

CRS Report for Congress

Immigration: Terrorist Grounds for Exclusion and Removal of Aliens

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Summary

The Immigration and Nationality Act (INA) spells out a strict set of admissions criteria and exclusion rules for all foreign nationals who come permanently to the United States as immigrants (i.e., legal permanent residents) or temporarily as nonimmigrants. Notably, any alien who engages in terrorist activity, or is a representative or member of a designated foreign terrorist organization, is generally inadmissible. After the September 11, 2001, terrorist attacks, the INA was broadened to deny entry to representatives of groups that endorse terrorism, prominent individuals who endorse terrorism, and (in certain circumstances) spouses and children of aliens who are removable on terrorism grounds. The INA also contains grounds for inadmissibility based on foreign policy concerns.

The report of the National Commission on Terrorist Attacks Upon the United States (also known as the 9/11 Commission) concluded that the key officials responsible for determining alien admissions (consular officers abroad and immigration inspectors in the United States) were not considered full partners in counterterrorism efforts prior to September 11, 2001, and as a result, opportunities to intercept the September 11 terrorists were missed. The 9/11 Commission's monograph, *9/11 and Terrorist Travel*, underscored the importance of the border security functions of immigration law and policy.

This report opens with an overview of the grounds for inadmissibility and summarizes key legislation enacted in recent years. The section on current law explains the legal definitions of "terrorist activity," "engage in terrorist activity," and "terrorist organization," and describes the terrorism-related grounds for inadmissibility and removal.

Immigration reform is an issue in the 110th Congress, and some legislative proposals contain provisions modifying the terrorism-related grounds for inadmissibility and removal, as well as the impact that these grounds have upon alien eligibility for relief from removal. Both the House- and Senate-passed versions of H.R. 2764, the Department of State, Foreign Operations, and Related Programs Appropriations Act, FY2008, contain provisions that would modify certain terrorism-related provisions of the INA, including by exempting certain groups from inclusion under the INA's definition of "terrorist organization."

For legislative analysis of related issues, see CRS Report RL32754, *Immigration: Analysis of the REAL ID Act of 2005*; CRS Report RL32399, *Border Security: Inspections Practices, Policies and Issues*; CRS Report RL32621, *U.S. Immigration Policy on Asylum Seekers*; CRS Report RL32234, *U.S. Visitor and Immigrant Status Indicator Technology Program (US-VISIT)*; and CRS Report RL31512, *Visa Issuances: Policy, Issues, and Legislation*. This report will be updated as events require.

Contents

Introduction	1
Overview of Terrorist Exclusion	2
Grounds for Inadmissibility	2
Key Legislation	3
Current Law	4
Definitions of Terror-Related Terms in the INA	4
Definition of “Terrorist Activity” under the INA	5
Definition of “Terrorist Organization” Under the INA	6
Definition of “Engage in Terrorist Activity” under the INA	7
Terrorism-Related Grounds for Inadmissibility or Deportation	
Under Immigration Law	9
Grounds for Inadmissibility and Deportability	9
Waiver over Inadmissibility Provisions Concerning Representing	
a Terrorist Group or Espousing Terrorist Activity	11
Security-Related and Foreign Policy Grounds for Deeming	
an Alien Inadmissible	11
Screening Aliens for Admissibility	12
Visa Issuance	12
Terrorist Screening	13
Controlled Technologies	13
Biometric Visas	14
Terrorist Travel	14
Admissibility at Ports of Entry	15
Border Inspections	15
US-VISIT	16
Pre-inspection	16
Expedited Removal under INA § 235(c)	17
Recent Legislative Developments	17

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Introduction

In the years following the September 11, 2001, terrorist attacks, considerable concern has been raised because the 19 terrorists were aliens (i.e., foreign nationals) who apparently entered the United States on temporary visas despite provisions in immigration law intended to bar the admission of suspected terrorists. The report of the National Commission on Terrorist Attacks Upon the United States (also known as the 9/11 Commission) contended that “(t)here were opportunities for intelligence and law enforcement to exploit al Qaeda’s travel vulnerabilities.” The 9/11 Commission maintained that border security was not considered a national security matter prior to September 11, and as a result the consular and immigration officers were not treated as full partners in counterterrorism efforts.¹ The 9/11 Commission’s monograph, *9/11 and Terrorist Travel*, underscored the importance of the border security functions of immigration law and policy.²

In the 108th Congress, several proposals were introduced in response to the 9/11 Commission’s findings, some of which contained provisions relating to border security,³ most notably the Intelligence Reform and Terrorism Prevention Act of 2004 (P.L. 108-458). In the 109th Congress, the REAL ID Act of 2005 (P.L. 109-13, Division B) included, among other things, a number of provisions related to immigration reform and document security that were considered during congressional deliberations on the Intelligence Reform and Terrorism Prevention Act, but which were ultimately not included.⁴

Under current law, three departments — the Department of State (DOS), the Department of Homeland Security (DHS) and the Department of Justice (DOJ) —

¹ H.R. 418 National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report*, Executive Summary, at 14 (July 2004).

² National Commission on Terrorist Attacks Upon the United States, *9/11 and Terrorist Travel* (August 2004).

³ For further analysis, see CRS Report RL32616, *9/11 Commission: Current Legislative Proposals for U.S. Immigration Law and Policy*, by Michael John Garcia and Ruth Ellen Wasem.

⁴ For a detailed analysis of the REAL ID Act, see CRS Report RL32754, *Immigration: Analysis of the REAL ID Act of 2005*, by Michael John Garcia, Margaret Mikyung Lee, and Todd Tatelman.

play key roles in administering the law and policies on the admission of aliens.⁵ DOS's Bureau of Consular Affairs (Consular Affairs) is the agency responsible for issuing visas, DHS's Citizenship and Immigration Services (USCIS) is charged with approving immigrant petitions, and DHS's Bureau of Customs and Border Protection (CBP) is tasked with inspecting all people who enter the United States. DOJ's Executive Office for Immigration Review (EOIR) has a significant policy role through its adjudicatory decisions on specific immigration cases.

This report focuses on the terrorism-related grounds for inadmissibility and deportation/removal. It opens with an overview of the terror-related grounds as they evolved through key legislation enacted in recent years. The section on current law explains the legal definitions of "terrorist activity," "engage in terrorist activity," and "terrorist organization," and describes the terror-related grounds for inadmissibility and removal. The report then discusses the alien screening process to determine admissibility and to identify possible terrorists, both during the visa issuance process abroad and the inspections process at U.S. ports of entry.

