



February 23, 2011

PM-602-0031

Policy Memorandum

SUBJECT: Implementation of New Discretionary Exemption Under INA Section 212(d)(3)(B)(i) For the Solicitation of Funds or Members under Duress

Purpose

On January 7, 2011, following consultation with the Secretary of State and the Attorney General, the Secretary of Homeland Security (the Secretary) exercised her discretionary authority not to apply the solicitation inadmissibility grounds to certain aliens who, under duress, solicited funds or members for a terrorist organization. *See* Attachment 1. This document guides U.S. Citizenship and Immigration Services (USCIS) adjudicators on implementation of the Secretary's situational exemption.¹

Scope

Unless specifically exempted herein, this PM applies to and binds all USCIS employees.

Authority

Section 212(d)(3)(B)(i) of the Immigration and Nationality Act (INA).

Background

INA section 212(a)(3)(B) renders inadmissible an alien who solicits funds or members for a terrorist organization. In turn, INA section 212(d)(3)(B)(i) authorizes the Secretary to exempt certain terrorism-related grounds of inadmissibility (TRIG). On January 7, 2011, the Secretary issued an exemption that authorizes USCIS, in consultation with Immigration and Customs Enforcement (ICE), not to apply the inadmissibility ground related to certain aliens who, under

¹ Some exercises of secretarial authority relate to individuals having affiliations with specific terrorist organizations, while this "situational" exercise of authority relates to a scenario or situation (solicitation of funds or members) that may occur with respect to various terrorist organizations. Processing of group-based and situation-based exemptions is identical, except for a hold policy distinction described below in section III(F).

This document supplements existing guidance on terrorism-related inadmissibility grounds (TRIG), including Jonathan Scharfen, Deputy Director, USCIS, "Processing the Discretionary Exemption to the Inadmissibility Ground for Providing Material Support to Certain Terrorist Organizations," May 24, 2007; Michael L. Aytes, Acting Deputy Director, USCIS, "Implementation of Section 691 of Division J of the Consolidated Appropriations Act, 2008, and Updated Processing Requirements for Discretionary Exemptions to Terrorist Activity Inadmissibility Grounds," July 28, 2008; and Michael Aytes, Acting Deputy Director, USCIS, "Revised Guidance on the Adjudication of Cases Involving Terrorist-Related Inadmissibility Grounds and Amendment to the Hold Policy for such Cases," February 13, 2009.

duress, solicited funds or members for a terrorist organization. This exemption may be applied to immigration benefit applications under the INA, including, but not limited to, asylum, refugee status, adjustment of status, and asylee and refugee following-to-join petitions. USCIS will consider an exemption only if the threshold requirements, listed below and in the Secretary's Exercise of Authority, are met.

Policy

Pursuant to the Secretary's exercise of authority under INA section 212(d)(3)(B)(i), USCIS will consider whether certain aliens are eligible for and warrant an exemption from the application of the solicitation grounds of inadmissibility.

Implementation

I. Identifying Individuals Subject to Terrorism-Related Inadmissibility Grounds Due to the Provision of Solicitation Under Duress

Adjudicators who consider an exemption must familiarize themselves with country conditions information on the relevant country and terrorist organization(s) by consulting the [Refugee, Asylum & International Operations \(RAIO\) Research: Country Conditions by Region/Country](#) and/or the research information made available through and authorized by their HQ components.² In addition to research products generated by USCIS, open source reference documents produced by other agencies may be available from the U.S. Department of State (DOS) (see, for example, the annual [U.S. Dept. of State Country Reports on Human Rights Practices](#)), or through the [Department of Homeland Security \(DHS\) Library](#) available on the intranet through DHS Connect.

Adjudicators should be alert for indications - in benefit applications, supporting documentation, and testimony - that an applicant's actions may be described in INA sections 212(a)(3)(B)(iv)(IV) and (V) for the solicitation of funds or other things of value for, or the solicitation of individuals for membership in a terrorist organization, when these activities were performed under duress. While this exemption is limited to acts of solicitation under duress, adjudicators should be alert for and elicit information about all TRIG-related activities or associations.

