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In this issue...

Let's Talk "TRIG": Litigation in the Federal Courts on the Terrorism-related Inadmissibility Grounds

by Patricia Allen

Don't know much about geography
Don't know much trigonometry
Don't know much about algebra
Don't know what a slide rule is for

But I do know one and one is two
And if this one could be with you
What a wonderful world this would be
-Sam Cooke, Wonderful World

Thankfully, this article is not about trigonometry. Not even slide rules. Here, we are talking about a different sort of "TRIG," that is, the terrorism-related grounds for inadmissibility under section 212(a)(3)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(3)(B). This article will provide an update on movements in the district courts and courts of appeal relating to TRIG since the last time we published on the topic in February of 2009. The first part of the article relates to district court treatment of TRIG issues as encountered by United States Citizenship and Immigration Services ("USCIS"), and the second part covers recent court of appeals treatment of TRIG issues affecting our own agency. While USCIS and the Executive Office for Immigration Review ("EOIR") act separately, they do intertwine in this area of inadmissibility, thus making true Sam Cooke's "one and one is two."

Brief Background on TRIG

Over the past 5 years, the Immigration Law Advisor has provided its readers with a number of excellent articles on the topic of terrorism-related inadmissibility grounds ("TRIG") and exemptions, particularly relating to material support.[1] These articles, listed in the endnotes, provide a thorough and comprehensive look at TRIG's history and scope. As a refresher, the

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following is a brief summary of the aspects of TRIG most relevant to the present theme.

Section 212(a)(3)(B) of the Act enumerates a number of terrorism-related grounds that render an individual inadmissible.[2] The ground discussed in this article applies where the alien "has engaged in terrorist activity" by "commit[ing] 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. Sections 212(a)(3)(B)(i)(I), (iv)(VI) of the Act. However, an alien who has provided "material support" to an undesignated, or "Tier III," terrorist organization, as defined by section 212(a)(3)(B)(vi)(III) of the Act,[3] may avoid inadmissibility if he or she can show 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." Section 212(a)(3)(B)(iv)(VI)(dd) of the Act. This alien may also escape the application of the "material support bar" if he or she qualifies for an exemption issued by the Secretary of Homeland Security, which is the focus of this article.

As noted in Lisa Yu's article in this newsletter in 2008, the Secretary of Homeland Security has delegated to USCIS the authority to adjudicate exemptions for the certain grounds of inadmissibility under section 212(a)(3)(B) of the Act. *See* section 212(d)(3)(B)(i) of the Act (providing exemption authority). EOIR lacks jurisdiction to consider or adjudicate such exemptions.[4] Cases in which a final order of removal has been entered may be referred by Immigration and Customs Enforcement ("ICE") to USCIS for exemption consideration. However, only those cases where relief from removal was denied solely on the basis of a terrorism-related ground and for which an exemption is currently available are referred. This process underscores Ms. Yu's recommendation that "[a]s USCIS will only consider for an exemption cases in which the *sole* obstacle to a grant of relief is one of the section 212(a)(3)(B) grounds for which an exemption is currently available, it is very important that the record be developed fully."[5]

The following recent circuit and district court decisions also highlight the importance of a full record. However, the cases outlined below do not concern aliens denied relief in removal proceedings. Instead, they involve individuals who were actually granted asylum but encountered issues at the next stage where they were seeking to adjust status before USCIS. Under section 212(d)(3)(B)(i) of the Act, the Secretaries of State and Homeland Security, in consultation with the Attorney General and each other, may grant exemptions from the terrorism-related inadmissibility grounds. These exemptions may be applied to applications for immigration benefits, such as adjustment of status, submitted by individuals who currently possess lawful status in the United States (such as asylee status) and are not in removal proceedings or subject to a final order of removal. The following cases highlight issues raised during this exemption process.

District Court Action

The "hot" issue in the district courts relating to TRIG at the moment relates to the process within USCIS when an applicant for adjustment of status seeks a waiver of inadmissibility for material support provided to terrorist activities, which would otherwise be grounds for denial of the application. An applicant's sole recourse in cases where he claims that he provided material support under duress is to seek a waiver from the Secretaries of State or Homeland Security. Through a waiver provision enacted by Congress in section 212(d)(3)(B)(i) of the Act, "sole unreviewable discretion" vests with the Secretary of State and the Secretary of Homeland Security to waive the material support bar, provided that the alien has not "voluntarily and knowingly" supported terrorist activities. It is the "sole unreviewable discretion" language in this statute that has been heating up the district courts.