Overview of Terrorist Exclusion

Grounds for Inadmissibility

With certain exceptions,⁶ aliens seeking admission to the United States must undergo separate reviews performed by DOS consular officers abroad and CBP inspectors upon entry to the United States.⁷ These reviews are intended to ensure that applicants are not ineligible for visas or admission under the grounds for inadmissibility spelled out in the Immigration and Nationality Act (INA).⁸ These criteria are

- health-related grounds;
- criminal history;⁹
- security and terrorist concerns;

⁵ Other departments, notably the Department of Labor (DOL) and the Department of Agriculture (USDA), play roles in the approval process depending on the category or type of visa sought, and the Department of Health and Human Services (HHS) sets policy on the health-related grounds for inadmissibility.

⁶ Certain classes of aliens are not required to obtain a visa to enter the United States and are therefore exempt from the consular review process. For example, under the visa waiver program (VWP), nationals from certain countries are permitted to enter the United States as temporary visitors (nonimmigrants) for business or pleasure without first obtaining a visa from a U.S. consulate abroad. See INA § 217; 8 U.S.C. § 1187. For additional background on the VWP, see CRS Report RL32221, *Visa Waiver Program*, by Alison Siskin.

⁷ For background and analysis of alien screening and visa issuance policy, see CRS Report RL31512, *Visa Issuances: Policy, Issues, and Legislation*, by Ruth Ellen Wasem.

⁸ INA § 212(a); 8 U.S.C. § 1182(a).

⁹ For a full discussion of this ground, see CRS Report RL32480, *Immigration Consequences of Criminal Activity*, by Michael John Garcia.

- public charge (e.g., indigence);
- seeking to work without proper labor certification;
- illegal entry and immigration law violations;
- ineligible for citizenship; and
- aliens previously removed.

Some grounds for inadmissibility may be waived or are not applicable in the case of nonimmigrants, refugees (e.g., public charge),¹⁰ and other aliens. For aliens seeking to enter temporarily as nonimmigrants, even the terrorism grounds for inadmissibility may possibly be waived for aliens who do not pose an immediate danger.¹¹ As the terrorism grounds broadened from active and former terrorists to representatives of terrorist organizations to members and supporters of terrorist organizations to those who may have endorsed or espoused terrorism at one time, many believed it was appropriate to at least leave open the possibility of a waiver to allow temporary admission for limited purposes and subject to strict controls.¹²

Key Legislation

Prior to the Immigration Act of 1990 (P.L. 101-649), there was no express terrorism-related ground for exclusion. Congress added the terrorism ground in the 1990 Act as part of a broader effort to streamline and modernize the security and foreign policy grounds for inadmissibility and removal. Before 1990, certain terrorists were excludable under security grounds, but the 1990 Act opened the door for broader elaboration of what associations and promotional activities could be deemed to be terrorist activities. In part as a response to the 1993 World Trade Center bombing, Congress strengthened the anti-terrorism provisions in the INA and passed provisions that many maintained would ramp up enforcement activities, notably in the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996 (P.L. 104-208) and the Antiterrorism and Effective Death Penalty Act (P.L. 104-132). As part of the Violent Crime Control Act of 1994 (P.L. 103-322), Congress also amended the INA to establish temporary authority for an “S” nonimmigrant visa category for aliens who are witnesses and informants on criminal and terrorist activities. In September 2001, Congress enacted S. 1424 (P.L. 107-45), providing permanent authority for admission under the S visa.¹³

¹⁰ All family-based immigrants and employment-based immigrants who are sponsored by a relative must have binding affidavits of support signed by U.S. sponsors in order to show that they will not become public charges.

¹¹ INA § 212(d)(3); 8 U.S.C. § 1182(d)(3).

¹² See, e.g., *International Terrorism: Threats and Responses, Hearings on H.R. 1710, the Comprehensive Antiterrorism Act of 1995, Before the House Comm. on the Judiciary*, 104th Cong., 1st Sess., 243-244 (1995) (testimony of Jamie S. Gorelick, Deputy Attorney General) (while strongly endorsing greater antiterrorism authority, also observing that it might be in our interest to allow a member of a terrorist organization to enter in some circumstances). Controversy has especially arisen from time-to-time on whether to waive terrorism inadmissibility for certain Palestinians.

¹³ CRS Report RS21043, *Immigration: S Visas for Criminal and Terrorist Informants*, by Karma Ester.

Enacted in October 2001, the USA PATRIOT Act (P.L. 107-56) was a broad anti-terrorism measure that included several important changes to immigration law. Specifically in the context of this report, the USA PATRIOT Act amended the INA to expand the definition of “terrorism” and amend the criteria and process for designating “terrorist organizations.”

The Enhanced Border Security and Visa Entry Reform Act of 2002 (P.L. 107-173) aimed to improve the visa issuance process abroad as well as immigration inspections at the border. It expressly required the development of an interoperable electronic data system to share information relevant to alien admissibility and removability and the implementation of an integrated entry-exit data system. It also required that, beginning in October 2004, all newly issued visas have biometric identifiers. In addition to increasing consular officers’ access to electronic information needed for alien screening, it expanded the training requirements for consular officers who issue visas.¹⁴

The Intelligence Reform and Terrorism Prevention Act of 2004 (P.L. 108-458) focused primarily on targeting terrorist travel through an intelligence and security strategy based on reliable identification systems and effective, integrated information-sharing. Its immigration provisions aimed at closer monitoring of persons entering and leaving the United States as well as tightening up the grounds for removal. It also authorized a substantial increase in funding for immigration-related homeland security.

The REAL ID Act represented a continuation in the trend to expand the terror-related grounds for exclusion and removal. Of particular relevance to this report, the REAL ID Act expanded the terror-related grounds for inadmissibility and deportability, and amended the definitions of “terrorist organization” and “engage in terrorist activity” used by the INA.

Current Law

Since 1990, certain “terrorism”-related activities by an alien have expressly been grounds for exclusion and removal. Many of the terrorism-related grounds for inadmissibility and deportation use certain terms — i.e., “terrorist activity,” “engage in terrorist activity,” and “terrorist organization” — that are expressly defined by the INA to describe particular kinds of conduct or entities. The following sections provide an overview of the terrorism-related terms defined by the INA, as well as the terrorism-related grounds for inadmissibility and deportation.