II. Aliens Whose Inadmissibility for Solicitation Under Duress May Be Exempted as a Matter of Discretion

Duress only

USCIS may consider a discretionary exemption only for those cases in which the solicitation activities occurred under duress. Voluntary solicitation of funds or members is not covered by this exemption. Duress is established if the solicitation activities occurred in response to a *reasonably-perceived threat of serious harm*.³ To determine whether duress exists, adjudicators must consider the following, non-exhaustive list of factors: whether the applicant reasonably could have avoided, or took steps to avoid, soliciting; the severity and type of harm inflicted or

² DHS employees may access the [RAIO-Virtual Library's RAIO Research](#).

³ Scharfen memorandum (May 24, 2007), at 5.

threatened and to whom the harm was directed; and the perceived imminence of the harm threatened and the perceived likelihood that the harm would be inflicted. A threat of serious harm need not be expressly communicated or demonstrated; an alien may reasonably perceive a threat from the context and circumstances of his or her encounter with a terrorist organization.

Conduct Exempted

The Secretary's Exercise of Authority provides that "subsections 212(a)(3)(B)(iv)(IV) and 212(a)(3)(B)(iv)(V) of the INA, 8 U.S.C. 1182(a)(3)(B)(iv)(IV) and 1182(a)(3)(B)(iv)(V), shall not apply, with respect to an alien, for solicitation of funds or other things of value *for a terrorist organization ... or for solicitation of any individual for membership in a terrorist organization....*" (emphasis added). As such, the Exercise of Authority does not include the activities described in INA subsections 212(a)(3)(B)(iv)(IV)(**aa**) (solicitation for "a terrorist activity") and 212(a)(3)(B)(iv)(V)(**aa**) (solicitation "to engage in [terrorism-related] conduct"). The exemption applies to subsections (bb) and (cc) of each form of solicitation. This exemption is not limited to undesignated terrorist organizations as defined at INA section 212(a)(3)(B)(vi)(III) (Tier III organization) but also includes Tier I and II terrorist organizations as defined at INA sections 212(a)(3)(B)(vi)(I) and (II).

Threshold Eligibility

To be considered for an exemption, an applicant must satisfy the following threshold requirements:

- Establish that he or she is otherwise eligible for the immigration benefit or protection being sought;
- Undergo and pass all required background and security checks;
- Fully disclose, to the best of his or her knowledge, in all relevant applications and interviews with U.S. Government representatives and agents, the nature and circumstances of each instance of solicitation and any other TRIG activity or association; and
- Establish that he or she poses no danger to the safety and security of the United States.

Discretion

For those applicants who have met all threshold requirements, adjudicators will consider whether the applicant warrants a discretionary exemption in the totality of the circumstances. When considering the totality of the circumstances, factors to be considered, in addition to the duress-related factors stated above, may include, among others: the amount, type, and frequency of solicitation provided; the nature of the activities committed by the terrorist organization; the alien's awareness of those activities; whether the applicant participated in any violent activities; the length of time since the solicitation was provided; the alien's conduct since the last instance of solicitation; and any other relevant factors.

III. Making the Exemption Determination

A. General

A spouse or child is inadmissible under INA section 212(a)(3)(B)(i)(IX) if the related alien is inadmissible under INA section 212(a)(3)(B) for actions occurring within the last five years, unless the spouse or child qualifies for one of two statutory exceptions.⁴ If the activity of the related alien may be exempted, USCIS may also consider an exemption for the spouse or child, even if the related alien is not also seeking admission or a benefit from USCIS. A spouse or child does not require an exemption relative to any acts for which the related alien has been exempted.

B. Vetting Cases for Possible Security Risk

Adjudicators will follow existing agency procedures when a possible national security risk arises during the course of the adjudication, including thorough security checks. These procedures include coordination with local Fraud Detection and National Security Immigration Officers (FDNS-IO), or with the Service Center Operations (SCOPS) Threat Assessment Branch, for possible further review and vetting. Appropriate officers will manage necessary vetting with a record holder, as well as deconfliction with law enforcement or intelligence agencies.