For background, on March 26, 2008, USCIS issued an internal memorandum directing its adjudicators to withhold adjudication of adjustment of status applications where the applicant appears to be inadmissible for having provided material support to a Tier III terrorist organization "until further notice," because "new exemptions [to the terrorism-related ground of inadmissibility] may be issued by the Secretary in the future."[6] Following this directive, an applicant for adjustment of status awaiting a determination on his application might receive a notice from USCIS containing this language:

> Your case is on hold because you appear to be inadmissible under [§] 212(a)(3)(B) of the [Immigration and Nationality Act], and USCIS currently has no authority not to apply the inadmissibility ground(s) to which you

> appear to be subject. Rather than denying your application based on inadmissibility, we are holding adjudication in abeyance while the Department of Homeland Security considers additional exercises of the Secretary of Homeland Security[']s discretionary exemption authority. Such an exercise of the exemption authority might allow us to approve your case.

Geneme v. Holder, 935 F. Supp. 2d 184, 186 (D.D.C. 2013) (alterations in original) (quoting a Dec. 11, 2009, letter from USCIS to the petitioner).

Applicants have demanded that agency action be compelled under the Mandamus Act[7] and/or the Administrative Procedures Act.[8] These arguments are presented despite provisions contained in both Acts that prohibit judicial review of discretionary agency action. *See* 5 U.S.C. § 701(a)(1), (2); 28 U.S.C. § 1361. Judicial review of discretionary agency action is also prohibited under section 242(a)(2)(B)(ii) of the Act, 8 U.S.C. § 1252(a)(2)(B)(ii). District courts nationwide are split on whether claims that USCIS unreasonably delayed adjudicating applications for adjustment of status involving a waiver of terrorism-related inadmissibility grounds are subject to judicial review because USCIS inaction constitutes discretionary agency action. *See Al-Rifahe v. Mayorkas*, 776 F. Supp. 2d 927, 932, 938 (D. Minn. 2011) (explaining that district courts across the country are divided, but noting that the overwhelming majority have concluded that section 242(a)(2)(B)(ii) of the Act does not bar judicial review of claims alleging unreasonable delay in the disposition of applications of asylees associated with Tier III terrorist organizations).

The cases surveyed for this article reveal abeyances lasting more than 5 years. Since USCIS does not possess a timetable for these particular adjudications, an abeyance is, in effect, open-ended. However, USCIS has maintained that an applicant is not prejudiced by the delay because the delay "actually benefits him" and that the agency is "exercising every effort to address the delay." *Singh v. Napolitano*, 909 F. Supp. 2d 1164, 1172 (E.D. Cal. 2012). Indeed, as of May of 2012, the Secretary's exemption authority has proved to benefit 14,393 applicants. *See Beyene v. Napolitano*, No. C 12-01149 WHA, 2012 WL 2911838, at *6 (N.D. Cal. July 13, 2012). Additionally, from June 2010 to June 2012, USCIS released more than 3,500 cases from being held in abeyance. *Id*.

The following is an example of a case that reached the district court where the petitioner sought an order compelling USCIS to make a decision on an adjustment application and the district court found that it did have jurisdiction. *Irshad v. Napolitano*, No. 8:12CV173, 2012 WL 4593391 (D. Neb. Oct. 2, 2012). The petitioner, a native of Afghanistan, was granted asylum in 1998 and duly filed an application for adjustment of status in 1999. Nearly 9 years later, in February of 2008, the petitioner was notified by USCIS that his application was denied on the ground that "his transporting of supplies for the Mujahidin as a child constituted material support of an 'undesignated terrorist organization.'" *Id*. at *2. The petitioner timely appealed this denial with USCIS a month later and USCIS reopened his case sua sponte. After waiting close to another 4 years, the petitioner received a letter from USCIS, similar to that referred to above in *Geneme*, informing him that adjudication on his application was being held in abeyance. Four months after receiving this notice, the petitioner filed suit against USCIS in district court demanding a final ruling on his application. The district court found that section 242(a)(2)(B)(ii) of the Act "does not divest [it] of jurisdiction over a claim that USCIS has failed to adjudicate an application for adjustment of status within a reasonable time." *Id*. at *5. The court clarified that it saw "no indication that the USCIS has the discretion to refuse to resolve the applications placed before it, or to delay its decisions indefinitely" and that USCIS has "a nondiscretionary duty to act on an I-485 application." *Id*. at *5-6. After extensive analysis, the court then found that the delay in adjudication was reasonable and granted USCIS's motion for summary judgment. The petitioner appealed to the Eighth Circuit Court of Appeals.

