



November 20, 2011

PM-602-0052

Policy Memorandum

SUBJECT: Implementation of New Exemption Under INA Section 212(d)(3)(B)(i) for the Provision of Material Support in the Form of Medical Care

Purpose

On October 13, 2011, following consultation with the Secretary of State and the Attorney General, the Secretary of Homeland Security (the Secretary), exercised her discretionary authority not to apply the material support inadmissibility ground to certain aliens who provided medical care to persons associated with terrorist activities or organizations.¹ See Attachment 1. This Policy Memorandum (PM) 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

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

Background

INA section 212(a)(3)(B) renders inadmissible an alien who provides material support, including the provision of medical care, to a terrorist organization or to an individual the alien knows, or reasonably should know, has committed or plans to commit a terrorist activity.³ In turn,

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

² This PM supplements existing guidance on terrorism-related inadmissibility grounds (TRIG), including: Jonathan Scharfen, Deputy Director, USCIS, "Processing the Discretionary Exemption to the Inadmissibility Ground for Providing Material Support to Certain Terrorist Organizations," May 24, 2007; Michael L. Aytes, Acting Deputy Director, USCIS, "Implementation of Section 691 of Division J of the Consolidated Appropriations Act, 2008, and Updated Processing Requirements for Discretionary Exemptions to Terrorist Activity Inadmissibility Grounds," July 28, 2008; and USCIS 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 20, 2011.

³ Section 212(a)(3)(B)(iv)(VI) of the INA establishes the material support ground of inadmissibility and does not explicitly incorporate or exclude medicine or medical care. By comparison, the analogous criminal statute defines

INA section 212(d)(3)(B)(i) authorizes the Secretary to exempt certain terrorism-related grounds of inadmissibility (TRIG). On October 13, 2011, the Secretary issued an exemption that authorizes USCIS, in consultation with Immigration and Customs Enforcement (ICE), not to apply the material support inadmissibility grounds to certain aliens who provided medical care to persons associated with terrorist activities or organizations. This exemption may be applied to immigration benefit 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 the application of the material support inadmissibility ground for the voluntary provision of medical care to persons associated with terrorist activities or organizations.

Implementation

I. Identifying Individuals Subject to TRIG Due to the Provision of Material Support in the Form of Medical Care

General

Adjudicators should be alert for indications – in benefit applications, supporting documentation, and testimony – that an applicant's actions may be described in the inadmissibility ground at INA section 212(a)(3)(B)(iv)(VI) for the provision of material support in the form of medical care to individuals who have engaged in terrorist activities or are members of terrorist organizations. For purposes of this exemption authority, the phrase "provided medical care" includes both:

1. Services provided by and in the capacity of a medical professional, such as physician, nurse, dentist, psychiatrist or other mental health care provider, emergency room technician, ambulance technician, medical lab technician, or other medical-related occupation; and
2. Related assistance by non-medical professionals providing, for example, emergency first aid services to persons who have engaged in terrorist activity.

material support as explicitly excluding "medicine." 18 U.S.C. § 2339B(b)(1). The INA material support provision has been interpreted to include a broad and non-exhaustive list of items and activities that constitute material support. See *McAllister v. Attorney General*, 444 F.3d 178, 187 (3d Cir. 2006) ("[T]he INA's definition of 'terrorist activity' certainly encompasses more conduct than our society, and perhaps even Congress, has come to associate with traditional acts of terrorism . . ."); *Singh-Kaur v. Ashcroft*, 385 F.3d 293, 298 (3d Cir. 2004) (statutory list is non-exhaustive).

Country Conditions

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/or the research information made available through and authorized by their HQ components.⁴ 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 exemption is limited to the voluntary provision of medical care, adjudicators should be alert for and elicit information about all TRIG related activities or associations. If additional terrorism-related grounds apply, verify whether other available exemptions exist for those additional grounds and determine whether the applicant is eligible for those exemptions. If so, adjudicate all appropriate exemptions according to the guidance issued for each exemption. An adjudicator may grant an exemption for medical care only if there are available exemptions for all applicable TRIG-related activities, and the adjudicator has recommended an exemption for each ground of inadmissibility. If an exemption is not available for each terrorism-related inadmissibility concern, refer the case to the appropriate headquarters program office for further instructions, including whether to maintain the case on hold.

II. Aliens Whose Inadmissibility, for the Provision of Material Support in the Form of Medical Care, May Be Exempted as a Matter of Discretion – Contexts in which Medical Care is Provided

Voluntary v. Duress

This Exercise of Authority is designed to address scenarios involving voluntary provision of medical care. An earlier exercise of authority which generally exempts the provision of material support under duress remains in effect, and may be used as appropriate in cases not covered by this exemption. *See* 72 FR 9958 (March 6, 2007).

Medical care “to individuals” v. “on behalf of” a designated terrorist organization

An alien is subject to the material support ground of inadmissibility if he or she provides medical care (1) to a terrorist organization, (2) to a member of a terrorist organization, or (3) to an individual the alien knows, or reasonably should know, has committed or plans to commit a terrorist activity. INA § 212(a)(3)(B)(iv)(VI). If a medical professional provided medical care to a person that the medical professional did not know, and should not reasonably have known, had committed or planned to commit a terrorist activity, this terrorism-related ground of inadmissibility would not apply.

⁴ DHS employees may access the [RAIO-Virtual Library's RAIO Research](#).

