




U.S. Citizenship
and Immigration
Services

JAN 23 2010

Memorandum

TO: USCIS Field Leadership

FROM: Lauren Kielsmeier 
Acting Deputy Director

SUBJECT: Implementation of New Discretionary Exemption under INA Section 212(d)(3)(B)(i)
for Activities Related to the INC, KDP and PUK

I. INTRODUCTION

A. Purpose

On September 21, 2009, the Secretary of Homeland Security and the Secretary of State, in consultation with each other and the Attorney General, exercised their authority not to apply the terrorist-related grounds of inadmissibility contained in INA § 212(a)(3)(B) for certain activities and associations involving the Iraqi National Congress (INC), Kurdish Democratic Party (KDP) or Patriotic Union of Kurdistan (PUK).

This document provides guidance to adjudicators who consider applications for immigration benefits filed with USCIS where an applicant is found to be inadmissible or otherwise barred from an immigration benefit for an activity or association with the INC, KDP or PUK. This guidance supplements past guidance regarding the implementation of exemptions for certain cases involving terrorist-related grounds of inadmissibility.¹ Further, this guidance will:

- Discuss the threshold requirements that must be present in order to consider an exemption;
- Describe the factors to consider when determining whether an applicant merits a favorable exercise of the discretionary exemption;

¹ See, Jonathan Scharfen, Deputy Director, USCIS, "Processing the Discretionary Exemption to the Inadmissibility Ground for Providing Material Support to Certain Terrorist Organizations," May 24, 2007; Michael L. Aytes, Acting Deputy Director, USCIS, "Implementation of Section 691 of Division J of the Consolidated Appropriations Act, 2008, and Updated Processing Requirements for Discretionary Exemptions to Terrorist Activity Inadmissibility Grounds," July 28, 2008; and Michael Aytes, Acting Deputy Director, USCIS, "Revised Guidance on the Adjudication of Cases Involving Terrorist-Related Inadmissibility Grounds and Amendment to the Hold Policy for such Cases," February 13, 2009.

Implementation of New Discretionary Exemption under INA Section 212(d)(3)(B)(i) for Activities Related to the INC, KDP, and PUK

Page 2

- Provide guidance on identifying those applicants who may be subject to inadmissibility grounds under INA § 212(a)(3)(B), particularly as encountered in these cases, and will refer to documents with more detailed guidance on these issues;
- Make recommendations on how an adjudicator might elicit sufficient relevant testimony to adjudicate the exemption; and
- Set out oversight and reporting requirements for the implementation of this authority.

B. Delegation of Authority to USCIS

The Secretary delegated to USCIS, in consultation with ICE, the authority to determine whether a particular alien meets the criteria required for the exercise of this discretionary exemption. These exemptions may be applied to immigration benefit and protection applications under the INA, including, but not limited to, asylum, refugee status, adjustment of status, and following to join petitions. An exemption will be applied only after the threshold requirements listed in the exemption are met.²

II. IDENTIFYING INDIVIDUALS SUBJECT TO TERRORIST-RELATED INADMISSIBILITY GROUNDS DUE TO ACTIVITIES OR ASSOCIATIONS WITH THE INC, KDP OR PUK

A. Indicators for Review Prior to and During an Interview/Adjudication

Adjudicators who consider one of these exemptions must be familiar with country conditions information on Iraq related to the INC, KDP and PUK. Adjudicators or any DHS employee may consult the Asylum Virtual Library (AVL) Iraq collection at <http://z02rscow12:8080/docushare/dsweb/View/Collection-5801>. In addition to research products generated by USCIS (see for example "Response to Information Request, Iraq: Information on violent activities of the INC and violent activities of the INC's constituent groups," 13 September 2006, USCIS Resource Information Center), USCIS will provide an overview document highlighting the activities of each group. This document will be posted to the AVL.

Adjudicators should review immigration benefit applications for indicators that raise the possibility that an applicant may be described in the inadmissibility grounds at INA § 212(a)(3)(B) based on an association or activity involving the INC, KDP or PUK. Examples of language that may indicate terrorist activity include: "fighter," "militant," "soldier," rebel," or "*peshmerga*."³ The adjudicator

² See USCIS Fact Sheet, "Secretaries Napolitano and Clinton Exercise Authority under the Immigration and Nationality Act (INA) to Exempt Individuals Affiliated with Certain Iraqi Groups from Certain Inadmissibility Provisions" (October 19, 2009), which is included as Attachment A to this memorandum and is also available at http://www.uscis.gov/USCIS/Refugee.%20Asylum.%20and%20Int'l%20Ops/Asylum/exempt_iraqi_inadmissibility.pdf; "Signed Exercise of Authority under Section 212(d)(3)(B)(i) of the INA for Individuals Affiliated with the INC, KDP and PUK" (September 21, 2009), which is included as Attachment B to this memorandum and is also available at [http://www.uscis.gov/USCIS/Refugee.%20Asylum.%20and%20Int'l%20Ops/Asylum/Signed_Exercise_Authority_Section_212\(d\)\(3\)\(B\)\(i\)_INA.pdf](http://www.uscis.gov/USCIS/Refugee.%20Asylum.%20and%20Int'l%20Ops/Asylum/Signed_Exercise_Authority_Section_212(d)(3)(B)(i)_INA.pdf)