C. Documenting the Exemption Determination

Using the 212(a)(3)(B) Exemption Worksheet (revised Jan. 12, 2011), adjudicators will document exemption determinations as follows:

- Determine threshold eligibility;
- Describe the applicant's associations or activities with the group, noting any involvement in violence or other activities of concern;
- In Section IV,
 - Check the "Situation Exemption" box and then the "Solicitation of Funds / Other Things of Value under Duress" or "Solicitation of Individuals under Duress" box ; and
 - Indicate the Tier and identify the relevant terrorist organization; and
- In Section V, indicate whether the adjudicator recommends granting or denying the exemption.

Each Division will instruct its adjudicators on the requisite levels of review.

D. Record-Keeping Requirements

USCIS will maintain records on the number of cases considered under this exemption and their outcome, and statistics will be consolidated on a quarterly basis, at a minimum. These

⁴ A spouse or child is not inadmissible under INA section 212(a)(3)(B)(i)(IX) if (1) s/he did not know or should not reasonably have known of the TRIG activity or (2) an adjudicator has reasonable grounds to believe that the spouse or child has renounced the TRIG activity. INA § 212(a)(3)(B)(ii).

statistics will be used to provide information to the interagency members, stakeholders, and the Congress.

E. Effect of Exemption on Future Adjudications

An exemption determination made under this exercise of authority can inform but will not control a decision regarding any subsequent benefit or protection application.

F. Processing of Cases for which No Exemption will be Granted Under This Exercise of the Exemption Authority

If a case (1) falls entirely outside of the scope of this exercise of authority (e.g., voluntary solicitation; membership in a terrorist organization), or (2) does not satisfy certain threshold requirements⁵, the case should remain on hold pending further guidance. A future exercise of authority that is specific to the relevant terrorist organization may afford a basis to consider an exemption.⁶

If, however, a case meets the threshold requirements but an exemption is denied in the totality of the circumstances, the application should be denied (or, if pertaining to an asylum application, referred as appropriate) after appropriate review in accordance with the above procedures. The availability of a future, group-based exemption would not likely impact USCIS's assessment of the totality of the circumstances.

If additional terrorism-related grounds apply beyond the scope of this situational exemption, adjudicators should determine whether there are available exemptions for those TRIG grounds and adjudicate all exemptions in accordance with the guidance issued for each exemption. In such a case, an adjudicator may adjudicate a solicitation exemption only if other relevant TRIG exemptions exist, and the adjudicator will recommend exemptions for each additional applicable ground.

Cases not granted a TRIG exemption or denied for TRIG-related issues should be processed pursuant to existing guidelines. For additional guidance or clarification, such as whether a particular case should remain on hold, adjudicators should consult the appropriate headquarters program office.

⁵ Specifically, a case should remain on hold if the applicant is not otherwise eligible due to additional TRIG grounds for which an exemption may become available. Also, a case should remain on hold pending interview if it is not clear in the record whether an alien has fully disclosed relevant TRIG activities, or had the opportunity to do so.

⁶ By comparison, when an individual is ineligible for an exercise of authority related to a specific terrorist organization, either because he or she falls outside the scope of the exemption or does not satisfy all threshold requirements, the case should be denied rather than maintained on hold. Unlike with the situational exemptions, there is little possibility that the Secretary will later authorize a different or broader exemption that could resolve the cases of individuals associated with a terrorist organization addressed in a prior exercise of authority. If, however, an applicant described here does not meet the "otherwise eligible" threshold requirement due to activity with *another* terrorist organization for which no exemption has yet been considered or issued, the case should remain on hold.

Use

This PM is intended solely for the guidance of USCIS personnel in the performance of their official duties. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

Contact Information

Questions or suggestions regarding this PM should be forwarded to the appropriate component representative on the USCIS TRIG Working Group.

