



July 5, 2012

PM-602-0068

Policy Memorandum

SUBJECT: Implementation of New Discretionary Exemption Under Immigration and Nationality Act (INA) Section 212(d)(3)(B)(i) for Activities and Associations Relating to the Kosovo Liberation Army (KLA)

Purpose

On June 4, 2012, following consultation with the Secretary of State and the Attorney General, the Secretary of Homeland Security (the Secretary) exercised her discretionary authority not to apply the following terrorism-related inadmissibility grounds to certain aliens for voluntary activities or associations relating to the Kosovo Liberation Army (KLA):

- Soliciting funds or other things of value for;
- Soliciting any individuals for membership in;
- Providing material support to; or
- Receiving military-type training from or on behalf of the KLA.¹

See Attachment 1. This document guides U.S. Citizenship and Immigration Services (USCIS) adjudicators on implementation of the Secretary's exemption.²

Scope

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

Authority

INA section 212(d)(3)(B)(i)

¹ This exemption expressly does not apply to persons whom a USCIS officer knows, or has reasonable grounds to believe, is engaged in or is likely to engage after entry in any terrorist activity. INA section 212(a)(3)(B)(i)(II).

² This document supplements existing guidance on terrorism-related inadmissibility grounds, including Jonathan Scharfen, Deputy Director, USCIS, "Processing the Discretionary Exemption to the Inadmissibility Ground for Providing Material Support to Certain Terrorist Organizations," May 24, 2007; Michael L. Aytes, Acting Deputy Director, USCIS, "Implementation of Section 691 of Division J of the Consolidated Appropriations Act, 2008, and Updated Processing Requirements for Discretionary Exemptions to Terrorist Activity Inadmissibility Grounds," July 28, 2008; Michael Aytes, Acting Deputy Director, USCIS, "Revised Guidance on the Adjudication of Cases Involving Terrorist-Related Inadmissibility Grounds and Amendment to the Hold Policy for such Cases," February 13, 2009; and PM-602-0051, "Revised Guidance on the Adjudication of Cases Involving Terrorism-Related Inadmissibility Grounds (TRIG) and Further Amendment to the Hold Policy for Such Cases," November 21, 2011.

Background

INA section 212(a)(3)(B) renders inadmissible an alien who engages in terrorist activity and also defines acts and associations that constitute engagement in terrorist activity. However, INA section 212(d)(3)(B)(i) authorizes the Secretary to exempt certain terrorism-related inadmissibility grounds. On June 4, 2012, the Secretary issued an exemption that authorizes USCIS, in consultation with Immigration and Customs Enforcement (ICE), not to apply certain terrorism-related inadmissibility grounds to aliens having activities or associations with the KLA. These grounds are: (1) solicitation of funds or individuals for the KLA; (2) receipt of military-type training from or on behalf of the KLA; and, (3) material support to the KLA. This exemption may be applied to immigration benefits and protection applications under the INA, including, but not limited to, asylum, refugee status, adjustment of status, and asylee and refugee following-to-join petitions. USCIS will consider an exemption only if the threshold requirements, listed below and in the Secretary's Exercise of Authority, are met.

Policy

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

Implementation

I. Identifying Individuals Subject to Terrorism-Related Inadmissibility Grounds (TRIG) Due to Activities or Associations with the KLA

Adjudicators should be alert for indications – in benefit applications, supporting documentation, and testimony – of activities or associations relating to the KLA. In addition, adjudicators who consider an exemption must familiarize themselves with country conditions information on the relevant country and terrorist organization(s) by consulting the [Refugee, Asylum & International Operations Virtual Library \(RAIO-VL\)](#) and the research information made available through and authorized by their HQ components.³ In addition to research products generated by USCIS, open-source reference documents produced by other agencies may be available from the U.S. Department of State (DOS) (see, for example, the annual [U.S. Dept. of State Country Reports on Human Rights Practices](#)), or through the [DHS Library](#) (available on the intranet through DHS Connect).

Other Possible TRIG Inadmissibilities

While this delegation of exemption authority is limited to activities and associations with the KLA, adjudicators should be alert for and elicit information about all TRIG-related activities or associations. If additional terrorism-related grounds apply, adjudicators must verify whether other available exemptions exist for those additional grounds and determine whether the applicant is eligible for those exemptions. If so, all appropriate exemptions must be adjudicated according to the guidance issued for each exemption. An adjudicator may grant an exemption for activities or associations with the KLA only if there are available exemptions for all applicable TRIG-related activities and the adjudicator has recommended an exemption for each

³ DHS employees may access the [RAIO-VL's Country of Origin Information Collection](#).

ground of inadmissibility. If an exemption is not available for each terrorism-related inadmissibility concern, the case should remain on hold. Refer any questions to the appropriate headquarters program office.