³ Note: Some Iraqi applicants may indicate activities or associations with a "*peshmerga*." *Peshmerga* means "he who faces death" and is a generic term used to refer to a "fighter" or one who is a member of a local guard force. The term should not automatically be construed as identifying one as a terrorist. If the term is used in a case, one should take

Implementation of New Discretionary Exemption under INA Section 212(d)(3)(B)(i) for Activities Related to the INC, KDP, and PUK

Page 3

should look for any indication that the applicant: (1) provided food, money, services, shelter, weapons, or transportation to one of these groups; (2) requested others to contribute money or other things of value to one of these groups; (3) asked others to join one of these groups; (4) received military-type training from one of these groups; (5) fought for one of these groups; (6) planned activities/operations or gathered information for one of these groups; or (7) is currently a member of one of these groups. Examples of language that may indicate membership include “member,” “follower,” and “supporter.” Adjudicators should also be alert to oral testimony provided by applicants involving their association or activity with the INC, KDP or PUK.

B. Aliens Whose Inadmissibility for Certain Activities Carried Out on Behalf of These Iraqi Groups May be Exempted as a Matter of Discretion

Aliens whose cases remain on hold solely because they committed one of the activities below on behalf of the INC, KDP and PUK may now be considered for a discretionary exemption of these inadmissibility grounds, if the alien:

- Solicited funds or other things of value on behalf of one of these named groups—INA § 212(a)(3)(B)(iv)(IV)(cc);
- Solicited an individual for membership in one of these named groups—INA § 212(a)(3)(B)(iv)(V)(cc);
- Committed an act that provided material support to one of these named groups—INA § 212(a)(3)(B)(iv)(VI)(dd);
- Was a representative of one of these named groups—INA § 212(a)(3)(B)(i)(IV)(aa);
- Is a member of one of these named groups—INA § 212(a)(3)(B)(i)(VI);
- Persuaded others to support one of these named groups—INA § 212(a)(3)(B)(i)(VII); or
- Received military-type training from one of these named groups—INA § 212(a)(3)(B)(i)(VIII).

Aliens may be exempted from the activities listed below with the requirement that no such activity targeted civilians. Special care must be made in such cases to determine whether civilians were targeted or harmed during the alien’s activities and whether the applicant merits an exemption under the totality of the circumstances, in the exercise of discretion when any of these inadmissibility grounds are present; if the alien:

- Committed or incited to commit, under circumstances indicating an intention to cause death or serious bodily injury, a terrorist activity—INA § 212(a)(3)(B)(iv)(I);
- Prepared or planned a terrorist activity—INA § 212(a)(3)(B)(iv)(II);
- Gathered information on potential targets for terrorist activity—INA Section 212(a)(3)(B)(iv)(III);
- Solicited funds or other things of value for a terrorist activity—INA § 212(a)(3)(B)(iv)(IV)(aa);

steps to elicit more details. An exemption is only available if the *peshmerga* activity is a barred activity or association under the INA and was carried out under the auspices of the INC, KDP or PUK.

Implementation of New Discretionary Exemption under INA Section 212(d)(3)(B)(i) for Activities Related to the INC, KDP, and PUK

Page 4

- Solicited an individual to engage in conduct otherwise described in INA § 212(a)(3)(B)(iv), other than those involving activity carried out on behalf of a “terrorist organization”—INA § 212(a)(3)(B)(iv)(V)(aa);
- Committed an act the alien knows, or reasonably should have known, affords material support for the commission of a terrorist activity—INA § 212(a)(3)(B)(iv)(VI)(aa); or to any individual who the alien knows, or reasonably should know, has committed or plans to commit a terrorist activity—INA § 212(a)(3)(B)(iv)(VI)(bb);
- Has, under circumstances indicating an intention to cause death or serious bodily harm, incited terrorist activity—INA § 212(a)(3)(B)(i)(III);
- Is a representative of a political, social, or other group that endorses or espouses terrorist activity—INA § 212(a)(3)(B)(i)(IV)(bb); or
- Endorses or espouses terrorist activity or persuades others to endorse or espouse terrorist activity—INA § 212(a)(3)(B)(i)(VII).