Definitions of Terror-Related Terms in the INA

Terms including “terrorist activity,” “engage in terrorist activity,” and “terrorist organization” are specifically defined for INA purposes and refer to distinct concepts. As these definitions change, so too does the scope of INA provisions that use them.

¹⁴ CRS Report RS21438, *Immigration Legislation Enacted in the 107th Congress*, by Andorra Bruno.

The term “terrorist activity” refers to certain, specified acts of violence — for example, hijacking an airplane or assassinating a Head of State. “Engaging in terrorist activity” includes both the commission of direct acts of terrorism and certain activities in support of them — for example, soliciting participation in a terrorist act. The INA defines “terrorist organization” to include two general categories of groups. The first category are those groups that are designated as terrorist organizations by the United States, thereby providing public notice of these organizations’ involvement in terrorism. The second category includes other groups that carry out terror-related activities, but have not been designated either because they are operating under the radar or have shifting alliances, or designating the group as a terrorist organization would jeopardize ongoing U.S. criminal or military operations. The groups belonging to this second category may be called non-designated terrorist organizations.

The terms “engage in terrorist activity” and “terrorist organization” were amended by the REAL ID Act to cast a wider net over groups and persons who provide more discrete forms of assistance to terrorist organizations, particularly with respect to fund-raising and soliciting membership in those organizations. This section will discuss the meaning of these terms as they relate to immigration matters.

Definition of “Terrorist Activity” under the INA. “Terrorist activity” is defined by INA § 212(a)(3)(B). In order for an action to constitute “terrorist activity,” it must be unlawful in the place where it was committed and involve:

- the hijacking or sabotage of an aircraft, vessel, or other vehicle;
- seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained;
- a violent attack upon an internationally protected person (e.g., Head of State, Foreign Minister, or ambassador);¹⁵
- an assassination;
- the use of any biological agent, chemical agent, or nuclear weapon or device;
- the use of any explosive, firearm, or other weapon or dangerous device (*other than for mere personal monetary gain*), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property; or

¹⁵ “Internationally protected person” is defined under U.S. law as “(A) a Chief of State or the political equivalent, head of government, or Foreign Minister whenever such person is in a country other than his own and any member of his family accompanying him; or (B) any other representative, officer, employee, or agent of the United States Government, a foreign government, or international organization who at the time and place concerned is entitled pursuant to international law to special protection against attack upon his person, freedom, or dignity, and any member of his family then forming part of his household.” 18 U.S.C. § 1116(b)(4).

- a threat, attempt, or conspiracy to commit any of the foregoing.¹⁶

Definition of “Terrorist Organization” Under the INA. The REAL ID Act expanded the INA’s definition of “terrorist organization” to include a broader range of groups that provide indirect assistance to other groups involved in terrorist activities. Further, the INA’s definition of “terrorist organization” now covers entities that have not directly engaged in terrorist activities or assisted terrorist organizations, but have *subgroups* that do so. For purposes of the INA, a “terrorist organization” may describe groups falling into one of three categories (“Tiers”):

- any group designated by the Secretary of State as a terrorist organization pursuant to INA § 219, on account of that entity threatening the security of U.S. nationals or the national security of the United States (“Tier I”);¹⁷
- upon publication in the *Federal Register*, any group designated as a terrorist organization by the Secretary of State in consultation with or upon the request of the Attorney General, after finding that the organization engages in any activity that is considered “engage[ment] in terrorist activity,” as defined under INA § 212(a)(3)(B)(iv) (“Tier II”); and
- any group of two or more individuals, whether organized or not, which engages in, or has a subgroup which “engage[s] in terrorist activity,” as defined under INA § 212(a)(3)(B)(iv) (“Tier III”).¹⁸

Waiver of Application of “Terrorist Organization” Definition to Members of Certain Groups. The Secretary of State or Secretary of Homeland Security, following consultation with the other and the Attorney General, may waive the application of this provision with respect to a group that might otherwise constitute a “terrorist organization” solely on account of having a subgroup that has engaged in terrorist activity.¹⁹ They may *not* waive the application of this provision with respect to any group that has itself engaged in conduct defined by the INA as “terrorist activity.”²⁰ Possibly complicating matters further is that the INA defines what constitutes “terrorist activity” broadly, arguably ignoring the context in which activity occurs and whether such activity is supported by the United States. For example, the use of weapons to endanger the safety of persons or cause substantial damage to property (other than for monetary gain) is considered “terrorist activity.” Accordingly, a pro-democracy group engaged in armed conflict against an oppressive regime could potentially be considered a “terrorist organization” under the INA, even

¹⁶ INA § 212(a)(3)(B)(iii); 8 U.S.C. § 1182(a)(3)(B)(iii).

¹⁷ For further discussion, see CRS Report RL32120, *The ‘FTO List’ and Congress: Sanctioning Designated Foreign Terrorist Organizations*, by Audrey Kurth Cronin.

¹⁸ INA § 212(a)(3)(B)(iv); 8 U.S.C. § 1182(a)(3)(B)(iv). The USA PATRIOT ACT previously amended INA § 212 to expand the definition of “terrorist organization” to potentially include terrorist organizations not designated pursuant to INA § 219.

¹⁹ This waiver provision was added by the REAL ID Act.

²⁰ INA § 212(a)(3)(B)(iii).

if the group's activities were supported by the United States, and as a result the persons involved with the group could be inadmissible and ineligible for asylum.²¹

As a result, some have argued that existing waiver authority is not sufficiently flexible. In a September 2006 congressional hearing, a State Department representative testified that

Although Secretarial exercise of the inapplicability authority allows us to make significant progress in reaching some populations in need of resettlement, it does not provide the flexibility required in all refugee cases. For example, Cuban anti-Castro freedom fighters and Vietnamese Montagnards who fought alongside U.S. forces have been found inadmissible on this basis, as have Karen who participated in resistance to brutal attacks on their families and friends by the Burmese regime. The Administration will continue to seek solutions for these groups and to further harmonize national security concerns with the refugee admissions program.²²

Definition of “Engage in Terrorist Activity” under the INA. As discussed previously, the INA treats being “engaged in terrorist activity” as a separate concept from terrorist activity itself. The REAL ID Act amended the definition of “engage in terrorist activity” to cover more indirect forms of support for non-designated terrorist organizations. In order to be “engage[d] in terrorist activity,” an alien must, either as an individual or as part of an organization,