Oral argument in *Irshad* was conducted on November 20, 2013. As of the date of publication of this newsletter, there has been no decision issued. Should the circuit court decide to address USCIS's delays through adjudication on the merits, it would be the first time a court at this level has done so. This would also be the first time a case in a circuit court specifically addressed an inadmissibility finding for material support of a Tier III organization as provided under section 212(a)(3)(B). Moreover, should the court address jurisdiction, although not argued by the Government, and affirm the district

court's finding that section 242(a)(2)(B)(ii) of the Act did not have effect over adjudication times, the Government would look forward to additional difficulties defending the delays.

Circuit Court Action

In a relatively recent case, the United States Court of Appeals for the Fifth Circuit addressed a similar issue involving agency delay. *Amrollah v. Napolitano*, 710 F.3d 568 (5th Cir. 2013). As in *Irshad,* the petitioner in *Amrollah* was granted asylum but the adjudication of his adjustment application was held abeyance by USCIS, in his case for nearly 9 years. He also filed a complaint with the district court, seeking a writ of mandamus to compel USCIS to act on his application. Unfortunately for him, USCIS proceeded to deny his application based on his previous support of the mujahedeen movement, which he testified to during his removal proceedings. Then, through an amended complaint, the petitioner argued that USCIS had wrongly denied his application. The district court found that substantial evidence supported the denial of his application and, most interestingly here, that collateral estoppel did not bar USCIS from issuing the denial. The petitioner had argued that USCIS was collaterally estopped from denying his application because the Immigration Judge had already granted him asylum after hearing his testimony and "extensive" cross-examination covering his support of the mujahedeen movement at his removal proceedings. He presented this argument to the Fifth Circuit and saw a different result.

The court of appeals first recognized that a "final decision by an immigration judge has a preclusive effect on future litigation and agency decisions." *Amrollah*, 710 F.3d at 571. The court then applied the three-prong test of issue preclusion: "(1) the identical issue was previously adjudicated; (2) the issue was actually litigated; and (3) the previous determination was necessary to the decision." *Id*. (quoting *Pace v. Bogalusa City Sch. Bd.*, 403 F.3d 272, 290 (5th Cir. 2005) (en banc) (internal quotations marks omitted)). The court found that the second and third prongs were "easily satisfied," given the petitioner's testimony on his support of the mujahedeen movement, and that "the IJ's ruling that Amrollah was admissible necessarily included, under the structure of [section 212(a)(3)(B) of the Act], a finding that Amrollah did not provide support to an individual or organization that engaged in terrorist activities." *Id*. at 571-72.

The trickier question was the first prong, which requires that the issue previously adjudicated be identical to the issue at hand. To level the playing field, the court first examined whether there was a "demonstrable difference" between the definition of "engag[ing] in terrorist activity" under the 2010 version of the statute and that which was in place in 1999, to avoid collateral estoppel. *Id*. (alteration in original). USCIS argued that the petitioner was inadmissible under the expanded 2010 statute for providing material support to a Tier III terrorist organization, which is defined as "a group of two or more individuals, whether organized or not, which engages in, or has a subgroup that engages in" terrorist activity. Section 212(a)(3)(B)(vi)(III) of the Act. The court then set out to determine whether the Immigration Judge had found that the petitioner fell under this definition. The petitioner argued that the Immigration Judge, "[b]y granting [him] asylum . . . specifically rejected the government's contention that [he] provided material support to terrorists." Brief of Appellant, *Amrollah v. Napolitano*, 710 F.3d 568 (5th Cir. 2013) (No. 12-50357), 2012 WL 3066837, at *23. In support, the petitioner presented the Immigration Judge's finding, as stated in his decision:

> Although the Service attorney asserts, or hinted that Respondent's support of the Mujahedeen indicated violent activity which might disqualify the Respondent from being eligible for asylum, the Immigration Judge concludes that the Respondent's testimony showed that he did not commit any violent act and there is no evidence of that in the record.

Id. at *23-24.