A spouse or child is inadmissible under INA § 212(a)(3)(B)(i)(IX) if the related alien is inadmissible under § 212(a)(3)(B) for actions occurring within the last five years, unless the spouse or child qualifies for the exception provided under INA § 212(a)(3)(B)(ii). If the activity of the related alien is exempted, the spouse or child may also be exempted from inadmissibility. 212(a)(3)(B) does not require that the alien “actor” who is inadmissible under 212(a)(3)(B) seek admission or a benefit from USCIS. If an adjudicator encounters a case wherein the spouse and/or child of such an actor is before USCIS but the actor is not included, the adjudicator should follow the guidance issued by the USCIS Office of Chief Counsel issued on November 8, 2007, “Authority to apply the material support exemption to certain spouses and children,” which is included as Attachment C to this memorandum.

III. THRESHOLD REQUIREMENTS

In order to be considered for an exemption from the applicability of the terrorist-related inadmissibility provision, an applicant must:

- 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, in all relevant applications and interviews with U.S. Government representatives and agents, the nature and circumstances of the activity or association with a terrorist organization; and
- Establish that he or she poses no danger to the safety and security of the United States.

These threshold considerations are the same as those included in the other exercises of the discretionary exemption authority issued previously. USCIS adjudicators are experienced in considering and documenting the review of these threshold considerations.

IV. SPECIFIC FACTORS FOR CONSIDERATION

For those applicants who have met the threshold requirements, adjudicators will consider whether the applicant is eligible for a group-based discretionary exemption. Note that this discretionary authority is applicable regardless of whether the applicant's activities or associations with the INC, KDP or PUK were voluntary or under duress.

Some specific factors for consideration include the nature of the applicant's activities with one of the three groups, including: (1) whether the applicant participated in any violent activities; (2) the frequency of support provided; (3) the applicant's conduct since his or her arrival in the United States; or (4) any other relevant factor.

V. MAKING THE DETERMINATION ON THE EXEMPTION

A. Vetting Cases for Possible Security Risk

USCIS adjudicators will follow existing agency procedures when results of security checks or interviews reveal possible national security risk. This includes coordination with the Fraud Detection and National Security Directorate (FDNS) for possible further review and vetting. If there is a need for vetting with a record holder or deconfliction with law enforcement or intelligence agencies, FDNS Immigration Officers will handle these actions and document results.

B. Prerequisite Training for Adjudicating the Exemption

Given the sensitivity of these cases, each adjudications program must ensure that adjudicators and first and second-line reviewers of these exemptions have received specialized training in the interviewing of and adjudicating benefits for Iraqi nationals. This specialized training is offered by the Refugee Affairs Division (RAD) on a periodic basis, and each program should coordinate through the Material Support Working Group (MSWG—also known as the Terrorist-Related Inadmissibility Grounds or TRIG Working Group) to ensure that a sufficient number of personnel in appropriate offices receive this training.

C. Analyzing the Applicability of the Exemption

Adjudicators will take the following steps to complete exemption determinations: (1) the adjudicator will first determine whether the applicant has met all threshold eligibility grounds, if so, the adjudicator will describe the applicant's associations or activities with any of the three above-named groups, noting any involvement in violence or other activities of concern; (2) the adjudicator will then document the exemption determination on the 212(a)(3)(B) Exemption Worksheet (rev. date)—when documenting the exemption, adjudicators will check the box marked "Other, Name:" in Section IV of the worksheet (revised: June 2, 2006); (3) the adjudicator will then indicate the name of the group—either INC, KDP or PUK, as appropriate, and indicate "Date authorized for exemption" as "September 21, 2009."

Initially, USCIS will require two levels of review before an exemption determination can be completed based on these exercises of authority. It is anticipated that this level of review will continue for the first 90 days the exemptions are in effect.

D. Headquarters Review and Oversight Procedures

Each HQ component will provide summaries of all exemptions adjudicated under this guidance to the MSWG on a bi-weekly basis for the first 90 days this guidance is in effect, to assure quality and agency-wide consistency in adjudications.

E. Record-Keeping Requirements

USCIS will maintain records on the number of exemptions considered in this category 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, stakeholders, and to inform the required report to Congress.

F. Effect of Exemption on Future Adjudications

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.

G. Processing or Continued Hold of Certain Cases

If a case does not satisfy all threshold requirements for consideration of the exemption, it should be referred to the Immigration Court or denied after appropriate review in accordance with the above procedures.

If a case does meet the threshold requirements, but an exemption is considered and denied, the case should be referred or denied after appropriate review in accordance with the above procedures, unless it is otherwise subject to a hold under the CAA hold policy as revised in the February 13, 2009 directive. Adjudicators should elevate to the appropriate HQ program office any questions or concerns as to whether a particular case shall be placed on hold.

Consistent with the discretionary nature of the exemption authorities, this memorandum is not intended to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States, or its agencies, officers or any other person.

Questions about implementation of these exemptions should be forwarded to the appropriate HQ Division POC who sits on the MSWG.

Attachments (3)