- commit or incite to commit, under circumstances indicating an intention to cause death or serious bodily injury, a terrorist activity;
 - prepare or plan a terrorist activity;
 - gather information on potential targets for terrorist activity;
 - solicit funds or other things of value for (1) terrorist activity, (2) a designated terrorist organization (i.e., a Tier I or Tier II organization), or (3) a non-designated terrorist organization (i.e., a Tier III organization), unless the solicitor can prove by clear and convincing evidence that he did not know, and should not have reasonably known, that the organization was a terrorist organization;
 - solicit another individual to (1) engage in terrorist activity, (2) join a designated terrorist organization (i.e., a Tier I or Tier II organization), or (3) join a non-designated terrorist organization (i.e., a Tier III organization), unless the solicitor can prove by clear and convincing evidence that he did not know, and should not have reasonably known, that the organization was a terrorist organization;
- or

²¹ *See* In re S-K-, 23 I. & N. Dec. 936, 941 (BIA 2006) (“Congress intentionally drafted the terrorist bars to relief very broadly, to include even those people described as ‘freedom fighters,’ and it did not intend to give us discretion to create exceptions for members of organizations to which our Government might be sympathetic.”).

²² Ellen Sauerbrey, Assistant Secretary for the Bureau of Population, Refugees, and Migration, Testimony Before the Senate Judiciary Committee Subcommittee On Immigration, Border Security and Citizenship, September 27, 2006.

- commit an act that the individual knows, or reasonably should know, provides material support to (1) the commission of a terrorist activity, (2) an individual or organization that the individual knows or should reasonably know has committed or plans to commit a terrorist activity, (3) a designated terrorist organization (i.e., a Tier I or Tier II organization) or member of such an organization, or (4) a non-designated terrorist organization (i.e., a Tier III organization) or a member of such an organization, unless the actor can demonstrate by clear and convincing evidence that the actor did not know, and should not reasonably have known, that the organization was a terrorist organization.²³

Waiver of Application of Material Support Provision of “Engage in Terrorist Activity” Definition. An alien who has provided material support to an individual or organization engaging in terrorist activity will not himself be considered to have “engaged in terrorist activity” for purposes of the INA if the Secretary of State or Secretary of Homeland Security, following consultation with the other and the Attorney General, concludes in his sole, unreviewable discretion that the definition of “engage in terrorist activity” does not apply with respect to the alien’s material support.²⁴

This waiver authority has been relied upon by the State Department and DHS to permit the consideration of applications for refugee status from aliens abroad and to consider asylum and adjustment of status claims for certain aliens present in the United States who provided material support to terrorist entities.²⁵ In 2006, the State Department waived the material support provision with respect to three large groups of refugees.²⁶ In 2007, DHS has exercised waiver authority over the material support provision with respect to aliens who gave material support to one of the following eight groups:

- Karen National Union/Karen National Liberation Army (KNU/KNLA);
- Chin National Front/Chin National Army (CNF/CNA);
- Chin National League for Democracy (CNLD);
- Kayan New Land Party (KNLP);
- Arakan Liberation Party (ALP);
- Tibetan Mustangs;

²³ INA § 212(a)(3)(B)(iv); 8 U.S.C. § 1182(a)(3)(B)(iv).

²⁴ INA § 212(d)(3)(B); 8 U.S.C. § 1182(d)(3)(B) (as amended by § 104 of the REAL ID Act).

²⁵ See Dept. of Homeland Security, Press Release, *Statement by Homeland Security Secretary Michael Chertoff on the Intention to Use Discretionary Authority for Material Support to Terrorism*, January 19, 2007, available at [http://www.dhs.gov/xnews/releases/pr_1169465766808.shtm]. Aliens who are inadmissible or deportable on terrorism-related grounds are generally ineligible for asylum. INA § 208(b)(2)(A)(v); 8 U.S.C. § 1158(b)(2)(A)(v).

²⁶ State Department Office of the Spokesman, Press Release, *The Department of State Decides Material Support Inapplicable to Chin Refugees from Burma*, October 19, 2006, available at [<http://www.state.gov/r/pa/prs/ps/2006/74761.htm>].

- Cuban Alzados; or
- Karenni National Progressive Party (KNPP).²⁷

This waiver applies only to aliens who provided material support to these organizations, not to aliens who were members of these groups.

DHS has also opted not to apply the material support provision to persons who provided material support under duress to a terrorist organization, if a totality of the circumstances is deemed to justify the exemption.²⁸ In September 2007, the Secretary of Homeland Security exempted from the material support provision certain persons who provided material support under duress to the Revolutionary Armed Forces of Colombia (FARC).²⁹ The material support provision has been interpreted by immigration authorities as generally covering any support given to a terrorist entity, regardless of whether such support was provided due to duress or coercion.³⁰

Terrorism-Related Grounds for Inadmissibility or Deportation Under Immigration Law

Engaging in specified, terror-related activity has direct consequences concerning an alien's ability to lawfully enter or remain in the United States. The INA provides that aliens engaged in terror-related activities generally cannot legally enter the United States. If an alien is legally admitted into the United States and subsequently engages in terrorist activity, he is deportable. Even if an alien does not fall under terror-related categories making him inadmissible or deportable, he might still be denied entry or removed from the United States on separate, security-related grounds.

Grounds for Inadmissibility and Deportability. The INA categorizes certain classes of aliens as inadmissible, making them “ineligible to receive visas and ineligible to be admitted to the United States.”³¹ Most recently, these grounds were expanded by the REAL ID Act in 2005, including by making activities such as

²⁷ Exercise of Authority Under Sec. 212(d)(3)(B)(i) of the Immigration and Nationality Act, 72 Fed. Reg. 9954 (March 6, 2007).

²⁸ Exercise of Authority Under Sec. 212(d)(3)(B)(i) of the Immigration and Nationality Act 72 Fed. Reg. 9958 (March 6, 2007) (concerning application of material support provision to Tier III organizations); Exercise of Authority Under Sec. 212(d)(3)(B)(i) of the Immigration and Nationality Act 72 Fed. Reg. 26138 (March 6, 2007) (concerning application of material support provision to Tier I and Tier II organizations).

