provides, in a manner that takes some untangling of cross-references to decipher, for the inadmissibility of aliens who join or support any organization that qualifies as "terrorist" under an extremely wide definition. According to INA section 212(a)(3)(B)(i), among the groups of aliens inadmissible to the United States

(and thus ineligible for adjustment) is anyone who:

> (I) has engaged in a terrorist activity,
>
> ...
>
> (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.

8 U.S.C. § 1182(a)(3)(B)(I). At first glance, these provisions seem so obviously justified and uncontroversial as to hardly be worth further discussion. The trouble begins when one examines what exactly it means to "engage in a terrorist activity" for the purpose of this section, and what exactly it entails to be a "terrorist organization" described in clause (vi)(III) of the section.

According to INA section 212(a)(3)(B)(iii)(V)(b), "terrorist activity" includes "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," among other possibilities, "he 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 damage to property." One who commits, prepares for, solicits funds for, or provides "material support" for such an activity is defined as having "engage in terrorist activity" under INA section 212(a)(3)(B)(iv). Note that anyone who has joined or supported armed resistance against a dictatorship, even if their fight was approved by the United States, qualifies as having "engaged in a terrorist activity" under this definition, because they have "used a weapon (other than for mere personal or monetary gain), with intent to endanger . . . the safety of one or more individuals" or supported this use, and their activities will have been illegal under the laws of the dictatorship.

Furthermore, any "group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in, the activities described in subclauses (I) through (VI) of clause (iv)" – that is, which commits, prepares for, solicits funds for, or provides "material support" to acts of terrorism as defined above – is deemed a "terrorist organization" under INA section 212(a)(3)(B)(vi)(III). Unlike terrorist organizations defined under subsections

212(a)(3)(B)(vi)(I) and (II) and referred to as "Tier I" and "Tier II" organizations, which are officially designated by the Secretary of State in consultation with other Cabinet officials, a so-called "Tier III" terrorist organization need not be officially designated at any time. So someone who knowingly provides funding or "material support" to a group that engages in violent activities, even if against a dictatorship, can be deemed a terrorist even if that group has never been publicly declared to be a terrorist organization by the U.S. government. This is a very significant point, because while the U.S. government could refrain from officially designating resistance groups with whose goals it sympathizes as "terrorist organizations" under Tier I or Tier II, that would not prevent them from being considered Tier III terrorist organizations.[2]

One should also note that the definition of "material support," providing which counts as engaging in terrorist activity, is quite broad. It is deemed engaging in terrorist activity

> to commit an act that the actor knows, or reasonably should know, affords material support, including a safe house, transportation, communication, funds . . . or training
>
> > (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.

8 U.S.C. § 1182(a)(3)(B)(iv)(VI)(cc), (dd). This is so even if the material support was provided under duress – if, say, armed terrorists threatened to harm you if you did not provide them with funds or a place to stay.

A final point of breadth that is worth noting is the application of the terrorism bars to persons who did not themselves meet even these expansive definitions of having engaged in terrorist activity, but whose family members did. Under INA section 212(a)(3)(B)(i)(IX), the spouse or child of an alien subject to the terrorism bars is also subject to them, "if the activity causing the alien to be found inadmissible occurred within the last 5 years." The spouse or child can

be exempted from the bar under INA section 212(a)(3)(B)(ii), however, upon a demonstration that he or she "should not reasonably have known of the activity causing the alien to be found inadmissible under this section" or "has renounced the activity causing the alien to be found inadmissible under this section."