While the Secretary has exercised her authority to exempt certain acts of medical care, INA section 212(d)(3)(B)(i) explicitly prohibits the exercise of exemption authority for aliens who “voluntarily and knowingly engaged in . . . terrorist activity *on behalf of*” a Tier I or II terrorist organization (emphasis added). That is, medical care is not exemptible under the statute when provided (1) voluntarily and (2) on behalf of a Tier I or Tier II organization.⁵

Although medical care by its nature is administered to individuals rather than organizations, in some instances medical care may be provided *on behalf of the group* to which the individual patients belong. This would be the case, for instance, when a medical provider serves as the staff physician for an organization, or provides medical care to an organization’s members in order to abet the group’s pursuit of its terrorist aims.

By comparison, if all other threshold conditions are met, an alien who provides medical care on behalf of an *undesigned*, Tier III terrorist organization remains eligible for consideration of an exemption in the totality of the circumstances. The role of the medical care provider and the activities of the group involved should be carefully considered in determining whether to grant a discretionary exemption to an individual who has provided medical care on behalf of a Tier III organization.

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 any medical care provided, as well as any other TRIG-related activity or association; and
- Establish that he or she poses no danger to the security of the United States.

Discretion

For those applicants who have met all threshold requirements, adjudicators will consider whether the applicant warrants a discretionary exemption in the totality of the circumstances. Factors to consider may include, among others: the purpose, extent, frequency, and nature of the medical care provided; the circumstances under which it was provided; the alien’s involvement with the terrorist organization, including past or present membership and role in the organization; the nature of the activities committed by the terrorist organization; the alien’s awareness of those activities; and the alien’s conduct since providing the medical care; and any other relevant factors.

⁵ Paragraph (d) of the attached exemption explicitly excludes from the exemption authority voluntary medical care on behalf of a Tier I or II terrorist organization.

III. Making the Exemption Determination

General

A spouse or child is inadmissible under INA section 212(a)(3)(B)(i)(IX) if the related alien is inadmissible under INA section 212(a)(3)(B) for actions occurring within the last five years, unless the spouse or child qualifies for one of two statutory exceptions.⁶ 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.

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. 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 voluntary medical care exemption will require security checks through the NCTC pursuant to existing component procedures.

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;
- In Section IV,
 - Check the "Situational Exemption" box and then the "Medical Care" box, and
 - Indicate the Tier and name of the relevant terrorist organization; and
- In Section V, indicate whether the adjudicator recommends granting or denying the exemption.

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

Record-Keeping Requirements

USCIS will maintain records on the number of cases considered under the medical care exemption and their outcome, and statistics will be consolidated on a quarterly basis, at a

⁶ 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 § 212(a)(3)(B)(ii).

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.

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.

Processing or Continued Hold of Certain Cases

If a case (1) falls entirely outside the scope of this exercise of authority, or (2) does not satisfy certain threshold requirements,⁷ the case should remain on hold pending further guidance. A future exercise of authority that is specific to the relevant terrorist organization may afford a basis to consider an exemption.⁸

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

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

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

⁷ Specifically, a case should remain on hold if the applicant is not otherwise eligible due to additional TRIG grounds for which an exemption may become available. Also, a case should remain on hold pending interview if it is not clear in the record whether an alien has fully disclosed relevant TRIG activities, or had the opportunity to do so.

⁸ By comparison, when an individual is ineligible for an exercise of authority related to a specific terrorist organization, either because he or she falls outside the scope of the exemption or does not satisfy all threshold requirements, the case should be denied rather than maintained on hold. Unlike with the situational exemptions, there is little possibility that the Secretary will later authorize a different or broader exemption that could resolve the cases of individuals associated with a terrorist organization addressed in a prior exercise of authority. If, however, an applicant described here does not meet the "otherwise eligible" threshold requirement due to activity with *another* terrorist organization for which no exemption has yet been considered or issued, the case should remain on hold.

Use

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

Contact Information

Questions about implementation of this exemption should be forwarded to the appropriate component representative on the USCIS TRIG Working Group.

Attachment

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

DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

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

AGENCY: Office of the Secretary, DHS

ACTION: Notice of determination

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

Following consultations with the Secretary of State and the Attorney General, I hereby conclude, as a matter of discretion in accordance with the authority granted to me by section 212(d)(3)(B)(i) of the Immigration and Nationality Act (INA), 8 U.S.C.

1182(d)(3)(B)(i), as amended, as well as the foreign policy and national security interests deemed relevant in these consultations, that subsections 212(a)(3)(B)(iv)(VI)(bb), (cc), and (dd) of the INA, 8 U.S.C. 1182(a)(3)(B)(iv)(VI)(bb), (cc), and (dd), shall not apply with respect to the provision of medical care by an alien, provided that the alien satisfies the relevant agency authority that the alien:

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

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

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

(d) has not voluntarily and knowingly provided medical care on behalf of a designated terrorist organization, as described in INA section 212(a)(3)(B)(vi)(I) or (II);

(e) has not voluntarily and knowingly provided medical care with the intent of furthering the terrorist or otherwise violent activities of an organization or individual;

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

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

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

When considering the totality of the circumstances, factors to be considered may include, among others: the purpose, extent, frequency, and nature of the medical care provided; the circumstances under which it was provided; the alien's involvement with the terrorist organization, including past or present membership and role in the organization; the nature of the activities committed by the terrorist organization; the alien's awareness of those activities; and the alien's conduct since providing the medical care.

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

of authority has been revoked.

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

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

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

Dated: OCT 13 2011



Janet Napolitano,
Secretary of Homeland Security