²⁹ U.S. Citizenship and Immigration Services, Fact Sheet, *Uscis Implements Authority to Exempt Certain Persons Who Provided Material Support under Duress to the Revolutionary Armed Forces of Colombia (FARC)*, September 26, 2007, available online at [http://www.uscis.gov/files/pressrelease/MaterialSupportFS_26Sep07.pdf].

³⁰ See Note, *Admission Denied: in Support of a Duress Exception to the Immigration and Nationality Act's "Material Support for Terrorism" Provision*, 20 GEO. IMMIGR. L.J. 437, 458-468 (2006) (discussing decisions by immigration judges interpreting the “material support” provision to cover support given under duress and coercion).

³¹ INA § 212(a); 8 U.S.C. § 1182(a).

espousal of terrorist activity and receipt of military-type training from or on behalf of a terrorist organization grounds for exclusion. The REAL ID Act also amended the terror-related grounds for deportability of aliens who have already entered the United States, so that these grounds are now the same as those for inadmissibility.³² An alien is inadmissible or deportable on terror-related grounds if he

- has engaged in a terrorist activity;
- is known or reasonably believed by a consular officer, the Attorney General, or the Secretary of Homeland Security to be engaged in or likely to engage in terrorist activity upon entry into the United States;
- has, under circumstances indicating an intention to cause death or serious bodily harm, incited terrorist activity;
- is a representative of (1) a designated or non-designated terrorist organization; or (2) any political, social, or other group that endorses or espouses terrorist activity;
- is a member of (1) any designated terrorist organization (i.e., a Tier I or Tier II organization), or (2) any non-designated terrorist organization (i.e., a Tier III organization), unless the alien can demonstrate by clear and convincing evidence that the alien did not know, and should not reasonably have known, that the organization was a terrorist organization;
- is an officer, official, representative, or spokesman of the Palestine Liberation Organization;
- endorses or espouses terrorist activity or persuades others to endorse or espouse terrorist activity or support a terrorist organization;
- is the spouse or child of an alien who is inadmissible on terror-related grounds, if the activity causing the alien to be found inadmissible occurred within the last five years, unless the spouse or child (1) did not and should not have reasonably known about the terrorist activity or (2) in the reasonable belief of the consular officer or Attorney General, has renounced the activity causing the alien to be found inadmissible under this section;³³ or

³² Prior to the enactment of the REAL ID Act, the terrorism-related grounds for deportation were significantly less broad than the terror-related grounds for inadmissibility. Previously, an alien was deportable on terror-related grounds only if he had engaged or was presently engaged in terrorist activity. INA § 237(a)(4)(B); 8 U.S.C. § 1227(a)(4)(B) (2004). Membership in or association with a terrorist organization, the endorsement or espousal of terrorist activity, or being the spouse or child of an alien who was inadmissible to the United States on terror-related grounds did not provide grounds for deporting an alien legally present in the United States, even if such grounds would make an alien seeking to enter the United States statutorily inadmissible.

³³ Due to an apparent drafting error, the exception to the inadmissibility ground concerning the spouse or child of an alien who is inadmissible on terrorism-related grounds does not cross-reference the correct INA provision. *See* INA § 212(a)(3)(B)(ii); 8 U.S.C. § 1182(a)(3)(B)(ii) (citing to INA § 212(a)(3)(B)(i)(VII), which concerns the inadmissibility of aliens who espouse or endorse terrorist activity, rather than INA § 212(a)(3)(B)(i)(IX), which generally makes inadmissible the spouse or child of an alien who is inadmissible on

(continued...)

- has received military-type training, from or on behalf of any organization that, at the time the training was received, was a terrorist organization.³⁴

An additional, catch-all provision of INA § 212(a) provides that association with terrorist organizations may also be grounds for inadmissibility. Any alien who either the Secretary of State or Attorney General, after consultation with the other, determines has been associated with a “terrorist organization and intends while in the United States to engage solely, principally, or incidentally in activities that could endanger the welfare, safety, or security of the United States,” is inadmissible.³⁵ Pursuant to the REAL ID Act, this provision may also be used to remove an alien who has already been legally admitted into the United States.³⁶

Waiver over Inadmissibility Provisions Concerning Representing a Terrorist Group or Espousing Terrorist Activity. The Secretary of State or Secretary of Homeland Security, in consultation with the other and the Attorney General, may waive the inadmissibility of (1) representatives of political, social, or other groups that endorse or espouse terrorist activity and (2) aliens who endorse or espouse terrorist activity, or persuade others to endorse or espouse terrorist activity or support a terrorist organization.³⁷ Only the Secretary of Homeland Security (not the Secretary of State) may exercise waiver authority with respect to an alien after removal proceedings against the alien are instituted.

Although the REAL ID Act provides the Secretary of State and Secretary of Homeland Security with authority to waive certain terrorism-related grounds making an alien inadmissible under INA § 212, no similar waiver authority is expressly provided over the terror-related grounds that make an alien deportable under INA § 237.

Security-Related and Foreign Policy Grounds for Deeming an Alien Inadmissible

Even if an alien is not found inadmissible or deportable on terror-related grounds, he may nevertheless be removed from the United States or denied entry on separate, security-related grounds. An alien may be deemed inadmissible or deportable if he has engaged, is engaged, or (in the case of an alien not yet admitted into the United States) intends to engage in “any activity a purpose of which is the opposition to, or the control or overthrow of, the Government of the United States

³³ (...continued)

terrorism-related grounds). Legislation has been introduced in the 110th Congress to amend this provision to cross-reference the correct INA provision. *See, e.g.*, H.R. 2764 (House- and Senate-passed versions).

³⁴ “Military-type training” is defined under 18 U.S.C. § 2339D(c)(1).

³⁵ INA § 212(a)(3)(F); 8 U.S.C. § 1182(a)(3)(F).

³⁶ INA § 237(a)(4)(B); 8 U.S.C. § 1227(a)(4)(B).

³⁷ INA § 212(d)(3)(B); 8 U.S.C. § 1182(d)(3)(B).

by force, violence, or other unlawful means.”³⁸ In the case of aliens not yet admitted into the United States, either a consular officer or relevant immigration authority may designate an alien inadmissible if he has reasonable grounds to believe that the alien seeks to enter the United States to engage in such conduct.³⁹

Further, if the Secretary of State has reasonable grounds to believe an alien’s entry, presence, or activities in the United States would have potentially serious adverse foreign policy consequences for the United States, that alien may be deemed inadmissible or deportable.⁴⁰ However, an alien may not be deported or denied entry into the United States on account of the alien’s past, current, or expected beliefs, statements, or associations, if such beliefs, statements, or associations would be lawful within the United States, unless the Secretary of State personally determines that the alien’s admission would compromise a compelling United States foreign policy interest.⁴¹ No similar limitation on removal is provided for aliens who are deportable on account of their (1) espousal of terrorist activity or (2) association with a terrorist organization, when such aliens intend while in the United States to engage solely, principally, or incidentally in activities that could endanger the welfare, safety, or security of the United States.