The court extrapolated from the Immigration Judge's finding (which is absent of any TRIG-related discussion) that by "finding Amrollah admissible to the United States in 1999, the immigration judge necessarily decided that Amrollah did not afford material support to any: (i) individual, (ii) organization, or (iii) government in conducting a terrorist activity at any time." *Amrollah*, 710 F.3d at 573. The court concluded that the Immigration Judge's finding "has a preclusive effect against a subsequent finding that Amrollah provided material support to 'a group of two or more individuals' engaged in terrorist activity." *Id*. Consequently, the court held that USCIS

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CIRCUIT COURT DECISIONS FOR OCTOBER 2013

by John Guendelsberger

The United States courts of appeals issued 253 decisions in October 2013 in cases appealed from the Board. The courts affirmed the Board in 241 cases and reversed or remanded in 12, for an overall reversal rate of 4.7%, compared to last month's 8.6%. There were no reversals from the First, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits.

The chart below shows the results from each circuit for October 2013 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	% Reversed
First	5	5	0	0.0
Second	62	59	3	4.8
Third	16	14	2	12.5
Fourth	19	18	1	5.3
Fifth	13	13	0	0.0
Sixth	10	10	0	0.0
Seventh	4	4	0	0.0
Eighth	1	1	0	0.0
Ninth	108	102	6	5.6
Tenth	6	6	0	0.0
Eleventh	9	9	0	0.0
All	253	241	12	4.7

The 253 decisions included 124 direct appeals from denials of asylum, withholding, or protection under the Convention Against Torture; 50 direct appeals from denials of other forms of relief from removal or from findings of removal; and 79 appeals from denials of motions to reopen or reconsider. Reversals within each group were as follows:

	Total	Affirmed	Reversed	% Reversed
Asylum	124	116	8	6.5
Other Relief	50	47	3	6.0
Motions	79	78	1	1.3

The eight reversals or remands in asylum cases involved corroboration (two cases), the 1-year filing bar for asylum (two cases), the level of harm for past persecution, nexus, particular social group, and the Convention Against Torture.

The three reversals or remands in the "other relief" category addressed whether a "violation" under a municipal ordinance was a conviction, the retroactive application of an IIRIRA amendment to the aggravated felony definition, and application of the categorical approach in determining whether an offense is a crime involving moral turpitude. The motion to reopen case involved the departure bar.

The chart below shows the combined numbers for the first 10 months of 2013 arranged by circuit from highest to lowest rate of reversal.

Circuit	Total	Affirmed	Reversed	% Reversed
Seventh	66	48	18	27.3
Eleventh	115	96	19	16.5
Ninth	902	769	133	14.7
Tenth	35	30	5	14.3
First	45	40	5	11.1
Third	178	164	14	7.9
Second	294	274	20	6.8
Eighth	32	30	2	6.3
Sixth	85	82	3	3.5
Fourth	113	110	3	2.7
Fifth	118	115	3	2.5
All	1983	1758	225	11.3

Last year's reversal rate at this point (January through October 2012) was 9.4%, with 2367 total decisions and 222 reversals.

The numbers by type of case on appeal for the first 10 months of 2013 combined are indicated below.

	Total	Affirmed	Reversed	% Reversed
Asylum	969	843	126	13.0
Other Relief	469	407	62	13.2
Motions	545	508	37	6.8

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CIRCUIT COURT DECISIONS FOR NOVEMBER 2013

by John Guendelsberger

The United States courts of appeals issued 183 decisions in November 2013 in cases appealed from the Board. The courts affirmed the Board in 165 cases and reversed or remanded in 18, for an overall reversal rate of 9.8%, compared to last month's 4.7%. There were no reversals from the Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth Circuits.

The chart below shows the results from each circuit for November 2013 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	% Reversed
First	3	2	1	33.3
Second	36	34	2	5.6
Third	15	13	2	13.3
Fourth	9	9	0	0.0
Fifth	29	29	0	0.0
Sixth	9	9	0	0.0
Seventh	3	3	0	0.0
Eighth	11	11	0	0.0
Ninth	57	46	11	19.3
Tenth	3	3	0	0.0
Eleventh	8	6	2	25.0
All	183	165	18	9.8

The 183 decisions included 104 direct appeals from denials of asylum, withholding, or protection under the Convention Against Torture; 40 direct appeals from denials of other forms of relief from removal or from findings of removal; and 39 appeals from denials of motions to reopen or reconsider. Seventeen of the decisions from the Fifth Circuit have decision dates from March, April, or May of this year but were not reported until this month. Reversals within each group were as follows:

	Total	Affirmed	Reversed	% Reversed
Asylum	104	93	11	10.6
Other Relief	40	35	5	12.5
Motions	39	37	2	5.1

The 11 reversals or remands in asylum cases involved the level of harm for past persecution (3 cases), credibility (2 cases), corroboration, the 1-year filing bar for asylum, application of the "one central reason" test for nexus, well-founded fear, termination of asylum, and the Government's burden to overcome the presumption of a well-founded fear after a showing of past persecution.