Even before December 2007, the Secretary of State and the Secretary of Homeland Security, in consultation with one another and with the Attorney General, had some limited authority to provide exemptions to the most problematic applications of these provisions, primarily with regard to material support provided under duress. The law changed further on December 26, 2007, with the enactment of the Consolidated Appropriations Act of 2008 (the "CAA").[3] Section 691 of division J of the CAA, in addition to declaring that ten specific groups (which had previously been granted waivers under existing law) should not be considered as Tier III organizations based on their past conduct,[4] allowed the Secretaries to waive all of INA section 212(a)(3)(B) as applied to individuals or other entire groups, with a few exceptions.[5] Aliens who were reasonably expected to engage in terrorist activities in the future, were members of Tier I or Tier II designated terrorist organizations, "voluntarily and knowingly" engaged in terrorist activity on behalf of such organizations or "endorsed or espoused" the idea of doing so, or "voluntarily and knowingly received military-type training from" such organizations, were still inadmissible. And no "group that has engaged terrorist activity against the United States or another democratic country or that has purposefully engaged in a pattern or practice of terrorist activity that is directed at civilians" may be granted a group-wide exemption. Other than that, the CAA exemption authority was essentially universal. For several months, however, the new CAA exemption authority went largely unexercised.

On March 22, 2008, the Washington Post published an article about a former translator for U.S. forces in Iraq who had been denied a green card because of his previous membership in the Kurdish Democratic Party (KDP), which was deemed an undesignated Tier III terrorist organization due to its involvement in efforts to overthrow former Iraqi dictator Saddam Hussein by force.[6] Some of these efforts had been backed by the United States – indeed, the USCIS denial letter in the case cited KDP activities during Operation Desert Storm and Operation Iraqi Freedom – and the KDP is a current U.S. ally, but neither of

these things mattered if the terrorism bars were strictly applied. As Scharfen himself later explained to the Post, the bars "cover groups that are opposed to the government. Any government."[7] This particularly absurd example of the overly expansive application of terrorism bars, according to a subsequent article in the Post, was what prompted the issuance of the Scharfen memorandum.[8]

The Scharfen memorandum does not itself grant any exemptions, but it directs that a number of categories of cases be held or reopened in anticipation of such exemptions potentially being granted. Specifically, the memorandum directs withholding of adjudication of the cases of aliens falling into the following categories, if this is the only reason their applications would otherwise be denied (or, in the case of asylum applications, referred to immigration court):

1. Applicants belonging to one of the groups granted automatic protection by the CAA, who cannot benefit from that protection because, for example, they were combatants (against a dictatorship) rather than merely group members.

2. Applicants who provided assistance to any other Tier III (undesignated) terrorist organization, and did not do so under duress.

3. Applicants who would be inadmissible because of association with or provision of aid to a terrorist organization whether Tier I, Tier II, or Tier III, *under duress*, except those whose cases were already covered by a previously existing exemption for provision of material support under duress to undesignated Tier III organizations,[9] or by another exemption for provision of support under duress to two specific designated organizations from Colombia, the Revolutionary Armed Forces of Columbia (FARC) and the National Liberation Army of Colombia (ELN).[10]

4. Applicants who voluntarily provided *medical care* to terrorist organizations of any tier, to members of those organizations, or to other individuals who had engaged in terrorist activity.

5. Family members who are inadmissible under INA section 212(a)(3)(B)(i)(IX).

USCIS adjudicators are also authorized by the Scharfen memorandum to raise

with headquarters any case that does not fall into any of these categories but "presents compelling circumstances that warrant consideration of a new or individualized exemption that would not otherwise be covered by the above hold instructions."

The Scharfen memorandum also revives some cases that had been denied or referred prior to its issuance but subsequent to the enactment of the CAA on December 26, 2007. USCIS adjudicators are instructed that cases denied within this time period, and falling within the above-listed hold categories, "should be reopened on a USCIS motion and placed on hold." Furthermore, "should an alien request reopening or reconsideration of a case denied on or after December 26, 2007, that could benefit from the expanded exemption authority or a case denied at any time that involved one of the 10 groups granted relief by the CAA, the motion and any request for fee waiver should receive favorable consideration." Even if a motion is filed beyond the usual thirty-day period required by 8 C.F.R. § 103.5, USCIS adjudicators are instructed to seek guidance from Headquarters (rather than simply denying all such motions as untimely).