Attachment:

1. Exercise of Authority under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act (Solicitation Under Duress)

DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

**Exercise of Authority under Section 212(d)(3)(B)(i) of the Immigration and
Nationality Act**

AGENCY: Office of the Secretary, DHS

ACTION: Notice of determination

Authority: 8 U.S.C. 1182(d)(3)(B)(i)

Following consultations with the Secretary of State and the Attorney General, I hereby conclude, as a matter of discretion in accordance with the authority granted to me by section 212(d)(3)(B)(i) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(d)(3)(B)(i), as amended, as well as the foreign policy and national security interests deemed relevant in these consultations, that subsections 212(a)(3)(B)(iv)(IV) and 212(a)(3)(B)(iv)(V) of the INA, 8 U.S.C. 1182(a)(3)(B)(iv)(IV) and 1182(a)(3)(B)(iv)(V), shall not apply, with respect to an alien, for solicitation of funds or other things of value for a terrorist organization described in subsection 212(a)(3)(B)(vi), 8 U.S.C. 1182(a)(3)(B)(vi), under duress, or for solicitation of any individual for membership in a terrorist organization described in subsection 212(a)(3)(B)(vi), 8 U.S.C.

1182(a)(3)(B)(vi), under duress, provided that the alien satisfies the relevant agency authority that the alien:

- (a) is seeking a benefit or protection under the INA and has been determined to be otherwise eligible for the benefit or protection;
- (b) has undergone and passed all relevant background and security checks;
- (c) has fully disclosed, to the best of his or her knowledge, in all relevant applications and interviews with U.S. government representatives and agents, the nature and circumstances of each instance of solicitation and any other activity or association falling within the scope of section 212(a)(3)(B) of the INA, 8 U.S.C. 1182(a)(3)(B);
- (d) poses no danger to the safety and security of the United States; and
- (e) warrants an exemption from the relevant inadmissibility provision in the totality of the circumstances.

Implementation of this determination will be made by U.S. Citizenship and Immigration Services (USCIS), in consultation with U.S. Immigration and Customs Enforcement (ICE), or by U.S. consular officers, as applicable, who shall ascertain, to their satisfaction, and in their discretion, that the particular applicant meets each of the criteria set forth above.

When determining whether the solicitation was provided under duress, the following factors, among others, may be considered: whether the applicant reasonably could have avoided, or took steps to avoid, soliciting; the severity and type of harm inflicted or threatened and to whom the harm was directed; and the perceived imminence of the harm threatened and the perceived likelihood that the harm would be inflicted.

When considering the totality of the circumstances, factors to be considered, in addition to the duress-related factors stated above, may include, among others: the amount, type, and frequency of solicitation provided; the nature of the activities committed by the terrorist organization; the alien's awareness of those activities; the length of time since the solicitation was provided; the alien's conduct since that time; and any other relevant factor.

This exercise of authority may be revoked as a matter of discretion and without notice at any time with respect to any and all persons subject to it. Any determination made under this exercise of authority as set out above can inform but shall not control a decision regarding any subsequent benefit or protection applications, unless such exercise of authority has been revoked.

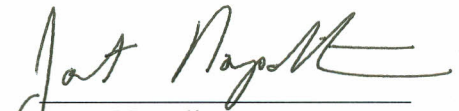
This exercise of authority shall not be construed to prejudice, in any way, the ability of the U.S. government to commence subsequent criminal or civil proceedings in accordance with U.S. law involving any beneficiary of this exercise of authority (or any other person). This exercise of authority creates no substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person.

In accordance with section 212(d)(3)(B)(ii) of the INA, 8 U.S.C. 1182(d)(3)(B)(ii), a report on the aliens to whom this exercise of authority is applied, on the basis of case-by-case decisions by the U.S. Department of Homeland Security or by the U.S. Department of State, shall be provided to the specified congressional committees not later than 90 days after the end of the fiscal year.

This determination is based on an assessment related to the national security and

foreign policy interests of the United States as they apply to the particular persons described herein and shall not have any application with respect to other persons or to other provisions of U.S. law.

Dated: January 7, 2011



Janet Napolitano,
Secretary of Homeland Security