The five reversals or remands in the "other relief" category addressed application of the categorical approach in determining whether an offense is an aggravated felony crime of violence (two cases), right to counsel, impermissible fact-finding by the Board, and whether an offense is a crime involving moral turpitude. The two motions cases involved prima facie eligibility for a U-visa and new hardship evidence for cancellation of removal.

The chart below shows the combined numbers for the first 11 months of 2013 arranged by circuit from highest to lowest rate of reversal.

Circuit	Total	Affirmed	Reversed	% Reversed
Seventh	69	51	18	26.1
Eleventh	123	102	21	17.1
Ninth	959	815	144	15.0
Tenth	38	33	5	13.2
First	48	42	6	12.5
Third	193	177	16	8.3
Second	330	308	22	6.7
Eighth	43	41	2	4.7
Sixth	94	91	3	3.2
Fourth	122	119	3	2.5
Fifth	147	144	3	2.0
All	2166	1923	243	11.2

Last year's reversal rate at this point (January through November 2012) was 9.5%, with 2529 total decisions and 241 reversals.

The numbers by type of case on appeal for the first 11 months of 2013 combined are indicated below.

	Total	Affirmed	Reversed	% Reversed
Asylum	1073	936	137	12.8
Other Relief	509	442	67	13.2
Motions	584	545	39	6.7

John Guendelsberger is a Member of the Board of Immigration Appeals.

AILA InfoNet Doc. No. 13120199. (Posted 12/1/13)

RECENT COURT OPINIONS

Second Circuit:

Pierre v. Holder, No. 10-2131-ag, 2013 WL 6439343 (2d Cir. Dec. 10, 2013): The Second Circuit denied a petition for review of the Board's decision ordering the petitioner removed after it rejected the petitioner's claim to be a U.S. citizen based on his father's naturalization under former section 321(a) of the Act. The third clause of that statute (which was in effect at the time the petitioner became a lawful permanent resident and therefore applied to him) allowed for derivative citizenship upon the naturalization of one parent only where such parent (1) had legal custody of the child following a legal separation, or (2) upon naturalization of the mother where the child was born out of wedlock and paternity had not been established by legitimation. The Board held that the petitioner did not meet the first requirement because his parents were never married and therefore were not legally separated. The Board further found that the petitioner did not meet the terms of the alternate requirement because he had not been legitimated, so he could only derive citizenship through the naturalization of his mother. The petitioner challenged the constitutionality of the statute before the circuit court on two grounds: that the first clause discriminated based on legitimacy, while the second clause did so based on gender. The court found that the petitioner had standing to challenge the constitutionality of the requirements. As to the legitimation requirement, the petitioner argued that under the doctrine of constitutional avoidance, where the interpretation of the language in question would raise serious constitutional problems (in this case equal protection violations), the court should construe the statute to also apply to children born out of wedlock where one parent has renounced parental rights. However, the court concluded that constitutional avoidance does not apply here because the term in question is not ambiguous, observing that it had consistently been construed to apply only to marital relationships. The court further found no violation of the Equal Protection Clause because the policy in question was intended to protect the interest of the noncitizen parent. Therefore the statute was not considered to discriminate based on legitimacy. The petitioner argued that Congress should have created an alternative scheme covering children born out of wedlock whose parents subsequently took a "formal legal act" of separation. But the court agreed with the Government's argument that the proposed standard was "amorphous and unworkable," because "[t]here is no legal event that marks the separation of an unmarried couple." The court additionally found no unconstitutional discrimination based on gender. Citing the Supreme Court decision in *Tuan Anh Nguyen v. INS*, 533 U.S. 53 (2001), the court noted that Congress had a legitimate interest in assuring the existence of both a biological and actual relationship between a child and an unmarried father, and that such an interest was important enough to justify the gender distinction. The court further observed that no such formal act is required as to mothers, with whom legitimation is established "at the moment of birth."

