



# Immigration Law Advisor

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## In this issue...

Page 1: Feature Article:

*One Person's Freedom Fighter,  
Duress, and the Terrorism Bar*

Page 5: Federal Court Activity

Page 10: BIA Precedent Decisions

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## One Person's Freedom Fighter, Duress, and the Terrorism Bar

by Chaya M. Citrin

Individuals have raised a host of arguments—two of which this article explores—in defending against the Immigration and Nationality Act's "terrorism bar," which sweeps broadly in barring many aliens who have engaged in any form of insurgency from admission to or relief in this country. One defense asserts that legitimate or justifiable violence is not unlawful and thus does not qualify as "terrorist activity" within the meaning of section 212(a)(3)(B)(iii) of the Act, 8 U.S.C. § 1182(a)(3)(B)(iii). That section provides that an activity constitutes terrorist activity only if it is "unlawful under the laws of the place where it is committed" or "if it had been committed in the United States, would be unlawful under the laws of the United States or any State." *Id.* Another defense is that an exception for duress is implicit in the terrorism bar's material-support provision, contained at section 212(a)(3)(B)(iv)(VI) of the Act, and that involuntarily providing support to terrorists therefore does not trigger the "material-support bar."<sup>1</sup>

The *Immigration Law Advisor* has previously explored several of the terrorism bar's numerous facets.<sup>2</sup> In short, the bar renders individuals who have engaged in terrorist activity inadmissible, *see* section 212(a)(3)(B)(i) of the Act; removable, *see* section 237(a)(4)(B) of the Act, 8 U.S.C. § 1227(a)(4)(B); and ineligible for most forms of immigration relief.<sup>3</sup> Individuals subject to the terrorism bar remain eligible for a discretionary waiver under section 212(d)(3)(B)(i) of the Act and deferral of removal under the Convention Against Torture. *See, e.g., Khan v. Holder*, 766 F.3d 689, 698 (7th Cir. 2014); *Haile v. Holder*, 658 F.3d 1122, 1125–26 (9th Cir. 2011); *accord Matter of S-K*, 23 I&N Dec. 936, 946 (BIA 2006).

This article provides a survey of case law from the Board of Immigration Appeals and the federal courts of appeals addressing defenses against the terrorism bar raised by individuals who have engaged in claimed "legitimate" violence as part of an independence movement or who have

involuntarily provided material support to terrorists. In considering a defense for “freedom fighters,” the Board and the courts of appeals for the Third and Ninth Circuits, the only circuits to address the issue, have consistently rejected attempts to find implied exceptions to the terrorism bar. Likewise, the Board recently agreed with the Third, Fourth, Ninth, and Eleventh Circuits in *Matter of M-H-Z-*, 26 I&N Dec. 757 (BIA 2016), that the terrorism bar does not contain an implicit exception for material support provided under duress. This article discusses the scope of the holdings regarding these proposed defenses, specifically in light of international law permitting the use of force against an illegitimate regime and limiting refoulement, and also discusses the availability of a waiver of the terrorism bar under section 212(d)(3)(B)(i) of the Act.

## “Freedom Fighting” and the Terrorism Bar

### *Failed Defenses*

The following are arguments, generally variations on the same theme, that the Board and circuit courts have considered in the context of applying the terrorism bar to individuals involved with independence movements. Despite some adjudicators’ concerns regarding the terrorism bar’s broad scope, none of these defenses has prevailed.

#### 1. Political-Offense Exception

In *McAllister v. Attorney General of the United States*, 444 F.3d 178 (3d Cir. 2006), the Third Circuit dismissed the alien’s petition for review in which he argued for an exception to the terrorism bar for political violence. *McAllister* is the first published decision to analyze the bar’s application to independence movements. The petitioner argued that his conduct in the Irish National Liberation Army did not constitute terrorist activity because he had not targeted non-combatants and “the situation in Northern Ireland had risen to the level of an Article 3 conflict under the Geneva Convention.”<sup>4</sup> *Id.* at 187. The court rejected that argument because the Act’s “definition of engaging in terrorist activity does not address either the targeting of non-combatants or the levels of conflict under the Geneva Convention.” *Id.* at 187–88. The petitioner alternatively maintained that even if he had engaged in terrorist activity, his conduct fell within the Act’s exception for political offenses.

*Id.* at 188. The court disagreed with that argument as well, explaining that none of the Act’s provisions recognizing an exception for political offenses—section 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F) (concerning crimes of violence); section 212(a)(2)(A)(i)(I) (concerning crimes involving moral turpitude); and section 212(a)(2)(B) (concerning multiple criminal convictions)—pertains to terrorist activities. *See McAllister*, 444 F.3d at 188. Thus, the court held, the Board did not err in declining to apply the Act’s political-offense exception to the petitioner’s conduct. *See id.*

Several years later, the Ninth Circuit considered nearly the same argument concerning the relevance of the political-offense exception that the Third Circuit had rejected in *McAllister*. In *Annachamy v. Holder*, the petitioner conceded that he had engaged in terrorist activity under section 212(a)(3)(B)(iv)(VI) of the Act by providing material support to the Liberation Tigers of Tamil Eelam (LTTE)—“a militant organization . . . at war with the Sri Lankan government.” 733 F.3d 254, 257 (9th Cir. 2013), *overruled on other grounds by Abdisalan v. Holder*, 774 F.3d 517 (9th Cir. 2014). He urged the court, however, to read an exception into the Act for individuals who provide material support only for “legitimate political violence.” *See Annachamy*, 733 F.3d at 259 (internal quotation marks omitted). The court rejected that invitation, explaining that the petitioner had not suggested any “textual hook for his argument that the material support bar does not apply to political offenses.” *Id.*; *cf. Hussain v. Mukasey*, 518 F.3d 534, 537 (7th Cir. 2008) (noting that “[t]errorism as used in common speech refers to the use of violence for political ends”).

#### 2. Regimes’ Legitimacy and Resistance Groups’ Motivations

Shortly after the Third Circuit decided *McAllister*, the Board published *Matter of S-K-*, a decision in which it declined to infer an exception to the terrorism bar for the “use of justifiable force to repel attacks by forces of an illegitimate regime.” 23 I&N Dec. 936, 941 (BIA 2006).<sup>5</sup> The respondent—who had supported the Chin National Front (CNF)—argued that the Burmese government and its legislative acts were illegitimate. She contended that the CNF’s violent actions against such an illegitimate government were not “unlawful” under Burmese law and therefore did not constitute terrorist activity. *See id.* at 939. The Board rejected that

argument, however, on the ground that it lacks authority to judge a regime's legitimacy; "[s]uch a determination," the Board explained, "is a matter left to elected and other high-level officials." *Id.* at 940. The Board also disagreed with the respondent's contention that, in determining whether a group has engaged in terrorist activity, the Board must consider the group's motivations for "seeking to effect change in a country." *Id.* at 940–41. In reaching that conclusion, the Board noted that other parts of the Act contain exceptions for "serious nonpolitical offenses and aliens who have persecuted others, even where persecuted themselves." *Id.* at 941. That section 212(a)(3)(B) of the Act lacks a similar exception suggests, the Board explained, that "Congress intentionally drafted the terrorist bars to relief very broadly, to include even those people described as 'freedom fighters.'" *Id.*

Recently, the Ninth Circuit cited *Matter of S-K* approvingly for the proposition that, in determining the terrorism bar's application, the Board does not assess a government's "legitimacy" or a group's "motives in attempting to overthrow" that regime. *See Zumel v. Lynch*, 803 F.3d 463, 474 (9th Cir. 2015). *Zumel* concerns the application of the terrorism bar to an individual who had helped plan a coup against the president of the Philippines. *Id.* at 466–67. In the petitioner's view, the Board erred by ignoring that his conduct had been politically motivated given that the definition of terrorist activity under section 212(a)(3)(B)(iii)(V) of the Act requires as an element the "intent to endanger." *Zumel*, 803 F.3d at 474 (internal quotation marks omitted). The appellate court disagreed with that argument, explaining that the Board's refusal to consider his political intentions had not prevented it from assessing whether the coup attempt had involved the requisite "intent to endanger."<sup>6</sup> *See id.*; *see also Chhun v. Holder*, 345 F. App'x 297, 299 (9th Cir. 2009) (describing Cambodian Freedom Fighters' "democratic goals" as "irrelevant" to whether the organization had engaged in terrorist activity); *Choub v. Gonzales*, 245 F. App'x 618, 619–20 (9th Cir. 2007) (same).