Screening Aliens for Admissibility

Visa Issuance

Personal interviews are required for all prospective legal permanent residents and are generally required for foreign nationals seeking nonimmigrant visas.⁴² Pursuant to the Intelligence Reform and Terrorist Prevention Act of 2004, an in-person consular interview is required for most applicants between the ages of 14 and 79 for nonimmigrant visas. Consular officers use the Consular Consolidated Database (CCD) to screen visa applicants. Over 82 million records of visa applications are now automated in the CCD, with some records dating back to the mid-1990s.⁴³ Since February 2001, the CCD has stored photographs of all visa applicants in electronic form, and more recently the CCD has begun storing finger

³⁸ INA §§ 212(a)(3)(A), 237(a)(3)(A), 8 U.S.C. §§ 1182(a)(3)(A), 1227(a)(3)(A).

³⁹ INA § 212(a)(3)(A); 8 U.S.C. § 1182(a)(3)(A).

⁴⁰ INA § 212(a)(3)(C); 8 U.S.C. § 1182(a)(3)(C).

⁴¹ INA §§ 212(a)(3)(C)(iii), 237(a)(3)(C)(ii); 8 U.S.C. §§ 1182(a)(3)(C)(iii), 1227(a)(3)(C)(ii).

⁴² 22 C.F.R. §42.62. Personal interview waivers may be granted only to children under age 16, persons 60 years or older, diplomats and representatives of international organizations, aliens who are renewing a visa they obtained within the prior 12 months, and individual cases for whom a waiver is warranted for national security or unusual circumstances. 68 Fed. Reg. 40127-40129 (July 7, 2003).

⁴³ According to the Department of State’s Office of Legislative Affairs, consular officers have stored photographs of nonimmigrant visa applicants in an electronic database for over ten years. These data are now in the CCD.

prints of the right and left index fingers. In addition to indicating the outcome of any prior visa application of the alien in the CCD, the system links with other databases to flag problems that may affect the issuance of the visa. The CCD is the nexus for screening aliens for admissibility, notably screening on terrorist security and criminal grounds.⁴⁴

Terrorist Screening. For some years, consular officers have been required to check the background of all aliens in the “lookout” databases, specifically the Consular Lookout and Support System (CLASS) and TIPOFF databases.⁴⁵ In 2003, the Administration announced the creation of the Terrorist Screening Center (TSC) to consolidate the various watchlists into a single terrorist screening database.⁴⁶ There is also the “Terrorist Exclusion List” (TEL) which lists organizations designated as terrorist-supporting and includes the names of individuals associated with these organizations.⁴⁷

Consular officers also send suspect names to the FBI for a name check program called Visa Condor. Visa Condor is part of the broader Security Advisory Opinion (SAO) system that requires a consular officer abroad to refer selected visa cases, identified by law enforcement and intelligence information (originally certain visa applicants from 26 predominantly Muslim countries), for greater review by intelligence and law enforcement agencies.⁴⁸

Controlled Technologies. With procedures distinct from the terrorist watch lists, consular officers screen visa applicants for employment or study that would

⁴⁴ For more on alien screening procedures and policy, see CRS Report RL31512, *Visa Issuances: Policy, Issues, and Legislation*, by Ruth Ellen Wasem.

⁴⁵ CLASS and TIPOFF information provided by Department of State Bureau of Legislative Affairs, e-mail dated September 7, 2004. The State Department’s CLASS and TIPOFF terrorist databases interface with the Interagency Border Inspection System (IBIS) used by the DHS immigration inspectors. For more background, see Testimony of Maura Harty, Assistant Secretary of State for Consular Affairs, National Commission on Terrorist Attacks Upon the United States, *U.S. Government Agencies Aimed at Improving Border Security*, hearing, January 26, 2004.

⁴⁶ Homeland Security Presidential Directive 6 (HSPD-6) ordered the creation of the Terrorist Screening Center (TSC) to consolidate terrorist watch lists. It was issued on September 16, 2003, and directed the operations to begin on December 1, 2003. The TSC is a multi-agency entity, including participants from the FBI, DOS, CBP, Immigration and Customs Enforcement (ICE), Secret Service, Coast Guard, Transportation Security Administration, and the Office of Foreign Assets Control. Its stated goal is “to consolidate the Government’s approach to terrorism screening and provide for the appropriate and lawful use of terrorist information in screening processes.” For more on the TSC, see CRS Report RL32366, *Terrorist Identification, Screening, and Tracking Under Homeland Security Presidential Directive 6*, by William J. Krouse.

⁴⁷ For background and analysis, see CRS Report RL32120, *The ‘FTO List’ and Congress: Sanctioning Designated Foreign Terrorist Organizations*, by Audrey Kurth Cronin.

⁴⁸ U.S. Congress, Senate Committee on Foreign Relations, Subcommittee on International Operations and Terrorism, *The Post 9/11 Visa Reforms and New Technology: Achieving the Necessary Security Improvements in a Global Environment*, hearing, October 23, 2003.

give the foreign national access to controlled technologies, i.e., those that could be used to upgrade military capabilities, and refer foreign nationals from countries of concern (e.g., China, India, Iran, Iraq, North Korea, Pakistan, Sudan, and Syria) to the FBI and other key federal agencies.⁴⁹ This screening is part of a name-check procedure known as Visa Mantis, which has the following stated objectives: (1) stem the proliferation of weapons of mass destruction and missile delivery systems; (2) restrain the development of destabilizing conventional military capabilities in certain regions of the world; (3) prevent the transfer of arms and sensitive dual-use items to terrorist states; and (4) maintain U.S. advantages in certain militarily critical technologies.

Biometric Visas. Aliens who are successful in their request for a visa are then issued the actual travel document.⁵⁰ Since October 2004, all visas issued by the United States use biometric identifiers (e.g., scans of the right and left index fingers) in addition to the digitized photograph that has been collected for some time.⁵¹ These biometric data are available through the CCD to CBP officers at ports of entry as well as to consular officers abroad.