Fourth Circuit:

Pastora v. Holder, No. 12-2095, 2013 WL 6487378 (4th Cir. Dec. 11, 2013): The Fourth Circuit denied a petition for review of decisions of the Board and an Immigration Judge denying an application for special rule cancellation of removal based on the persecutor bar in section 241(b)(3)(B)(i) of the Act. The Immigration Judge found the petitioner ineligible for relief because he did not meet his burden of proving that he did not engage in persecution in his native El Salvador. The Immigration Judge determined that the petitioner's burden was triggered by (1) his sworn statement that he had served as a leader of a local civil patrol during the height of El Salvador's civil war and (2) record evidence of human rights abuses committed by such groups in the communities patrolled by the petitioner. The court agreed that the totality of the specific evidence in the case was sufficient to trigger the persecutor bar and thus place the burden of proof on the petitioner to prove by a preponderance of the evidence that he did not assist or otherwise participate in such persecution. The evidence included the petitioner's own statements as to his date and places of service and his rank, weapons training, and duties. The record also contained lists of the names and ages of victims in the petitioner's area who were killed, disappeared, sexually assaulted, captured, or tortured and evidence regarding the role played by local patrols in such actions. The court affirmed the Immigration Judge's adverse credibility finding because it was based on specific, cogent reasons supported by substantial evidence in the record, including the petitioner's testimony.

Seventh Circuit:

Xue Juan Chen v. Holder, No. 13-1758, 2013 WL 6482542 (7th Cir. Dec. 11, 2013): The Seventh Circuit denied a petition for review of a denial of asylum and withholding of removal from China. The petitioner claimed to fear persecution because she gave birth to two children in the U.S. The court noted reports of a recent relaxation of the

Chinese Government's one-child policy where one of the parents is an only child. However, there was no indication that the petitioner fell into this category or that the new policy would be applied retroactively. The court observed a number of points in the decisions of the Immigration Judge and the Board that could have been grounds for reversal. These included certain assumptions about the petitioner's ability to forgo registering her U.S. born children in her household registry, her financial ability to pay a fine (or "social compensation fee"), and whether such payment would allow her to avoid forcible sterilization. The court also questioned the Board's interpretation of the country conditions evidence of record in assessing the likelihood of sterilization, calling attention to the annual reports of the Congressional-Executive Commission on China and citing passages from several of its recent reports. However, the court noted that the petitioner's appellate brief did not raise these issues and that our country's adversarial court system, which is dependent on the arguments of lawyers, does not allow the court itself to raise legal issues that could result in a ruling in the petitioner's favor. The court also concluded that the record did not contain sufficient evidence of the financial situation of the petitioner and her husband (who recently bought a restaurant in Wisconsin). It specifically pointed to a statement in the husband's signed affidavit stating that they "might be able to pay the fines." Deeming the petitioner's failure to present evidence of her financial situation a "fatal weakness," the court affirmed the Board's decision.

Eighth Circuit:

Garcia-Gonzalez v. Holder, No. 12-3651, 2013 WL 6405042 (8th Cir. Dec. 9, 2013): The Eighth Circuit denied a petition for review of decisions of the Immigration Judge and the Board denying the petitioner's application for adjustment of status and ordering him removed. The Immigration Judge found the petitioner removable based on his racketeering conviction pursuant to 21 U.S.C. § 846, which was found to be for an aggravated felony under section 101(a)(43)(J) of the Act. The petitioner acknowledged in his plea agreement that had the case proceeded to trial, the Government would have been able to prove his membership and leadership position in the Latin Kings, "a criminal organization whose members . . . engaged in acts of violence, including murder, attempted murder, robbery, extortion and distribution of controlled substances." The petitioner conceded that he was removable based on his aggravated felony conviction, but he contested the Immigration Judge's finding that he was ineligible for adjustment of status. The court disagreed, noting that an applicant for adjustment must prove that he is admissible. However, one who admits to acts constituting the essential elements of a conspiracy or attempt to violate any law relating to a controlled substance is inadmissible under section 212(a)(2)(A)(i) of the Act. The court held that the facts included in the petitioner's plea constituted an admission to each of the elements of 21 U.S.C. § 846, a Federal law relating to controlled substances. The court therefore concluded that the Immigration Judge and the Board did not err in finding the petitioner ineligible for adjustment of status.