### 3. International Law Permitting "Legitimate" Violence

The argument in *Matter of S-K* regarding a regime's lack of legitimacy reappeared in a slightly different form in *Khan v. Holder*, 584 F.3d 773 (9th Cir. 2009), a decision in which the Ninth Circuit, like the Board,

declined to read an exception into the terrorism bar for "legitimate" violence. The petitioner—who had worked with the Jammu Kashmir Liberation Front (JKLF), "a group dedicated to the establishment of an independent Kashmir" and to "armed struggle against the Indian government"—argued that the group's actions were in opposition to an illegitimate regime, were permissible under international law, and therefore did not constitute terrorist activity. *Id.* at 778. In the petitioner's view, the Act's definition of terrorist activity incorporates international law to the effect that "actions that are illegal under the laws of the regime in power in the alien's country of origin are 'unlawful' within the meaning of [the Act] only if [they] violate the international law of armed conflict." *Id.* at 781. The court rejected that position, however, reasoning that the Act's definition of terrorist activity is "unambiguous" in that it "does not make an exception for actions that are lawful under international law." *Id.* Thus, the court held, terrorist activity under the Act includes "armed resistance against military targets that is permitted under the international law of armed conflict." *Id.* at 784.

Nevertheless, *Khan* acknowledges that international law may be relevant in determining whether conduct constitutes terrorist activity: "An action would be lawful within the meaning of [section 212(a)(3)(B)(iii) of the Act] if the law of the country in question incorporates international law such that the conduct in question is no longer 'unlawful' under the country's domestic law." 584 F.3d at 781. A concurring opinion in *Khan* explained further that this approach "is not premised on carving out an exception to the terrorist activity definition for groups engaged in legitimate armed conflict," but instead "turns on whether the conduct in question is unlawful." *Id.* at 787 (Nelson, J., concurring) (internal quotation marks omitted).

Courts have yet to publish a decision, however, ruling that armed resistance against a foreign regime was permitted under international law, as ratified by domestic law. Because the petitioner in *Khan* did not argue that India had adopted international law that would sanction the JKLF's activities, the panel's majority declined to consider whether the country had in fact adopted such law. *See id.* at 781. Likewise, in a case involving an individual who had supported the Eritrean People's Liberation Front, the Seventh Circuit noted in dictum that the petitioner's argument invoking international



law fell short given that he did not assert that Eritrea had ratified such law. *See FH-T v. Holder*, 723 F.3d 833, 840 n.4 (7th Cir. 2013). Indeed, though the petitioner in *Annachamy* requested that the Board “consider whether Sri Lanka has incorporated international law, such that the LTTE’s activities were not unlawful under Sri Lankan domestic law,” the Ninth Circuit declined to remand absent any evidence that the country had in fact “incorporated such international law.” 733 F.3d at 260 n.5. Finally, even considering the bearing of international law, the concurring opinion in *Khan* concluded that such law did not help the petitioner given the evidence “that the JKLF has exceeded the bounds of permissible conduct under the international law of armed conflict.” 584 F.3d at 787 (Nelson, J., concurring).

#### 4. International Law Prohibiting Refoulement

Individuals have also relied on international nonrefoulement law as a basis for challenging the terrorism bar’s application to their conduct. Nonrefoulement refers to “[a] refugee’s right not to be expelled from one state to another, esp[ecially] to one where his or her life or liberty would be threatened.” *Nonrefoulement*, Black’s Law Dictionary (10th ed. 2014). In *Khan*, the petitioner argued that applying the terrorism bar based on his involvement with an armed resistance group would violate the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223 [hereinafter “Protocol”], which, in his view, provides “the only permissible grounds on which a country can refoul a refugee.” 584 F.3d at 782–84.

The Ninth Circuit, providing context for the petitioner’s argument, explained that “[t]he Protocol binds parties to comply with the substantive provisions of Articles 2 through 34 of the United Nations Convention Relating to the Status of Refugees (“Refugee Convention”).” *Id.* at 782 (quoting *INS v. Stevic*, 467 U.S. 407, 416 (1984)) (internal quotation marks and brackets omitted). Article 33 of the Refugee Convention establishes the duty of nonrefoulement: “No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group or political opinion.” 584 F.3d at 782 (quoting the Refugee Convention, art. 33.1, July 28, 1951, 19 U.S.T. 6223). Yet, “a refugee whom there are reasonable grounds

for regarding as a danger to the security of the country in which he [or she] is” seeking refuge is not entitled to this protection. 584 F.3d at 782–83 (quoting the Refugee Convention, art. 33.2).

The petitioner argued that Article 33.2 of the Refugee Convention permits refoulement on the ground that an alien poses a danger to the security of the United States only if three conditions are satisfied: The alien “pose[s] a present danger to the United States,” “the danger [is] a serious threat to national security,” and “the danger [is] proved, not simply assumed.” *Khan*, 584 F.3d at 784. In light of those limitations, the petitioner contended, the Act’s definition of terrorist activity sweeps too broadly. *See id.* at 782–84.

As an initial matter, the Ninth Circuit assessed the extent to which the United States is bound by the Protocol, which this country acceded to in 1968. *See id.* at 783. Because the Protocol “is not self-executing,” the court explained, it “does not have the force of law in American courts.” *Id.* Accordingly, it “serves only as a useful guide in determining congressional intent in enacting the Refugee Act of 1980, which sought to bring United States refugee law into conformity with the Protocol.” *See id.* (internal quotation marks and citation omitted). Acknowledging the open question “whether the Protocol is also a useful guide in interpreting provisions of the [Act] that were not enacted with the Protocol in mind, such as the terrorism bars to relief from removal,” the court applied the canon observed in *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804), “that an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains.” *Khan*, 584 F.3d at 783 (internal quotation marks omitted); *see generally United States v. Ali*, 718 F.3d 929 (D.C. Cir. 2013) (conducting an analysis under the *Charming Betsy* canon).

Applying the canon, the court explained that neither the Protocol nor the Refugee Convention defines the term “danger to . . . security” and that “the Contracting State in whose territory the refugee finds himself” has the duty to determine the individual’s “refugee status.” *Khan*, 584 F.3d at 783 (internal quotation marks, citation, and ellipses omitted). Therefore, the court reasoned, the determination reflected in section 241(b)(3)(B) of the Act—that an individual who has engaged in terrorist activity is someone “with respect to whom there are reasonable grounds for regarding as

*continued on page 13*

# FEDERAL COURT ACTIVITY

## CIRCUIT COURT DECISIONS FOR AUGUST 2016

by John Guendelsberger

The United States courts of appeals issued 221 decisions in August 2016 in cases appealed from the Board. The courts affirmed the Board in 191 cases and reversed or remanded in 30, for an overall reversal rate of 13.6%, compared to last month's 13.1%. There were no reversals from the First, Fourth, Sixth, and Eleventh Circuits.

The chart below shows the results from each circuit for August 2016 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	% Reversed
First	4	4	0	0.0
Second	33	30	3	9.1
Third	7	6	1	14.3
Fourth	5	5	0	0.0
Fifth	10	8	2	20.0
Sixth	2	2	0	0.0
Seventh	7	6	1	14.3
Eighth	4	3	1	25.0
Ninth	144	124	20	13.9
Tenth	5	3	2	40.0
Eleventh	0	0	0	0.0
All	221	191	30	13.6

The 221 decisions included 119 direct appeals from denials of asylum, withholding, or protection under the Convention Against Torture; 63 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. Reversals within each group were as follows:

	Total	Affirmed	Reversed	% Reversed
Asylum	119	106	13	10.9
Other Relief	63	50	13	20.6
Motions	39	35	4	10.3

The 13 reversals or remands in asylum cases involved credibility (4 cases), Convention Against Torture (3 cases), nexus, past persecution, well-founded fear, the persecutor bar, humanitarian asylum, and

derivative asylum status. The 13 reversals or remands in the "other relief" category addressed crimes involving moral turpitude (5 cases), ineffective assistance of counsel, marriage fraud, voluntary departure, the section 212(h) waiver, adjustment of status, application of the categorical approach to a drug distribution statute, the definition of "admission" for temporary protected status, and retroactive application of a bar to admissibility. The four motions cases involved changed country conditions (two cases), and the provisional unlawful presence waiver (two cases).