Terrorist Travel. The Intelligence Reform and Terrorist Prevention Act of 2004 established an Office of Visa and Passport Security in the Bureau of Diplomatic Security of the Department of State, headed by a person with the rank of Deputy Assistant Secretary of State for Diplomatic Security. The Deputy Assistant Secretary and appropriate Department of Homeland Security officials are tasked with preparing a strategic plan to target and disrupt individuals and organizations at home and in foreign countries that are involved in the fraudulent production, distribution, or use of visas, passports and other documents used to gain entry to the United States. This strategic plan is to emphasize individuals and organizations that may have links to domestic terrorist organizations or foreign terrorist organizations as defined by INA. The Office also analyzes methods used by terrorists to travel internationally, particularly the use of false or altered travel documents to illegally enter foreign countries and the United States, and it advises the Bureau of Consular Affairs on changes to the visa issuance process that could combat such methods, including the introduction of new technologies.

The Intelligence Reform and Terrorism Prevention Act of 2004 (P.L. 108-458) required the Secretary of DHS, in consultation with the Secretary of State, to submit to Congress a plan to ensure that DHS and DOS acquire and deploy to all consulates, ports of entry, and immigration services offices, technologies that facilitate document authentication and the detection of potential terrorist indicators on travel documents.

⁴⁹ U.S. General Accounting Office, *Export Controls: Department of Commerce Controls Over Transfers of Technology to Foreign Nationals Needs Improvement*, GAO-02-972 (September 2002).

⁵⁰ For a full discussion of biometric visas, see congressional distribution memorandum, *Biometric and Laser Visas: Background and Current Policy*, by Ruth Ellen Wasem, August 19, 2004.

⁵¹ Section 414 of the USA PATRIOT ACT (P.L. 107-56) and Section 303 of the Enhanced Border Security and Visa Reform Act (P.L. 107-173) require that visas and other travel documents contain a biometric identifier and are tamper-resistant.

The law further required that the plan address the feasibility of using such technologies to screen passports submitted for identification purposes to a United States consular, border, or immigration official.

It seems that DHS has never created the terrorist travel program mandated by §7215 of P.L. 108-458. As a consequence, §503 of the Implementing Recommendations of the 9/11 Commission Act of 2007 (P.L. 110-53) requires the Secretary to establish the program within 90 days of enactment and to report to Congress within 180 days on the implementation of the program. The act further requires that the Assistant Secretary for Policy at DHS (or another official that reports directly to the Secretary) be designated as head of the terrorist travel program and outlines specific duties to be carried out by the head of the program.

Admissibility at Ports of Entry

Border Inspections. The INA requires the inspection of all aliens who seek entry into the United States; the possession of a visa or another form of travel document does not guarantee admission into the United States.⁵² Border inspections are extremely important because many foreign nationals enter the United States without visas. Perhaps the most notable exception to the visa is through the Visa Waiver Program (VWP), a provision of the INA that allows the visa requirements to be waived for aliens coming as visitors from selected countries that meet certain standards (e.g., Australia, France, Germany, Italy, Japan, New Zealand, and Switzerland).⁵³ In addition to the VWP, there are exceptions to documentary requirements for a visa that have been established by law, treaty, or regulation — most notably for citizens of Canada.⁵⁴

Primary inspection at the port of entry consists of a brief interview with a CBP officer, a cursory check of the traveler's documents and a query of the Interagency Border Inspection System (IBIS).⁵⁵ If the inspector is suspicious that the traveler may be inadmissible under the INA or in violation of other U.S. laws, the traveler is referred to a secondary inspection. During secondary inspections, travelers are

⁵² For a comprehensive analysis, see CRS Report RL32399, *Border Security: Inspections Practices, Policies, and Issues*, coordinated by Ruth Ellen Wasem with Jennifer Lake, James Monk, Lisa Seghetti, and Stephen Viña.

⁵³ See CRS Report RL32221, *Visa Waiver Program*, by Alison Siskin.

⁵⁴ See CRS Congressional Distribution Memorandum, *Waiving the Documentary Requirements for Visas and Passports to Enter the United States*, by Ruth Ellen Wasem and Andorra Bruno, October 27, 2003.

⁵⁵ IBIS is a broad system that interfaces with the FBI's National Crime Information Center (NCIC), the Treasury Department's Enforcement and Communications System (TECS II), the former INS's National Automated Immigration Lookout System (NAIS) and Non-immigrant Information System (NIIS) and the DOS's Consular Consolidated Database (CCD), Consular Lookout And Support System (CLASS) and TIPOFF terrorist databases. Because of the numerous systems and databases that interface with IBIS, the system is able to obtain such information as whether an alien is admissible, an alien's criminal information, and whether an alien is wanted by law enforcement.

questioned extensively and travel documents are further examined. Several immigration databases are queried as well, including lookout databases.⁵⁶

US-VISIT. Many nonimmigrants are entered into the US-VISIT system that uses biometric identification (i.e., finger scans and digital photographs) to check identity and track presence in the United States. It collects biometric information that is entered into an existing system called Automated Biometric Fingerprint Identification System (IDENT).⁵⁷ On January 5, 2004, US-VISIT was implemented at 115 airports and 14 seaports, and pilot programs were established at one airport and one seaport for the collection of biometric information of aliens leaving the United States.⁵⁸ The Intelligence Reform and Terrorist Prevention Act of 2004 called for a more accelerated implementation of a comprehensive entry and exit data system.

Pre-inspection. To keep inadmissible aliens from departing for the United States, IIRIRA required the implementation of a pre-inspection program at selected locations overseas. At these foreign airports, U.S. immigration officers inspect aliens before their final departure to the United States. IIRIRA also authorized assistance to air carriers at selected foreign airports to help in the detection of fraudulent documents. The Intelligence Reform and Terrorist Prevention Act of 2004 directed DHS to expand the pre-inspection program at foreign airports to at least 15 and up to 25 airports, and submit a report on the progress of the expansion by June 30, 2006. The act also directed DHS to expand the Immigration Security Initiative, which places CBP inspectors at foreign airports to prevent people identified as national security threats from entering the country. The new law requires that at least 50 airports participate in the Immigration Security Initiative by December 31, 2006.