Because of the political sensitivity of any issue related to terrorism, the largely unwaiveable overbreadth of the terrorism bars survived for quite some time, but it is commendable that it has finally been addressed. When an asylee has fled persecution by a designated terrorist group, and been granted asylum in the United States based on the threat posed to him or her by that group, it makes little sense to deny that asylee permanent residence on the ground that he or she agreed to give group members food or shelter when the alternative was being killed by them. And when any alien supports a group that commits acts of violence against an oppressive government in a fight for freedom supported by the United States itself, it makes little sense to hold that against the alien. The exemption authority created by the CAA is a victory for common sense in immigration law, and the holds and reopenings implemented by the Scharfen memorandum are an important step towards moving this victory from theory into practice, by keeping aliens from being unfairly denied a benefit simply because the exemptions have not yet been fully implemented.

There is a risk, however, that the holds implemented by the Scharfen memorandum will simply replace unfair denials of adjustment with unfair lengthy delays, if more is not done soon. The Secretary of State, the Secretary of Homeland Security, and the Attorney General should move quickly to promulgate rules for the actual granting of CAA exemptions to those who

deserve them. In the interim, attorneys should keep in mind that it is still possible to challenge an inappropriate material-support denial by a motion to reopen or reconsider in cases where the applicant did not actually provide any material support to the terrorist group in question, and thereby attempt to avoid being subject to a Scharfen memorandum hold of indefinite duration.

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[1] Jonathan Scharfen, Deputy Director, United States Citizenship and Immigration Services, "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, http://www.uscis.gov/files/nativedocuments/Withholding_26Mar08.pdf .

[2] The exemption for an alien who 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," INA 212(a)(3)(B)(i)(VI), is of little help in the context of such a sympathetic resistance organization because all the alien has to "know" (or be supposed to know) is that the group is, in fact, engaging in violent activities that qualify it as a terrorist organization under the statutory definition. Whether the United States supports the goals of the group has no bearing on this.

[3] Pub. L. 110-161, 121 Stat. 1844.

[4] The groups given this protection, in subsection 691(b) of the CAA, were "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 Mustangs, the Alzados, the Karenni National Progressive Party, and appropriate groups affiliated with the Hmong and the Montagnards." The Karen, Chin, Kayan and Arakan groups oppose the government of Myanmar, the Alzados oppose the government of Cuba, and the Mustangs are associated with Tibet. According to footnotes 1 and 2 of the Scharfen memorandum, "ppropriate groups affiliated with the Montagnards means the Front Unifie de Lutte des Races Opprimees (FULRO)", and "ppropriate groups affiliated with the Hmong means ethnic Hmong individuals or groups, provided there is no reason to believe that the relevant activities of the recipients were targeted against noncombatants."

[5] Section 691 of Division J of the CAA also declared that the Taliban should be considered a terrorist group, and corrected a typographical error in the already-existing exemption for spouses and children who did not know of the terrorist activity or had renounced it. See Human Rights First, "Newly Enacted Amendments to the 'Terrorism Bars' and Related Waivers Under the Immigration and Nationality Act," January 29, 2008.

[6] Karen DeYoung, "Kurdish Translator, Praised by Military, Denied Green Card," Washington Post, Match 22, 2008.

[7] Karen DeYoung, "U.S. to Hold Off on Green Card Denials Based on Terrorism," Washington Post, March 27, 2008.

[8] Id.

[9] The Scharfen memorandum indicates that "djudicators may move forward with the adjudication, following supervisory review as required by Divisional instructions, of cases that have been considered for and been determined to merit a discretionary exemption under one of the existing material support exemption authorities."

[10] Where the potential inadmissibility arose solely from *material support* provided under duress to a Tier I or Tier II terrorist organization besides the FARC or ELN, rather than membership in such a Tier I or Tier II organization under duress or other association with such an organization under duress, the Scharfen memorandum indicates that such cases were already to be held under a previous directive.