Circuit	Total	Affirmed	Reversed	% Reversed
Seventh	33	24	9	27.3
Sixth	37	31	6	16.2
Tenth	26	22	4	15.4
Ninth	778	668	110	14.1
Third	64	58	6	9.4
Fifth	106	97	9	8.5
First	25	23	2	8.0
Eleventh	33	31	2	6.1
Second	247	232	15	6.1
Fourth	63	60	3	4.8
Eighth	49	47	2	4.1
All	1,461	1,293	168	11.5

Last year's reversal rate at this point (January through August 2015) was 14.4%, with 1,167 total decisions and 168 reversals or remands.

The numbers by type of case on appeal for the first 8 months of 2016 combined are indicated below.

	Total	Affirmed	Reversed	% Reversed
Asylum	795	714	81	10.2
Other Relief	353	288	65	18.4
Motions	313	291	22	7.0

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

# FEDERAL COURT ACTIVITY

## CIRCUIT COURT DECISIONS FOR SEPTEMBER 2016

*by John Guendelsberger*

The United States courts of appeals issued 102 decisions in September 2016 in cases appealed from the Board. The courts affirmed the Board in 93 cases and reversed or remanded in 9, for an overall reversal rate of 8.8%, compared to last month's 13.6%. There were no reversals from the First, Third, Fourth, Fifth, Seventh, and Eleventh Circuits.

The chart below shows the results from each circuit for September 2016 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	% Reversed
First	5	5	0	0.0
Second	27	26	1	3.7
Third	5	5	0	0.0
Fourth	8	8	0	0.0
Fifth	5	5	0	0.0
Sixth	4	3	1	25.0
Seventh	2	2	0	0.0
Eighth	4	3	1	25.0
Ninth	35	31	4	11.4
Tenth	3	1	2	66.7
Eleventh	4	4	0	0.0
All	102	93	9	8.8

The 102 decisions included 61 direct appeals from denials of asylum, withholding or protection under the Convention Against Torture; 26 direct appeals from denials of other forms of relief from removal or from findings of removal; and 15 appeals from denials of motions to reopen or reconsider. Reversals within each group were as follows:

	Total	Affirmed	Reversed	% Reversed
Asylum	61	57	4	6.6
Other Relief	26	22	4	15.4
Motions	15	14	1	6.7

The four reversals or remands in asylum cases involved credibility (two cases), the Convention Against Torture and the terrorist activity bar. The four reversals or remands in the "other relief" category addressed the

categorical approach in determining whether an offense was a "theft" aggravated felony, the constitutionality of 18 U.S.C. § 16(b) for aggravated felony "crimes of violence," divisibility of a state statute regulating possession of controlled substances, and a remand for further fact-finding as to a ground of removal. The motions case involved an in absentia order of removal.

The chart below shows the combined numbers for January through September 2016 arranged by circuit from highest to lowest rate of reversal.

Circuit	Total	Affirmed	Reversed	% Reversed
Seventh	35	26	9	25.7
Tenth	29	23	6	20.7
Sixth	41	34	7	17.1
Ninth	813	699	114	14.0
Third	69	63	6	8.7
Fifth	111	102	9	8.1
First	30	28	2	6.7
Second	274	258	16	5.8
Eighth	53	50	3	5.7
Eleventh	37	35	2	5.4
Fourth	71	68	3	4.2
All	1,563	1,386	177	11.3

Last year's reversal rate at this point (January through September 2015) was 13.6%, with 1,334 total decisions and 182 reversals or remands.

The numbers by type of case on appeal for the first nine months of 2016 combined are indicated below.

	Total	Affirmed	Reversed	% Reversed
Asylum	856	771	85	9.9
Other Relief	379	310	69	18.2
Motions	328	305	23	7.0

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

## RECENT COURT OPINIONS

### ***First Circuit:***

*Hernandez-Lima v. Lynch*, --- F.3d ---, No. 15-1983, 2016 WL 4651370 (1st Cir. Sept. 7, 2016): The First Circuit denied a petition for review of the denial of withholding of removal to Guatemala. The court concluded that the respondent did not establish a nexus between harm experienced or feared and a protected ground. The court did not recognize error in the finding that threats made against the petitioner through third parties did not rise to the level of past persecution since they were not “so menacing as to cause significant actual suffering or harm.” The court also concluded that harm experienced by the petitioner was not shown to be on account of his membership in a particular social group comprised of “members of a family who were persecuted by gang members.” The court noted that threats and actions against the petitioner and his family members were linked to extortion efforts, inferring a motive of greed. The court found no basis to reverse the Board where the record did not establish that the criminal gangs were motivated by family membership as opposed to monetary gain.

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*Legal v. Lynch*, --- F.3d ---, No. 15-2529, 2016 WL 5335683 (1st Cir. Sept. 23, 2016): The First Circuit dismissed the alien’s petition for review where the agency denied relief based on the Immigration Judge’s adverse credibility determination. In making the adverse credibility determination, the Immigration Judge afforded more weight to the alien’s initial sworn statement with a DHS port-of-entry officer than to the respondent’s subsequent asylum application. In his initial statement, the applicant alleged persecution within the last year on account of his membership in a particular political party, while his asylum application and testimony asserted persecution nearly 8 years prior on account of his membership in a different political organization. In dismissing the alien’s petition for review, the First Circuit stated that “[t]he mere fact that a detail is omitted from a DHS interview but is included in subsequent submission does not necessarily warrant an adverse credibility determination,” but where those inconsistencies “create strong doubt about the veracity of [the] story” or “[t]ell different tales at different times,” the Immigration Judge is entitled to discount the alien’s testimony.

### ***Third Circuit:***

*Gayle v. Warden Monmouth Cty. Corr. Inst.*, --- F.3d ---, No. 15-1785, 2016 WL 5219877 (3d Cir. Sept. 22, 2016): The Third Circuit vacated two decisions by the district court, *Gayle v. Johnson*, 4 F. Supp. 3d 692, 697 (D.N.J. 2014) (“*Gayle I*”), and *Gayle v. Johnson*, 81 F. Supp. 3d 371, 375 (D.N.J. 2015) (“*Gayle II*”), and remanded for consideration of a motion for class certification. The Third Circuit held that the district court did not have authority to reach the merits of the *Gayle I & II* decisions. As a result, the Third Circuit vacated, on procedural grounds, the injunctive relief the lower court had ordered pertaining to the conduct of bond hearings for aliens alleged to be subject to mandatory detention pursuant to section 236(c) of the Act. The Third Circuit remanded for consideration of the only issue over which the district court had jurisdiction: the motion for class certification. The court reached this conclusion because, although the claims of the individual class representatives were moot, the district court had jurisdiction to consider the motion under the exception to mootness. Further, in denying the motion to certify a class, the district court erred by relying exclusively on the ground that a class action was unnecessary.

### ***Fifth Circuit:***

*Zermeno v. Lynch*, --- F.3d ---, No. 15-60206, 2016 WL 4544440 (5th Cir. Aug. 31, 2016): In this case, the Fifth Circuit afforded deference to the Board’s interpretation of the “10-year bar” to admission described in section 212(a)(9)(C)(i)-(ii) of the Act. That bar applies to an alien who seeks admission to the United States after having been unlawfully present for a period of 1 year. Section 212(a)(9)(C)(ii) of the Act permits an alien to seek a waiver after 10 years from the alien’s last departure from the United States. The petitioner in this case had reentered the United States unlawfully in 2004 after having previously accrued more than 1 year of unlawful presence. He argued that he was eligible for section 245(i) adjustment of status because 10 years had elapsed since his prior departure and unlawful reentry. The Fifth Circuit affirmed the Board’s holding that the petitioner could not obtain a waiver of inadmissibility under section 212(a)(9)(C)(ii) of the Act based on 10 years having passed where the petitioner had spent those years unlawfully present in the United States.

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*United States v. Howell*, --- F.3d ---, No. 15-10336, 2016 WL 5314661 (5th Cir. Sept. 22, 2016): In a federal sentencing case, the court held that an assault conviction in which the victim's breathing or circulation is substantially impeded constitutes a "crime of violence" under U.S.S.G. § 4B1.2, notwithstanding the possibility that the offense may be committed with a "reckless" mens rea. The court cited the recent holding in *Voisine v. United States*, 136 S. Ct. 2272 (2016), for the proposition that an assault may involve the use or attempted use of physical force even where committed recklessly. Additionally, although the petitioner argued that a conviction under Texas Penal Code §§ 22.01(a)(1), (b)(2)(B), might be incurred without the use of force, the court concluded that there was no "realistic probability" that a conviction would result where force had not been employed. Thus, the petitioner's conviction was found to categorically constitute a crime of violence under U.S.S.G. § 4B1.2.