⁵⁶ The Terrorist Screening Center (TSC) is developing a consolidated lookout database that is not yet fully operational. For more on lookout and terrorist screening databases of the TSC, see CRS Report RL32366, *Terrorist Identification, Screening, and Tracking Under Homeland Security Presidential Directive 6*, by William J. Krouse. The National Security Entry-Exit Registry System (NSEERS) and the Student and Exchange Visitor Information System (SEVIS) are also used during secondary inspections. For more on NSEERS, see CRS Report RL31570, *Immigration: Alien Registration*, by Andorra Bruno. For more on SEVIS, see CRS Report RL32188, *Monitoring Foreign Students in the United States: The Student and Exchange Visitor Information System (SEVIS)*, by Alison Siskin.

⁵⁷ The US-VISIT program was established to respond to statutory provisions that require DHS to create an integrated, automated entry and exit data system that (1) uses available data to produce reports on alien arrivals and departures; (2) deploys equipment at all ports of entry to allow for the verification of aliens' identities and the authentication of their travel documents through the comparison of biometric identifiers; and (3) records alien arrival and departure information from biometrically authenticated documents. See CRS Report RL32234, *U.S. Visitor and Immigrant Status Indicator Technology Program (US-VISIT)*, by Lisa M. Seghetti and Stephen R. Viña, for a complete legislative history of the requirements.

⁵⁸ 69 Fed. Reg. 482 (January 5, 2004).

Expedited Removal under INA § 235(c). Pursuant to INA § 235(c), in cases where the arriving alien is *suspected* of being inadmissible on security or related grounds, including terror-related activity, the alien may be summarily excluded by the regional director with no further administrative right to appeal. The Attorney General shall review such orders of removal.⁵⁹ If the Attorney General concludes on the basis of confidential information that the alien is inadmissible on security or related grounds under § 212(a)(3) of the INA, and determines after consulting with appropriate U.S. security agencies that disclosure of such information would be prejudicial to the public interest, safety, or security, the regional director of the CBP is authorized to deny any further inquiry as to the alien’s status and either order the alien removed or order disposal of the case as the director deems appropriate.⁶⁰

Generally, an alien’s removal to a particular country is withheld upon a showing that his life or freedom would be threatened in that country because of his race, religion, nationality, membership in a particular social group, or political opinion.⁶¹ However, an alien is, with limited exception, ineligible for this remedy if, *inter alia*, he has been convicted of an aggravated felony or “there are reasonable grounds to believe that the alien is a danger to the security of the United States.”⁶² Pursuant to U.S. legislation implementing the U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), all aliens — including those otherwise ineligible for withholding of removal and/or subject to expedited removal on security or related grounds such as terror-related activity — may not be removed to a country where they are “more likely than not to be tortured.”⁶³

Recent Legislative Developments

Immigration reform is an issue in the 110th Congress, and some legislative proposals would modify the terrorism-related grounds for inadmissibility and removal. Whereas legislative proposals introduced early in the 110th Congress would have expanded the scope of terrorism-related activity having immigration consequences,⁶⁴ more recent proposals receiving significant attention would narrow the application of the INA’s terrorism-related provisions.

⁵⁹ INA § 235(c)(2)(A); 8 U.S.C. § 1225(c)(2)(A).

⁶⁰ See 8 C.F.R. § 235.8(b)(1).

⁶¹ INA § 241(b)(3); 8 U.S.C. § 1231(b)(3).

⁶² INA § 241(b)(3)(B); 8 U.S.C. § 1231(b)(3)(B).

⁶³ Foreign Affairs Reform and Restructuring Act, P.L. 105-277, § 2242. For further discussion, see CRS Report RL32276, *The U.N. Convention Against Torture: Overview of U.S. Implementation Policy Concerning the Removal of Aliens*, by Michael John Garcia.

⁶⁴ See, e.g., S. 1348 (as introduced) (making aliens described in the terrorism-related grounds for inadmissibility and deportability ineligible for various immigration benefits and types of relief from removal).

Both the House- and Senate-passed versions of H.R. 2764, the Department of State, Foreign Operations, and Related Programs Appropriations Act, FY2008, contain provisions that would modify certain terrorism-related provisions of the INA. The House-passed version of H.R. 2764 would expressly provide that the Hmong and Montagnards — groups that assisted the United States during the Vietnam conflict — would not be considered “terrorist organizations” on the basis of any act or event occurring in or before 1975, meaning that persons would not face immigration consequences on account of their membership in such groups. The Senate-passed version of H.R. 2764 would not only exempt from the Hmong and Montagnards from being considered “terrorist organizations” (on the basis of any act occurring on or prior to the date of the bill’s enactment) but also eight other groups:

- the Karen National Union/Karen National 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 Tibetan Mustangs;
- the Cuban Alzados; and
- the Karenni National Progressive Party (KNPP).

Although immigration authorities previously waived the application of the INA’s “material support” provision to persons who provided *assistance* to these eight groups, *members* of these organizations could still face immigration consequences on account of belonging to groups considered “terrorist organizations” under the INA.⁶⁵

The Senate-passed version of H.R. 2764 would expand waiver authority concerning the application of certain terrorism-related provisions of the INA. Appropriate immigration authorities could waive application of the application of the INA’s “terrorist organization” definition to any non-designated (i.e., Tier III) group, except when the group has either engaged in terrorist activity against the United States or another democratic country, or purposefully engaged in a pattern of terrorist activity against civilians. Additionally, immigration authorities would be authorized to waive many of the terrorism-related grounds of inadmissibility. However, authorities would not be permitted to waive inadmissibility grounds covering aliens who

- engage or have engaged in terrorist activity;
- have received military training from a designated (i.e., Tier I or Tier II) terrorist organization;
- are members or representatives of Tier I or Tier II organizations; or
- endorse or espouse the terrorist activity of a Tier I or Tier II organization, or convince others to support the group’s terrorist activities.

⁶⁵ See *supra* at 6-7 (discussing INA’s definition of “terrorist organization,” and its potential application to groups supported by the United States).

The Senate-passed version of H.R. 2764 would also expressly designate the Taliban as a terrorist organization, and require the Secretary of Homeland Security to provide the House and Senate Committees on the Judiciary with reports regarding the issuance of waivers to aliens who provided material support to terrorist entities under duress.⁶⁶

⁶⁶ Both the House- and Senate passed versions of H.R. 2764 would also make a technical correction to INA § 212(a)(3)(B)(ii). *See supra* note 33.