Ninth Circuit:

Murillo-Prado v. Holder, 735 F.3d 1152 (9th Cir. 2013): The Ninth Circuit denied a petition for review of the Board's decision finding the petitioner ineligible for cancellation of removal because of his conviction for an aggravated felony. The petitioner was convicted of racketeering under section 13-2301 of the Arizona Revised Statutes and was sentenced to 3 years in prison. The Immigration Judge found this offense to be an aggravated felony under section 101(a)(43)(J) of the Act, which includes offenses described in 18 U.S.C. § 1962 relating to racketeer-influenced corruption for which a sentence of 1 year or more in prison may be imposed. The petitioner argued that the Government had not met its burden to prove removability because the documents it submitted did not unequivocally establish which subsection of the Arizona statute he violated. The court noted that the Arizona statute in question contains two offenses that are not explicitly listed in 18 U.S.C. § 1962. The court thus found the Arizona statute to be divisible, containing both offenses that constitute racketeering under the Federal statute and those that do not. The court therefore applied the modified categorical approach, allowing the consideration of limited additional documents contained in the record. Finding sufficient evidence in the indictment, plea agreement, and sentencing order to establish that the subsection under which the petitioner was convicted was included in the Federal definition of racketeering, the court concluded that Board's decision was not in error.

Urooj v. Holder, 734 F.3d 1075 (9th Cir. 2013): The Ninth Circuit granted a petition for review of the Board's order vacating a grant of asylum from Pakistan. The petitioner was granted asylum in December 2004 after testifying to having been arrested, beaten, interrogated, tortured, and threatened at least three times because of her membership

in the Pakistan People's Party. In August 2005, the petitioner signed a sworn statement admitting that the story was false and had been created with the help of a paid acquaintance. As a result, the petitioner was served with a notice to appear and a notice of intent to terminate her asylum status. At her hearing, the petitioner was called as a witness, but she refused to testify on advice of counsel. Drawing an adverse inference from the petitioner's refusal to testify, the Immigration Judge terminated asylum and found the asylum application to be frivolous. The Board affirmed, relying on its precedent decision in *Matter of Guevara*, 20 I&N Dec. 238, 244 (BIA 1990). The court cited to language in *Matter of Guevara* stating that if the Government's burden could be satisfied solely through the petitioner's silence, "it would be practically no burden at all." Although the Immigration Judge also relied on documentation submitted by the Government, the court observed that the Immigration Judge admitted the documents as "impeachment evidence." Since they were not filed by the deadline imposed by the immigration court's local operating procedures, their late filing could only be excepted if they were offered for the limited purpose of impeaching a witness, but the petitioner did not testify. The court held that the Immigration Judge and the Board improperly relied on the evidence for the impermissible purpose of establishing the facts in dispute, namely, that the petitioner had knowingly filed a fraudulent asylum application. Because there was no substantive evidence to impeach, the court found that the Government had not met its burden of establishing the grounds for terminating asylum by a preponderance of the evidence. The dissenting opinion found no error in the Board's decision.

REGULATORY UPDATE

78 Fed. Reg. 65,690 (Nov. 1, 2013)

DEPARTMENT OF HOMELAND SECURITY
U.S. Citizenship and Immigration Services

[CIS No. 2538–13; DHS Docket No. USCIS–2013–0006]
RIN 1615–ZB24

Extension of the Designation of Somalia for Temporary Protected Status

AGENCY: U.S. Citizenship and Immigration Services, Department of Homeland Security.
ACTION: Notice.
SUMMARY: Through this Notice, the Department of Homeland Security (DHS) announces that the Secretary of Homeland Security (Secretary) is extending the designation of Somalia for Temporary Protected Status (TPS) for 18 months from March 18, 2014 through September 17, 2015.

The extension allows currently eligible TPS beneficiaries to retain TPS through September 17, 2015, so long as they otherwise continue to meet the eligibility requirements for TPS. The Secretary has determined that an extension is warranted because the conditions in Somalia that prompted the TPS designation continue to be met. There continues to be a substantial, but temporary, disruption of living conditions in Somalia based upon ongoing armed conflict and extraordinary and temporary conditions in that country that prevent Somalis who have TPS from safely returning.