#### ***Sixth Circuit:***

*Acevedo-Perez v. Lynch*, No. 16-3188, 2016 WL 5389303 (6th Cir. Sept. 26, 2016) (per curiam): The Sixth Circuit dismissed the petition for review for lack of jurisdiction where the petitioner challenged the agency's denial of his application for cancellation of removal for certain non-lawful permanent residents. In this unpublished decision, the Sixth Circuit first iterated that it lacks jurisdiction to review discretionary determinations made by the Immigration Judge pursuant to section 242(a)(2)(D) of the Act, 8 U.S.C. § 1152(a)(2)(D), but retains jurisdiction over "constitutional claims and questions of law," under section 242(a)(2)(B)(i) of the Act. To demonstrate a due process violation, the alien must show both a "defect in the removal proceeding and that he was prejudiced by the defect." The petitioner argued that the Immigration Judge violated his due process by finding that he failed to show that his removal would result in exceptional and extremely unusual hardship to his United States citizen daughter; the petitioner asserted that he had demonstrated hardship consistent with existing agency precedent. The Sixth Circuit found that since Petitioner did not allege a procedural defect, but merely *formulated* his argument as one, granting review would require the court to engage in "factual comparison and reweighing," which section 242(a)(2)(D) of the Act expressly prohibits.

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*Reyes v. Lynch*, --- F.3d ---, No. 15-4402, 2016 WL 4487993 (6th Cir. Aug. 26, 2016): The Sixth Circuit

held in this case that the offense of soliciting prostitution constitutes a crime involving moral turpitude. In so holding, the circuit joined the Eighth, Ninth, and Tenth Circuits. The court noted the Board's longtime holding that prostitution itself is a crime involving moral turpitude, and the court agreed that soliciting such an offense is not meaningfully different. The court observed that societal views of prostitution may change but concluded that existing Board precedent is due deference.

#### ***Seventh Circuit:***

*Turkhan v. Lynch*, --- F.3d ---, No. 14-3456, 2016 WL 4709866 (7th Cir. Sept. 9, 2016): The Seventh Circuit denied the petitions for review, concluding that 1) the Board did not err in only partially reopening the respondent's proceedings and 2) the respondent did not have a Fifth Amendment due process right regarding the discretionary denial of 212(c) relief. The petitioner, who had been a lawful permanent resident, was convicted of conspiracy to distribute cocaine in 1990, was subsequently placed in removal proceedings, and found to be deportable for having been convicted of an aggravated felony. He applied for 212(c) relief which was denied as a matter of discretion, and the Board affirmed. After filing several motions to reopen and reconsider, which were all denied, the alien filed a new motion to reopen seeking CAT protection and reasserting his eligibility for 212(c) relief. The Board sua sponte reopened the case and remanded it for the Immigration Judge to consider the alien's claims regarding changed country conditions for his CAT application. An Immigration Judge concluded that the respondent was eligible for deferral of removal under the CAT, but held that the Board had not reopened proceedings for further consideration of 212(c) relief. In reluctantly dismissing the petition for review, the Seventh Circuit held that the Board may partially reopen proceedings and noted that non-citizens do not have Fifth Amendment due process rights with respect to discretionary relief in immigration proceedings.

#### ***Eighth Circuit:***

*Rodriguez-Quiroz v. Lynch*, --- F.3d ---, No. 15-2621, 2016 WL 4536524 (8th Cir. Aug. 31, 2016): The Eighth Circuit granted the petition for review where the issue was a factual determination as to whether the respondent was present in the United States pursuant to a lawful admission (and eligible for adjustment of status), or whether he had departed and re-entered illegally. The DHS entry-and-departure database indicated a January 2005 departure—which the respondent disputed—with no subsequent record of lawful reentry. However, the government



declined to provide information as to how air departures are entered into its database. In rebuttal, the petitioner offered evidence that he conducted a transaction at a bank after the DHS record indicated that he had departed. Further, the court concluded that the Immigration Judge's reliance on a Form I-213, indicating that the respondent had admitted entering without inspection, was improper where the respondent was not permitted to provide evidence concerning the circumstances surrounding the preparation of that document. The record was remanded.

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*Cambara-Cambara v. Lynch*, --- F.3d ---, Nos. 15-1916 and 15-1917, 2016 WL 4758488 (8th Cir. Sept. 13, 2016): In a case addressing family-based particular social groups, the Eighth Circuit found no evidence that gang members had attacked the respondents' family based on the family unit itself, agreeing instead that the gang likely targeted them as wealthy businessmen. The respondents, two brothers, were Guatemalan natives who asserted as their particular social groups both "the Cambara family" and "educated Guatemalan landowners and farmers." The Eighth Circuit noted that evidence did not implicate the family as the basis for persecution, but rather the fact that the family was wealthy. The Eighth Circuit also found that because the Guatemalan government had investigated the attacks on the family, the respondents could not show either acquiescence or willful blindness towards any potential torture.

#### ***Ninth Circuit:***

*Budiono v. Lynch*, --- F.3d ---, No. 12-71804, 2016 WL 5112030 (9th Cir. Sept. 21, 2016): In a case addressing the "terrorism bar," the Ninth Circuit held that the Government bears the initial burden to identify particularized evidence of the bar's applicability before the burden shifts to an applicant for rebuttal. The court followed its prior precedent addressing the "persecutor bar" and concluded that generalized evidence of an applicant's involvement with a culpable group is not sufficient to shift the burden to the applicant. The court concluded that it was not shown that involvement with the Indonesian group Jemaah Muslim Attaqwa was sufficient to implicate the terrorism bar such that the applicant might be barred from withholding of removal.

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*Ortega-Lopez v. Lynch*, --- F.3d ---, No. 13-71127, 2016 WL 4437613 (9th Cir. Aug. 23, 2016): Upon review of the Board's decision in *Matter of Ortega-Lopez*, 26 I&N Dec. 99 (BIA 2013), the Ninth Circuit remanded the record for consideration of whether cockfighting involves a "protected class of victim" such that the offense constitutes a crime involving moral turpitude. In its published decision, the Board relied on dog-fighting cases, which describe the practice as inhumane, and emphasized that cockfighting has been outlawed in all 50 states. The Board opined that this "sweeping prohibition" confirmed society's belief that cockfighting is morally reprehensible and agreed with the Immigration Judge's determination that participating in an animal-fighting venture is categorically a crime involving moral turpitude. The Ninth Circuit noted that crimes involving moral turpitude usually either involve fraud or involve grave acts of baseness or depravity, and that the latter offenses "almost always involve an intent to harm someone, [an] actual infliction of harm upon someone, or an action that affects a protected class of victim." The court remanded for the Board to further consider the case because harm to chickens appears to fall outside the normal scope of turpitudinous crimes. Judge Bea concurred in the panel's opinion but wrote separately to express the view that the categorical approach is inappropriate for determining whether a particular offense constitutes a crime involving moral turpitude.

#### ***Tenth Circuit:***

*Golicov v. Lynch*, --- F.3d ---, No. 16-9530, 2016 WL 4988012 (10th Cir. Sept. 19, 2016): The Tenth Circuit held that in light of the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), the Act's definition of "crime of violence" under section 101(a)(43)(F) is unconstitutionally vague. In *Johnson*, the Supreme Court found the "residual clause" of the Armed Career Criminal Act ("ACCA") to be unconstitutionally vague under the Due Process Clause. In defining the term "violent felony," the ACCA identifies not only specific elements and crimes, but also any crime that "otherwise involves conduct that presents a serious potential risk of physical injury to another" (i.e., "the residual clause"). The court noted that the vagueness issue arises in the application of the categorical approach (which requires the consideration of "an abstract generic version of the offense" as opposed to the defendant's actual conduct) to the above clause. The Tenth Circuit agreed with the Sixth, Seventh, and Ninth Circuits that

there was no material distinction between 18 U.S.C. § 16(b) (which is expressly referenced in the definition of “violent felony” contained in section 101(a)(43)(F) of the Act) and the ACCA’s residual clause.

## BIA PRECEDENT DECISIONS

**I**n *Matter of Ibarra*, 26 I&N Dec. 809 (BIA 2016), the Board held that an aggravated felony “theft offense” under section 101(a)(43)(G) of the Act, 8 U.S.C. § 1101(a)(43)(G), requiring a taking of property “without consent,” includes takings where consent is coerced through the wrongful use of force, fear, or threats. The Board concluded that robbery by force or fear in violation of California Penal Code § 211 is categorically an aggravated felony.