II. Aliens Whose Inadmissibility for TRIG Activities or Associations Relating to the KLA May Be Exempted as a Matter of Discretion

Voluntary v. Duress

This Exercise of Authority is designed to address scenarios involving voluntary activities or associations with the KLA, specifically, the provision of solicitation, material support, and receipt of military-type training. Earlier exercises of authority exempted these terrorist activities if they occurred while under duress; these exemptions remain in effect and may be used as appropriate in cases not covered by this exemption. *See* 72 Fed.Reg. 9958 (effective March 6, 2007) – material support under duress to Tier III organizations; 72 Fed.Reg. 26138 (effective April 27, 2007) – material support under duress to Tier I and II organizations; 76 Fed.Reg. 14418 (effective January 7, 2011) – receipt of military-type training by or on behalf of a terrorist organization under duress; and, 76 Fed.Reg. 14419 (effective January 7, 2011) – solicitation of funds or individuals for a terrorist organization under duress.

Threshold Requirements for an Exemption

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

- Establish that he or she is otherwise eligible for the immigration benefit or protection being sought;
- Undergo and pass all required background and security checks;
- Fully disclose, to the best of his or her knowledge, in all relevant applications and interviews with U.S. Government representatives and agents, the nature and circumstances of all activities or associations falling within the scope of INA section 212(a)(3)(B), including those relating to organizations other than KLA;
- Establish that he or she has not participated in, or knowingly provided material support to, terrorist activities that targeted noncombatant persons or U.S. interests;
- Establish that he or she poses no danger to the safety and security of the United States; and
- Establish that he or she warrants an exemption in the totality of the circumstances.

In addition, to be considered under the KLA exemption, an alien must further establish that he or she is not and has not been subject to an indictment by an international tribunal.

Discretion

For those applicants who have met all other threshold requirements, adjudicators will consider whether the applicant warrants a discretionary exemption in the totality of circumstances. When considering the totality of the circumstances, factors to be considered may include, among others: (1) the purpose, extent, frequency, and nature of the association or activities with the KLA; (2) the circumstances under which they took place; (3) the extent of the alien's

involvement with the KLA, including past or present membership and role in the organization; (4) whether the applicant participated in any violent activities; (5) the alien's conduct since the association with the KLA, including the applicant's conduct since his or her arrival in the United States; and, (6) any other relevant factors.

III. Making the Exemption Determination

A. Spouses and Children

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

B. Vetting Cases for Possible Security Risk

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

C. Documenting the Exemption Determination

Using the 212(a)(3)(B) Exemption Worksheet (revised 9/21/2011), adjudicators will document exemption determinations as follows:

- Determine threshold eligibility;
- Describe the applicant's associations or activities with the group, noting any involvement in violence or other activities of concern;
- Check the box marked "Other, Name:" in Section IV of the worksheet and write in the name of the group, "KLA"; and,
- In Section V, indicate whether the adjudicator recommends granting or denying the exemption.

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

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

D. Record-Keeping Requirements

USCIS will maintain records on the number of cases considered under the KLA exemption and their outcome, and statistics will be consolidated on a quarterly basis, at a minimum. These statistics will be used to provide information to the interagency and stakeholders, and to inform the content of the required annual report to Congress.

E. Effect of Exemption on Future Adjudications

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

F. Processing or Continued Hold of Certain Cases

If a case falls entirely outside the scope of this exercise authority, or does not satisfy certain threshold requirements, the case should remain on hold under the hold policy pending further guidance.⁵ Below are the various scenarios and the appropriate actions to be taken in each. Cases not granted a TRIG exemption or denied for TRIG-related issues should be processed pursuant to existing guidelines. For additional guidance or clarification, such as whether a particular case should remain on hold, adjudicators should consult the appropriate headquarters program office.