Through this Notice, DHS also sets forth procedures necessary for nationals of Somalia (or aliens having no nationality who last habitually resided in Somalia) to re-register for TPS and to apply for renewal of their Employment Authorization Documents (EADs) with U.S. Citizenship and Immigration Services (USCIS). Re-registration is limited to persons who have previously registered for TPS under the designation of Somalia and whose applications have been granted. Certain nationals of Somalia (or aliens having no nationality who last habitually resided in Somalia) who have not previously applied for TPS may be eligible to apply under the late initial registration provisions, if they meet: (1) At least one of the late initial filing criteria and (2) all TPS eligibility criteria (including continuous residence in the United States since May 1, 2012, and continuous physical presence in the United States since September 18, 2012).

For individuals who have already been granted TPS under the Somalia designation, the 60-day re-registration period runs from October 31, 2013 through December 30, 2013. USCIS will issue new EADs with a September 17, 2015 expiration date to eligible Somali TPS beneficiaries who timely re-register and apply for EADs under this extension.
DATES: The 18-month extension of the TPS designation of Somalia is effective March 18, 2014, and will remain in effect through September 17, 2015. The 60-day re-registration period runs from October 31, 2013 through December 30, 2013.

was collaterally estopped from denying the petitioner's application based on his provision of support to the mujahedeen movement.

The question remains, however, whether the court of appeals would have found that the issues were identical if the record of proceedings been more fully developed on the TRIG issues raised. We will never know. What if the Immigration Judge had made more specific TRIG-related findings on the petitioner's history of providing medical assistance as a pharmacist to members of the mujahedeen and monetary assistance for the printing of pamphlets? Would the court of appeals have found it more difficult to consider USCIS's findings to be "identical"? Possibly. Again, we will never know. What we do know is that a more developed record on TRIG-related issues that are raised in removal proceedings would help the inquiry later down the line.

When TRIG-related issues are raised in immigration proceedings, the development of the record, including clear findings of fact and conclusions of law, by EOIR's adjudicators may play an important role in future exemption consideration by USCIS and litigation before Federal courts. We hope the foregoing has been helpful in expanding your knowledge of TRIG as it is applied outside of EOIR and within our agency.

Have a very happy holiday!

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1. Linda Alberty, *Affording Material Support to a Terrorist Organization – A Look at the Discretionary Exemption to Inadmissibility for Aliens Caught Between a Rock and a Hard Place*, Immigration Law Advisor, Vol. 2, No. 4 (Apr. 2008); Lisa Yu, *New Developments on the Terrorism-Related Inadmissibility Ground Exemptions,* Immigration Law Advisor, Vol. 2, No. 12 (Dec. 2008) [hereinafter *Developments*]; Lisa Yu, *Differentiating the Material Support and Persecutor Bars in Asylum Claims*, Immigration Law Advisor, Vol. 3, No. 2 (Feb. 2009).

2. Section 212(a)(3)(B) renders inadmissible an alien who engaged in terrorist activity; is engaged in or is likely to engage in terrorist activity after entry; incited terrorist activity with intent to cause serious bodily harm or death; is a representative or current member of a terrorist organization, endorsed or espoused terrorist activity; received military-type training from or on behalf of a terrorist organization; or is the spouse or child of anyone who has engaged in terrorist activity within the last 5 years (with certain exceptions).

3. Linda Alberty provides an interesting outline of the different Tier designations in her article. *See* Alberty, *supra* note 1, at 2.

4. *Matter of S-K-*, 23 I&N Dec. 936, 941 (BIA 2008) ("Congress attempted to balance the harsh provisions set forth in the Act with a waiver, but it only granted the power to make exemptions to the Attorney General and the Secretaries of State and Homeland Security, who have not delegated such power to the Immigration Judges or the Board of Immigration Appeals."); *see also* REAL ID Act of 2005, Div. B of Pub. L. No. 109-13, §§ 103(b), 104, 119 Stat. 302, 307-09.

5. Yu, *Developments*, *supra* note 1, at 3.

6. Memorandum from Jonathan Scharfen, Deputy Dir., USCIS, to USCIS officials, at 2 (Mar. 26, 2008), *available at* http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2008/withholding_26mar08.pdf.

7. Under the Mandamus Act, a district court has the authority to "compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. § 1361. Mandamus is a "'drastic and extraordinary" remedy 'reserved for really extraordinary causes.'" *Cheney v. U.S. Dist. Court for Dist. of Columbia*, 542 U.S. 367, 380 (2004) (quoting *Ex parte Fahey*, 332 U.S. 258, 259-60 (1947)).

8. The Administrative Procedures Act ("APA") states that "[w]ith due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it." 5 U.S.C. § 555(b). The APA further provides that Federal courts shall "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1).