Applying the categorical approach set forth in *Taylor v. United States*, 495 U.S. 575 (1990), and *Mathis v. United States*, 136 S. Ct. 2243 (2016), the Board compared the elements of section 211 with the generic definition of theft applied in section 101(a)(43)(G) of the Act, which is the “taking of property or an exercise of control over property *without consent* with the criminal intent to deprive the owner of rights and benefits of ownership, even if such deprivation is less than total or permanent.” Noting that section 211 proscribes extortionate conduct that must be accomplished *with* the victim’s consent, the Board explained that “consent” is coerced in extortion offenses and thus does not constitute the sort of “consent” that would exempt such an offense from the ambit of section 101(a)(43)(G) of the Act. The Board observed that no meaningful difference exists between a taking of property against the victim’s will and one where his “consent” is coerced through force, fear, or threats.

Additionally, noting that the jury instructions for a section 211 offense require the jury to find that the defendant took property from another “against that person’s will,” the Board concluded that the respondent had been convicted of a categorical aggravated felony theft offense as defined in section 101(a)(43)(G) of the Act and that he was removable on that basis. The record was remanded for consideration of the respondent’s eligibility for any relief from removal.

In *Matter of Zaragoza-Vaquero*, 26 I&N Dec. 814 (BIA 2016), the Board held that criminal copyright infringement in violation of 17 U.S.C. § 506(a)(1)(A) and 18 U.S.C. § 2319(b)(1) is a crime involving moral turpitude. It is well established, the Board noted, that theft and fraud offenses involve moral turpitude. In *Matter of Kochlani*, 24 I&N Dec. 128 (BIA 2007), the Board concluded that trafficking in counterfeit goods was analogous to uttering or selling false or counterfeit papers; both involve traffic in false or counterfeit items, require proof of intent coupled with knowledge that the items are counterfeit, and result in harm to society. The Board similarly concluded that criminal copyright infringement is a crime involving moral turpitude because it requires a willful infringement of a form of intellectual property and has been recognized by Congress to be a significant and costly offense.

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In *Matter of Chairez*, 26 I&N Dec. 819 (BIA 2016), the Board addressed the divisibility of criminal statutes in light of the holding in *Mathis v. United States*, 136 S. Ct. 2243 (2016). The Board’s decision came in response to the Attorney General’s order in *Matter of Chairez and Matter of Sama*, 26 I&N Dec. 796 (A.G. 2016); the Attorney General had previously referred the two cases for review before the Supreme Court’s *Mathis* decision.

In its decision, the Board concluded that the understanding of statutory “divisibility” as expressed in *Descamps v. United States*, 133 S. Ct. 2276 (2013), and *Mathis*, applies in immigration proceedings nationwide to the same extent that it applies in criminal sentencing proceedings. Additionally, the Board instructed that the agency must abide by applicable circuit law in determining what *Descamps* and *Mathis* require. To the extent that prior Board precedent may be inconsistent with *Descamps* and *Mathis*, the Board superseded its prior decisions.

The respondent in the present case had pleaded guilty to felony discharge of a firearm in violation of section 76-10-508.1 of the Utah Code. The statute had several subsections and the criminal information charged the respondent by alleging the full text of section 76-10-508.1. The Immigration Judge concluded that he had been convicted of an aggravated felony crime of violence as defined in section 101(a)(43)(F) of the Act

and 18 U.S.C. § 16 (which defines a crime of violence as an offense that includes the use, attempted use, or threatened use of physical force). Parsing section 76-10-508.1, the Board determined that it was categorically overbroad as to section 16(a), because subsection 76-10-508.1(a) permits a conviction if the firearm was discharged intentionally, knowingly, or *recklessly*. Under controlling Tenth Circuit law, *reckless* conduct does not involve the deliberate use of physical force. Thus, to determine whether the respondent had been convicted of an aggravated felony under the Act, the Board analyzed whether or not section 76-10-508.1 was divisible.

Under *Descamps*, a divisible statute is one that: (1) lists multiple discrete offenses as alternatives or defines a single offense in a disjunctive set of elements, more than one combination of which would support a conviction; and (2) at least one (but not all) of the offenses is a “categorical match” to the comparable generic offense. In *Mathis*, the Court clarified that disjunctive language does not render a criminal statute divisible unless each statutory alternative defines an independent “element” of the offense rather than a mere “brute fact” that describes how the offense can be committed. *Mathis* explained that the difference between “elements” and “brute facts” can be determined, for example, by the statutory language; if statutory alternatives carry different punishments, they are elements. In contrast, if “illustrative examples” are provided, the statute includes only the means of committing the crime. Things that must be charged are elements and things that need not be are means. If the question is unresolved by the statutory language, the trier of fact may examine the record documents for “the sole and limited purpose of determining whether [the listed items are] element[s] of the offense.”

Applying the framework to section 76-10-508.1, the Board noted that no Utah cases directly addressed whether intent, knowledge, and recklessness were elements or brute facts. However, the Board pointed out that it had previously found informative the fact that the Utah Supreme Court has not required jury unanimity where second-degree murder can be committed in three separate manners, each with a different mens rea. The Board reasoned that the second-degree murder jurisprudence supported a reasonable inference that a unanimous jury verdict would not be required as to the mental state under which a defendant discharged a firearm in violation of section 76-10-508.1. Concluding that

section 76-10-508.1(1) is overbroad and indivisible and thus is not an aggravated felony crime of violence under the Act, the Board vacated the Immigration Judge’s decision and remanded the record for consideration of the respondent’s eligibility for relief from removal.

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In *Matter of Khan*, 26 I&N Dec. 797 (BIA 2016), the Board held that Immigration Judges lack jurisdiction to adjudicate an application by a U visa petitioner for a waiver of inadmissibility under section 212(d)(3)(A)(iii) of the Act, 8 U.S.C. § 1182(d)(3)(A)(iii). In so holding, the Board respectfully disagreed with the Seventh Circuit’s analysis in *L.D.G. v. Holder*, 744 F.3d 1022 (7th Cir. 2014).

Noting that United States Citizenship and Immigration Services (“USCIS”) has exclusive jurisdiction over section 101(a)(15)(U) visa petitions, the Board pointed out that section 212(d)(14) of the Act was enacted to provide a waiver of inadmissibility specifically for U visa petitioners. By comparison, a waiver of inadmissibility under section 212(d)(3)(A)(iii) of the Act is a general waiver authorizing temporary admission for nonimmigrants seeking advance permission to enter the United States at the discretion of the Attorney General; the nonimmigrant may apply for the waiver at a port of entry or preclearance office designated by United States Customs and Border Protection. In contrast, section 212(d)(14) of the Act provides a specific waiver of inadmissibility for U visa petitioners, was enacted contemporaneously with the introduction of U visas, and falls within the exclusive adjudicatory purview of the Department of Homeland Security (“DHS”).

The regulations allow an inadmissible nonimmigrant to renew before an Immigration Judge an application for a general section 212(d)(3)(A)(ii) waiver submitted at the time of arrival and denied by a district director. However, since a U visa petitioner is physically present in the United States and is not subject to denial of the waiver at a port of entry, the Board reasoned that Immigration Judges lack authority to consider a request by a U visa petitioner for a waiver under section 212(d)(3)(A)(ii) of the Act. Additionally, the Board observed that Congress presumably was aware that a section 212(d)(3)(A)(ii) waiver was unavailable to a U visa petitioner when it enacted section 212(d)(14) of

the Act and gave the DHS exclusive jurisdiction over waivers of inadmissibility for such visa petitioners.

The Board determined that its decision was entitled to deference pursuant to *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005), and that the decision would be applied nationwide.

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In *Matter of Guzman-Polanco*, 26 I&N Dec. 806 (BIA 2016) ("*Guzman-Polanco II*"), the Board reconsidered and clarified its prior decision in *Matter of Guzman-Polanco*, 26 I&N Dec. 806 (BIA 2016) ("*Guzman-Polanco I*"), continuing to hold that a conviction for aggravated battery in violation of the Puerto Rico Penal Code is not categorically a crime of violence under 18 U.S.C. § 16(a). The Board again held that the Puerto Rico statute is too vague to categorically establish a crime of violence because it merely requires that the infliction of "injury to the bodily integrity of another" person be "through any means or form," whereas 18 U.S.C. § 16(a) specifies that a crime of violence must involve "physical force," defined by the Supreme Court as violent force capable of causing physical pain or injury to another person.