- A case should remain on hold if the applicant is not otherwise eligible due to additional TRIG grounds for which an exemption may become available. A future exercise of authority that is specific to the applicant's case may afford a basis to consider an exemption. (For example, an applicant has provided material support voluntarily to both the KLA, the subject of the Secretary's exemption authority, and another organization that meets the Tier III definition, but for which the Secretary has not authorized an exemption. This case should remain on hold for a possible future exercise of the Secretary's exemption authority to the other Tier III organization.)
- If an adjudicator believes that any future exemption should be denied in the totality of the circumstances, assuming such an exemption did become available, the adjudicator may recommend that the underlying application proceed to denial without further hold. Such cases must be processed in accordance with existing guidance.⁶
- If additional terrorism-related inadmissibility grounds apply beyond the scope of the exemption that is the subject of this guidance, and there are available exemptions for those grounds, adjudicators should adjudicate all exemptions in accordance with the

⁵ If the case involves activity or association with the KLA that falls outside of the scope of the exemption (for example, participation in combat), then the case may be appropriate for denial because that activity was considered and not included in the final KLA exemption. Such cases should be referred to the USCIS TRIG Working Group through appropriate component chains of command.

⁶ See Policy Memorandum PM-602-0051, "Revised Guidance on the Adjudication of Cases Involving Terrorism-Related Inadmissibility Grounds (TRIG) and Further Amendment to the Hold Policy for Such Cases," November 21, 2011.

guidance issued for each exemption. It is important to bear in mind that, as with cases involving only a single exemption, eligibility for consideration of an exemption does not imply that such an exemption should be granted. In cases involving the need for more than one exemption, it is possible for an adjudicator to recommend that some exemptions be granted and others denied. Such a case need not continue to be held, but should proceed to the adjudication of the exemptions and the underlying application.

- In cases in which additional information is required, such as additional detail concerning the applicant's associations and activities giving rise to the TRIG inadmissibility, or if it is not clear in the record whether an applicant has fully disclosed relevant TRIG activities (or had the opportunity to do so), then the applicant should be scheduled for an interview using existing procedures. Adjudicators must consult with their supervisors if they believe an interview may be required in a particular case.
- If a case does meet the threshold requirements, but an exemption is denied in the totality of the circumstances, the underlying application should also be denied (or, if pertaining to an asylum application, referred as appropriate) after appropriate review in accordance with the above procedures.

Use

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

Contact Information

Questions should be directed through the component chain of command to the component USCIS TRIG Working Group point of contact.

Attachment

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

DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

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

AGENCY: Office of the Secretary, DHS

ACTION: Notice of determination

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

Following consultations with the Secretary of State and the Attorney General, I hereby conclude, as a matter of discretion in accordance with the authority granted to me by section 212(d)(3)(B)(i) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(d)(3)(B)(i), as amended, as well as the foreign policy and national security interests deemed relevant in these consultations, that, subject to paragraph (c) of this determination:

(a) that section 212(a)(3)(B) of the INA, 8 U.S.C. 1182(a)(3)(B), excluding subclause (i)(II), shall not apply with respect to an alien applying for a nonimmigrant visa for any activity or association relating to the Kosovo Liberation Army (KLA) and

(b) that subclauses (iv)(IV), (iv)(V), and (iv)(VI), and (i)(VIII) of section 212(a)(3)(B) of the INA, 8 U.S.C. 1182(a)(3)(B), shall not apply with respect to an alien who:

- (1) solicited funds or other things of value for;
- (2) solicited any individual for membership in;
- (3) provided material support to; or

(4) received military-type training from or on behalf of the KLA.

(c) To meet the requirements of this determination under paragraph (a) or (b), the alien must satisfy the relevant agency authority that the alien:

(1) is seeking a benefit or protection under the INA and has been determined to be otherwise eligible for the benefit or protection;

(2) has undergone and passed all relevant background and security checks;

(3) has fully disclosed, to the best of his or her knowledge, in all relevant applications and interviews with U.S. government representatives and agents, the nature and circumstances of activities or associations falling within the scope of section 212(a)(3)(B) of the INA, 8 U.S.C. 1182(a)(3)(B);

(4) is not and has not been subject to an indictment by an international tribunal;

(5) has not participated in, or knowingly provided material support to, terrorist activities that targeted noncombatant persons or U.S. interests;

(6) poses no danger to the safety and security of the United States; and

(7) warrants an exemption from the relevant inadmissibility provision(s) in the totality of the circumstances.

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

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

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

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

This determination is based on an assessment related to the national security and foreign policy interests of the United States as they apply to the particular persons described herein and shall not have any application with respect to other persons or to other provisions of U.S. law.

Dated:


Janet Napolitano,
Secretary of Homeland Security