Recognizing the circuit split as to whether an indirect action such as the use or threatened use of poison constitutes a sufficient use of force to fall under 18 U.S.C. § 16(a), the Board explained that *Guzman-Polanco I* should not be read as establishing a nationwide rule defining the parameters of the use of force through indirect means. Rather, circuit law governs the issue. The record was remanded to the Immigration Judge.

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In *Matter of Silva-Trevino*, 26 I&N Dec. 826 (BIA 2016), the Board revisited the methodology for determining whether an offense is a crime involving moral turpitude ("CMT") and articulated a standard adopting a categorical approach. The case was before the Board pursuant to *Matter of Silva-Trevino* ("*Silva-Trevino II*"), 26 I&N Dec. 550 (A.G. 2015), in which the Attorney General vacated *Matter of Silva-Trevino* ("*Silva-Trevino I*"), 24 I&N Dec. 687 (A.G. 2008), and remanded the record to the Board for further proceedings.

Considering Supreme Court precedent and its application in the immigration context, the Board determined that the categorical and modified categorical approaches apply to the proper construction and application of section 212(a)(2)(A)(i)(I) of the Act with respect to aliens "convicted of" a CMT. In accordance with *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013), and cases cited therein, the Board instructed that Immigration Judges and the Board will first examine the language of the statute of conviction to see if the offense falls within the generic definition of a CMT. Under the categorical approach, the realistic probability test is applied, requiring focus on the minimum conduct that has a realistic probability of being prosecuted under the statute of conviction; the facts underlying the actual conviction are not the focus of such an examination. Noting that there is a circuit split as to whether the realistic probability test is applied, the Board instructed that the test is applicable unless controlling circuit law dictates otherwise.

Where the statute of conviction includes some crimes that are CMTs and some that are not, adjudicators must determine if the statute is divisible as defined in *Matter of Chairez*, 26 I&N Dec. 819 (BIA 2016). In the present case, the parties did not dispute that the relevant statute, section 21.11(a)(1) of the Texas Penal Code (indecent with a child), is not divisible. Reaffirming that a crime involving intentional sexual conduct by an adult with a child involves moral turpitude so long as the perpetrator knew or should have known that the victim was a minor, the Board looked to the controlling categorical approach in the Fifth Circuit to determine if the "minimum reading" of section 21.11(a)(1) encompasses only offenses involving moral turpitude. The Board concluded that section 21.11(a)(1) does not necessarily define a CMT because the statute punishes behavior where the perpetrator need not know that the victim was a minor. Since the statutory offense is not categorically turpitudinous and is not divisible, the Board decided that the respondent was not inadmissible as an alien convicted of a CMT and remanded the record for the Immigration Judge to consider his application for adjustment of status.

The Board also concluded that the existing framework for a discretionary determination of an alien's eligibility for relief, outlined in decisions such as *Matter of C-V-T*, 22 I&N Dec. 7 (BIA 1998); *Matter of Marin*, 16 I&N Dec. 581 (BIA 1978); and *Matter of Thomas*, 21 I&N Dec. 20 (BIA 1995), is appropriate. The Board declined to adopt the additional framework of a



heightened standard for aliens convicted of sexual abuse of a minor, expressing confidence that an Immigration Judge can properly consider the scope of factors in determining whether an exercise of discretion is warranted. The record was remanded for further proceedings consistent with the opinion.

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### One Person's Freedom Fighter *continued*

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a danger to the security of the United States”—accords with the Protocol’s exception to nonrefoulement for refugees who pose a danger to security. *Id.* at 784 (internal quotation marks and citation omitted); see also *Annachamy*, 733 F.3d at 266 (“Under the Protocol and Convention, Congress is free to decide that an alien who provided material support to a terrorist organization, even if under duress, is a danger to the security of the United States.”). With that in mind, the Ninth Circuit disagreed with the petitioner’s contention that the Act’s definition of terrorist activity conflicts with the duty of nonrefoulement under the Protocol. See *Khan*, 584 F.3d at 783–84.

#### *Concerns Regarding the Terrorism Bar’s Application to “Legitimate” Violence*

Despite consensus concerning the terrorism bar’s application to armed resistance against repressive regimes, each appellate body to consider the issue has criticized the bar’s expansive reach. One line of criticism has focused on Congress’s disregard for the circumstances leading to such resistance. For example, the concurrence in *McAllister* faulted Congress for requiring courts to ignore the reasons for a group’s resort to violence, such as “the eight hundred years of history that led [the petitioner] to fight with his people to remove British rule, and the persecution inflicted by that rule on Northern Ireland and on [the petitioner] and his family.” 444 F.3d at 192 (Barry, J., concurring). In a similar vein, the Ninth Circuit has noted that the Act’s definition of terrorist activity is so broad that it would encompass “armed resistance by Jews against the government of Nazi Germany.” *Zumel*, 803 F.3d at 474 (internal quotation marks and citation omitted); see also *Khan*, 584 F.3d at 781; *Khan*, 584 F.3d at 787 (Nelson, J., concurring). Likewise, a concurrence to the Board’s decision in *Matter of S-K-* noted that the CNF qualified as a terrorist organization under the Act, despite the fact that it “engage[d] in violence primarily as a means of self-defense against the Burmese Government,

a known human rights abuser.” See 23 I&N Dec. at 947–48 (Osuna, concurring).<sup>7</sup>

The terrorism bar has also suffered criticism for conflicting with this country’s foreign-policy interests. According to the concurrence in *Matter of S-K-*, because the terrorism bar may apply to “[a]ny group that has used a weapon for any purpose other than for personal monetary gain,” the bar could apply to a group whose “activities coincide with our foreign policy objectives” or perhaps even one “who provide[d] assistance to United States or allied armed forces.” 23 I&N Dec. at 948, 949 n.15 (Osuna, concurring).<sup>8</sup> The concurrence in *Khan* opined that the terrorism bar would, in fact, apply to an individual who aided the United States military in its invasions of Afghanistan and Iraq because those operations “were indisputably ‘unlawful’ under the domestic laws of those countries.” 584 F.3d at 787 (Nelson, J., concurring). The concurrence further cautioned that the terrorism bar’s breadth “could discourage sympathetic groups from lending support to the U.S. military, knowing it would preclude them from seeking refuge in the U.S. in the future.” *Id.*

#### *Discretionary Exemptions for Freedom Fighters*

Both the Ninth Circuit and the Board have commented, however, that the terrorism bar’s expansive scope is mitigated by the availability of a discretionary waiver of the bar under section 212(d)(3)(B)(i) of the Act. See *Khan*, 584 F.3d at 782; *Matter of S-K-*, 23 I&N Dec. at 941 (noting that Congress included the waiver provision in an “attempt[] to balance the harsh provisions set forth in the Act”). The Board recently discussed the contours of the discretionary-waiver framework in *Matter of M-H-Z-*, 26 I&N Dec. at 762 n.5.<sup>9</sup> In short, section 212(d)(3)(B)(i) of the Act permits the Secretaries of State or Homeland Security, after consultation with one another and with the Attorney General, to exempt individuals and groups from most applications of the terrorism bar. In the Ninth Circuit’s view, “These officials are in a position to judge the characteristics of particular groups engaging in armed resistance in their home countries, as well as the implications for our foreign relations in determining whether the actions of these groups are terrorist activities.” *Khan*, 584 F.3d at 782. Both the Ninth Circuit and the Board have observed that the discretionary-waiver framework likely obviates any potential conflict between the terrorism bar and

international law limiting refolement. *See Khan*, 584 F.3d at 784; *Matter of S-K-*, 23 I&N Dec. at 943 n.7; *see also Annachamy*, 733 F.3d at 266 n.15.

The Secretary of Homeland Security has repeatedly exercised the discretion to waive the terrorism bar, more or less broadly, with respect to several resistance groups based on the United States' national-security and foreign-policy interests.<sup>10</sup> These groups include those listed in section 691(b) of the Consolidated Appropriations Act, 2008—"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"<sup>11</sup>—as well as the following groups:

- Aliens involved in uprisings against Saddam Hussein's government between March 1 and April 5, 1991
- All Burma Muslim Union
- All India Sikh Students Federation-Bittu Faction
- All Burma Students' Democratic Front
- Arakan Army
- Democratic Movement for the Liberation of Eritrean Kunama
- Eritrean Liberation Front
- Farabundo Marti National Liberation Front
- Hongsawatoi Restoration Army/Party
- Kachin Independence Army
- Kachin Independence Organization
- Karen National Defense Organization
- Karenni Nationalities People's Liberation Front
- Kawthoolei Muslim Liberation Front
- Kosovo Liberation Army
- Kuki National Army
- Mon National Liberation Army
- Mon National Warrior Army
- MyeikDawei United Front
- National Democratic Front
- National United Party of Arakan
- Nationalist Republican Alliance
- New Democratic Army Kachin
- New Mon State Party
- Parliamentary Democracy Party

- People's Democratic Front
- Ramanya Restoration Army
- Shan State Army
- Zomi Reunification Organization/Zomi Revolutionary Army.<sup>12</sup>

### Duress and the Material-Support Bar

Efforts to identify an exception to the terrorism bar for material support provided under duress have proven as unsuccessful as those urging an exception to the bar for violence against repressive regimes. The absence of an express duress exception is undisputed. *See Sesay v. Att'y Gen. of U.S.*, 787 F.3d 215, 222 (3d Cir. 2015); *Ay v. Holder*, 743 F.3d 317, 320 (2d Cir. 2014); *Annachamy*, 733 F.3d at 260; *Alturo v. U.S. Att'y Gen.*, 716 F.3d 1310, 1314 (11th Cir. 2013); *Barahona v. Holder*, 691 F.3d 349, 354 (4th Cir. 2012); *Matter of M-H-Z-*, 26 I&N Dec. at 760–61 n.3. The circuit courts have debated, however, the existence of an implicit duress exception. In considering the issue, the courts have acknowledged *Negusie v. Holder*, 555 U.S. 511, 518 (2009), a decision in which the United States Supreme Court held that the Act's silence regarding a duress exception to the persecutor bar in sections 208(b)(2)(A)(i) and 241(b)(3)(B)(i) "is not conclusive" as to whether a duress exception is implied. *See Sesay*, 787 F.3d at 222; *Ay*, 743 F.3d at 320; *Annachamy*, 733 F.3d at 260; *Barahona*, 691 F.3d at 354; *see also Matter of M-H-Z-*, 26 I&N Dec. at 760–61. Despite *Negusie*, each court to decide the issue on the merits—the Third, Fourth, Ninth, and Eleventh Circuits—has held that the material-support bar lacks an implicit exception for duress. *See Sesay*, 787 F.3d at 222–24; *Annachamy*, 733 F.3d at 260–65; *Alturo*, 716 F.3d at 1314; *Barahona*, 691 F.3d at 354–56; *but see Barahona*, 691 F.3d at 356–58 (Wynn, J., dissenting) ("[P]assive acquiescence to the crimes of terrorists does not constitute an act that affords material support to a terrorist organization.") (internal quotation marks and ellipses omitted); *see also Matter of M-H-Z-*, 26 I&N Dec. at 760 (noting the circuit courts' unanimity regarding the absence of an implied duress defense).

The Second Circuit, however, issued a series of remands in light of *Negusie*, instructing the Board "to address in a precedential decision" whether the material-support bar "should be construed to include a duress exception." *Ay*, 743 F.3d at 319; *see also Khan*, 766 F.3d at 700–01 (acknowledging the "open question whether there is a duress exception to the material support

bar”). The Board’s recent decision in *Matter of M-H-Z-* resulted from an unpublished remand order like the one in *Ay*, see *Hernandez v. Holder*, 579 F. App’x 12, 15 (2d Cir. 2014), and is the Board’s first published decision concerning an implied duress defense to the material support bar. See 26 I&N Dec. at 757. *Matter of M-H-Z-* concerns an individual who provided food and other goods to the Revolutionary Armed Forces of Colombia after receiving demands for goods and money, as well as threats, from the group. See *id.* at 757–58.

Along with the courts of appeals that have decided the issue on the merits, the Board in *Matter of M-H-Z-* declined to read a duress exception into the material-support bar and reiterated several of the reasons that the appellate courts have recognized for holding that such an exception is not implied. As an initial matter, the Board noted that the inclusion of an express exception for involuntary membership in a totalitarian party in section 212(a)(3)(D)(ii) of the Act suggests that Congress intentionally omitted a similar exception for duress from the terrorism bar’s material-support provision. See *Matter of M-H-Z-*, 26 I&N Dec. at 761; accord *Sesay*, 787 F.3d at 222 (noting that the Act’s “totalitarian bar” includes “an exception precisely for involuntariness”) (internal quotation marks omitted); *Annachamy*, 733 F.3d at 261; *Alturo*, 716 F.3d at 1314; *Barahona*, 691 F.3d at 355 n.9. The Board also noted that the Third and Ninth Circuits have cited the exception to the material-support bar in section 212(a)(3)(B)(iv)(VI)(dd) of the Act—“for aliens who demonstrate a lack of knowledge that the organization [to which they provided material support] was a terrorist organization”—as additional evidence that Congress “would have likewise expressly excepted involuntary support if it intended to do so.” See *Matter of M-H-Z-*, 26 I&N Dec. at 761 n.3 (internal quotation marks omitted).

Additionally, the Board relied on the availability of a discretionary waiver under section 212(d)(3)(B) of the Act as further reason not to construe the material-support bar as containing an implicit duress exception. See *id.* at 761–63. Citing *Matter of S-K-*, 23 I&N Dec. at 941, the Board explained that the later enactment of the discretionary-waiver provision demonstrates that Congress intended the waiver to “balanc[e] the harsh provisions of the material support bar” and that the “omission of ameliorative provisions in section 212(a)(3)(B) of the Act was intentional.” *Id.* at

762. That Congress “decide[d] to provide a waiver, but to allow no exception for involuntariness or duress,” the Board reasoned, “should therefore be given deference.” *Id.* at 762–63; accord *Annachamy*, 733 F.3d at 261–62.

In the Board’s view, later developments concerning discretionary waivers of the terrorism bar further confirm that Congress did not intend an exception for material support provided under duress. See *Matter of M-H-Z-*, 26 I&N Dec. at 761 n.4. In 2007, the Secretary of Homeland Security exercised the discretion to waive the terrorism bar “with respect to material support provided under duress.” Exercise of Authority Under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act, 72 Fed. Reg. 2613802 (May 8, 2007); Exercise of Authority Under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act, 72 Fed. Reg. 995801 (Mar. 6, 2007). The next year, Congress acted through the Consolidated Appropriations Act, 2008, to bar individuals who voluntarily provided material support from receiving a waiver and to require the Secretary of Homeland Security to report to Congress annually regarding discretionary waivers for individuals who provided material support under duress. See § 691(a), (e), 121 Stat. 1844. This legislation, the Board reasoned, further reveals Congress’s “ability to distinguish between voluntary and involuntary conduct” and its intent that the terrorism bar apply to material support provided under duress. See *Matter of M-H-Z-*, 26 I&N Dec. at 761 n.4; accord *Sesay*, 787 F.3d at 223–24; *Annachamy*, 733 F.3d at 264; *Alturo*, 716 F.3d at 1314; *Barahona*, 691 F.3d at 354–55.

After rejecting an implied duress exception as a matter of statutory interpretation, the Board dispatched two policy arguments that the respondent had presented in support of inferring a duress exception. First, the Board disagreed with the view that declining to read a duress exception into the material-support bar “would necessarily lead to results that are inconsistent with our treaty obligations, including the duty of nonrefoulement.” *Matter of M-H-Z-*, 26 I&N Dec. at 763. Citing the Ninth Circuit’s reasoning in *Annachamy*, 733 F.3d at 266, the Board explained that “under international law, Congress is free to decide that an alien who provided material support to a terrorist organization, even if under duress, is a danger to the security of the United States.” 26 I&N Dec. at 763 (internal quotation marks omitted); see also *Khan*, 584 F.3d at 783–84. Second, the Board



rejected the contention that duress must be a defense to the material-support bar given that it is a defense to criminal culpability, noting that immigration proceedings are “civil in nature”—not criminal—and “even in criminal cases, duress is not always a defense.” *Matter of M-H-Z-*, 26 I&N Dec. at 763–64; *accord Annachamy*, 733 F.3d at 260 n.6.

## Conclusion

Although most courts of appeals have not yet weighed in on exceptions to the terrorism bar for opposition to repressive regimes and material support provided under duress, the unanimity thus far suggests that the remaining circuits may likewise reject these defenses. The upshot of the Board and appellate courts’ decisions is that, aside from deferral of removal under the Convention Against Torture, a discretionary waiver is the singular recourse for individuals subject to the bar because of their opposition to repressive regimes or involuntary provision of material support for terrorists. *See, e.g., Matter of M-H-Z-*, 26 I&N Dec. at 762; *Matter of S-K-*, 23 I&N Dec. at 942. In light of the recent uptick in group-based waivers—the Secretary of Homeland Security exempted 21 Burmese groups earlier this year—perhaps further discretionary waivers for “freedom fighters” are forthcoming.<sup>13</sup> Observers may also want to watch for changes to the process for obtaining a waiver given several courts’ questions regarding the efficacy of the current system. *See, e.g., Ay*, 743 F.3d at 321; *FH-T v. Holder*, 743 F.3d 1077 (7th Cir. 2014) (Wood, J., dissenting from the denial of rehearing en banc); *Khan*, 584 F.3d at 786–88 (Nelson, J., concurring); *see also Sesay*, 787 F.3d at 223 n.7; *Annachamy*, 733 F.3d at 263 n.9.

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1. Other proposed defenses to the terrorism bar include the following: Material support does not include support that is “de minimis,” *see Sesay v. Att’y Gen. of U.S.*, 787 F.3d 215, 221–22 (3d Cir. 2015); *Haile v. Holder*, 658 F.3d 1122, 1128–29 (9th Cir. 2011); *Matter of S-K-*, 23 I&N Dec. 936, 944–46 (BIA 2006), or that is in furtherance of nonviolent activities, *see Hussain v. Mukasey*, 518 F.3d 534, 538–39 (7th Cir. 2008); *Singh-Kaur v. Ashcroft*, 385 F.3d 293, 301–13 (3d Cir. 2004) (Fisher, J., dissenting); *Matter of S-K-*, 23 I&N Dec. at 942–44; *see also Hosseini v. Johnson*, 826 F.3d 354, 357 (6th Cir. 2016); *Humanitarian Law Project v. U.S.*

*Treasury Dept.*, 578 F.3d 1133, 1148 n.14 (9th Cir. 2009); group members’ unauthorized commission of terrorist activity does not make a group a terrorist organization, *see Khan v. Holder*, 766 F.3d 689, 699–701 (7th Cir. 2014); and whether conduct is “unlawful” and therefore constitutes terrorist activity depends on “the law of the newly independent nation,” as opposed to “the laws of the oppressor nation,” *see FH-T v. Holder*, 723 F.3d 833, 839–41 (7th Cir. 2013). In addition, a recent article in the *Immigration Law Advisor* examines whether an immigration judge’s decision not to apply the terrorism bar may have a collateral estoppel effect on proceedings before U.S. Citizenship and Immigration Services. *See* Denise Bell, “Tier III Terrorist Organizations: The Role of the Immigration Court in Making a Terrorist Determination,” *Immigration Law Advisor*, Vol. 10, No. 5 (July 2016), at 10.

2. *See* Bell, *supra* note 1; Patricia Allen, “Let’s Talk ‘TRIG’: Litigation in the Federal Courts on the Terrorism-related Inadmissibility Grounds,” *Immigration Law Advisor*, Vol. 7, No. 9 (Nov.–Dec. 2013); Lisa Yu, “Differentiating the Material Support and Persecutor Bars in Asylum Claims,” *Immigration Law Advisor*, Vol. 3, No. 2 (Feb. 2009); Lisa Yu, “New Developments on the Terrorism-Related Inadmissibility Ground Exemptions,” *Immigration Law Advisor*, Vol. 2, No. 12 (Dec. 2008); 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).

3. The bar renders an applicant ineligible for asylum under section 208(b)(2)(A)(v) of the Act, 8 U.S.C. § 1158(b)(2)(A)(v); withholding of removal under both section 241(b)(3)(B) of the Act, 8 U.S.C. § 1231(b)(3)(B), and the United Nations Convention Against Torture, *see* 8 C.F.R. § 1208.16(d)(2); cancellation of removal under section 240A(c)(4) of the Act, 8 U.S.C. § 1229b(c)(4); and special rule cancellation of removal under the Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105100, § 203, 111 Stat. 2160 (1997), *see* 8 C.F.R. § 1240.66(b)(1).

4. Article 3 of the Geneva Conventions concerns “armed conflict not of an international character.” *E.g.*, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 3, Aug. 12, 1949, 6 U.S.T. 3516.

5. *See also* Alberty, *supra* note 2, at 4 (discussing the decision’s continuing precedential effect after *Matter of S-K-*, 24 I&N Dec. 289 (A.G. 2007) (“*Matter of S-K- II*”) and *Matter of SK*, 24 I&N Dec. 475 (BIA 2008) (“*Matter of S-K- III*”).

6. Notably, the Ninth Circuit granted the petition for review in *Zumel* and remanded the matter to the Board for application of the appropriate standard of review as well as an explanation concerning



how the Immigration Judge had clearly erred in finding that the coup participants lacked the requisite “intent to endanger.” 803 F.3d at 476.

7. To a great extent, the CNF no longer qualifies as a terrorist organization in light of the Consolidated Appropriations Act, 2008, which exempted the group, among others, from “be[ing] considered to be a terrorist organization” based on prior acts or events. Pub. L. No. 110–161, § 691(b), 121 Stat. 1844; *see also Matter of S-K- III*, 24 I&N Dec. at 476–78. In addition, the Secretary of Homeland Security has waived almost every application of the terrorism bar with respect to the CNF. *See* Exercise of Authority Under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act, 73 Fed. Reg. 34772-02 (June 18, 2008); Exercise of Authority Under Sec. 212(d)(3)(B)(i) of the Immigration and Nationality Act, 72 Fed. Reg. 9957-01 (Mar. 6, 2007); *see also Matter of S-K- III*, 24 I&N Dec. at 476; *Matter of S-K- II*, 24 I&N Dec. at 290.

8. *See* Bell, *supra* note 1, at 4.

9. *See* Alberty, *supra* note 2, at 3–5; *see also* Allen, *supra* note 2, at 2; Yu, “Differentiating the Material Support and Persecutor Bars in Asylum Claims,” *supra* note 2, at 5; Yu, “New Developments on the Terrorism-Related Inadmissibility Ground Exemptions,” *supra* note 2, at 2–3.

10. *See, e.g.*, Terrorism-Related Inadmissibility Grounds (TRIG)–Group-Based Exemptions, U.S. Citizenship and Immigration Services, <https://www.uscis.gov/unassigned/terrorism-related-inadmissibility-grounds-trig-group-based-exemptions> (last updated June 16, 2016); *see also* Terrorism-Related Inadmissibility Grounds (TRIG), U.S. Citizenship and Immigration Services, <https://www.uscis.gov/laws/terrorism-related-inadmissibility-grounds/terrorism-related-inadmissibility-grounds-trig> (last updated Mar. 28, 2016).

11. *See* Exercises of Authority Under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act, 73 Fed. Reg. 34770-03, 34771-01, 34772-01, 34772-02, 34773-01, 34774-01, 34774-02, 34775-01, 34776-01, 34776-02 (June 18, 2008).

12. *See* Exercise of Authority under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act, 81 Fed. Reg. 21891-01 (Apr. 13, 2016); Exercise of Authority Under the Immigration and Nationality Act, 78 Fed. Reg. 66036-02, 66037-01 (Nov. 4, 2013); Exercise of Authority Under the Immigration and Nationality Act, 78 Fed. Reg. 24225-01, 24225-02 (Apr. 24, 2013); Exercise of Authority Under the Immigration and Nationality Act, 77 Fed. Reg. 51545-02 (Aug. 24, 2012); Exercise of Authority Under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act, 77 Fed. Reg. 41795-01 (July 16, 2012); Exercise of Authority Under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act, 76 Fed. Reg. 2130-02, 2131-01 (Jan. 12, 2011).

13. *See* Exercise of Authority Under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act, 81 Fed. Reg. 21891-01 (Apr. 13, 2016); Policy Memorandum, U.S. Citizenship and Immigration Services, Implementation of the Discretionary Exemption Authority Under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act for Certain Burmese Groups (June 2, 2016), [https://www.uscis.gov/sites/default/files/USCIS/Laws/TRIG/APPROVED\\_2016-0602\\_Certain\\_Burmese\\_Groups\\_Implementation\\_PM.pdf](https://www.uscis.gov/sites/default/files/USCIS/Laws/TRIG/APPROVED_2016-0602_Certain_Burmese_Groups_Implementation_PM.pdf).

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