



May 22, 2013

PM-602-0082

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 Farabundo Marti National Liberation Front (FMLN) or to the Nationalist Republican Alliance (*Alianza Republicana Nacionalista*, or ARENA)

Purpose

On April 3, 2013, 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 most¹ terrorism-related inadmissibility grounds to certain aliens for voluntary activities or associations relating to the Farabundo Marti National Liberation Front (FMLN) or to the Nationalist Republican Alliance (*Alianza Republicana Nacionalista*, or ARENA). See attachments. 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.

Authorities

- INA section 212(d)(3)(B)(i)
- 8 U.S.C. § 1182(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 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; 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

Both from El Salvador, the FMLN and ARENA represent opposite ends of the political spectrum. The FMLN formed in 1980 as a Marxist-Leninist armed insurgency that was backed by the Cuban government. ARENA was formed in 1981 as a far-right political party with armed death squads it used to support its agenda. Both qualify as Tier III terrorist organizations under INA section 212(a)(3)(B)(vi)(III) on the basis of their violent activities.

Please note that the FMLN is not considered an undesignated or Tier III terrorist organization after January 16, 1992 because it has been the leading party in the government of El Salvador since that date. Consideration for an exemption pursuant to this exercise of the exemption authority should therefore not generally be necessary from January 19, 1992 forward.

Similarly, ARENA is not considered an undesignated or Tier III terrorist organization after June 1, 1989, when it first controlled the presidency. Consideration for an exemption pursuant to this exercise of the exemption authority should therefore not generally be necessary from June 1, 1989 forward.

INA section 212(a)(3)(B), 8 U.S.C. § 1182(a)(3)(B), renders inadmissible and ineligible for most immigration benefits an alien who engages in terrorist activity with any organization that, at the time of the interaction, was a terrorist organization. In turn, INA section 212(d)(3)(B)(i), 8 U.S.C. § 1182(d)(3)(B)(i), authorizes the Secretary to exempt such terrorism-related grounds of inadmissibility in certain cases. On April 3, 2013, the Secretary issued an exemption that authorizes USCIS not to apply the inadmissibility grounds to certain qualified aliens associated with FMLN or ARENA.

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), 8 U.S.C. § 1182(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 Due to Activities or Associations with FMLN or ARENA

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 \(RAIO-VL\)](#) or the research information

made available through and authorized by their headquarters 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) (e.g., 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).

Adjudicators should be alert for indications – in benefit applications, supporting documentation, and testimony – of activities or associations relating to FMLN or ARENA. In all cases, adjudicators should be alert for and elicit information about all TRIG-related activities or associations.⁴

II. Aliens Whose Inadmissibility for TRIG Activities or Associations Relating to FMLN or ARENA 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 FMLN or ARENA. 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 Eligibility

USCIS may only consider a discretionary exemption for those cases on hold solely because of TRIG-related activities or associations relating to FMLN or ARENA, regardless of whether such conduct occurred under duress.⁵ To be considered for an exemption, an individual applicant must to the satisfaction of the adjudicator:

- 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;

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

⁴ If additional terrorism-related grounds apply, adjudicators should determine whether there are available exemptions for those additional grounds and determine whether the applicant is eligible for those exemptions. If so, adjudicators should adjudicate all appropriate exemptions according to the guidance issued for each exemption. An adjudicator may grant an exemption for activities or associations relating to FMLN or ARENA only if there are available exemptions for all applicable TRIG-related activities, and if the adjudicator has recommended an exemption for each ground of inadmissibility.

⁵ An earlier Exercise of Authority exempts generally 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).

- 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), 8 U.S.C. § 1182(a)(3)(B);⁶
- 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 has not engaged in terrorist activity in association with FMLN or ARENA outside the context of civil war activities directed against military, intelligence, or related forces of the Salvadoran Government;
- 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 as discussed in the following paragraph.

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, in addition to the threshold factors stated above, may include, among others: (1) the length and nature of the TRIG-related activity; (2) the amount, type, frequency, and nature of the applicant's activity; (3) the nature of the organization's terrorist activities and the alien's awareness of those activities; (4) the alien's conduct since the association with the FMLN or ARENA; (5) the length of time that has elapsed since the alien engaged in the TRIG-related activity; and, (6) any other relevant factors.

III. Making the Exemption Determination⁷

A. 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 through security checks. These procedures include coordination with local Fraud Detection and National Security

⁶ To fully disclose TRIG-related activities and associations entails credible, persuasive, consistent, and complete representations by the applicant of all involvement in such activities. If this level of disclosure has not been provided, the applicant has failed to meet this threshold criterion and is ineligible for exemption consideration.

⁷ A spouse or child is inadmissible under INA section 212(a)(3)(B)(i)(IX). 8 U.S.C. § 1182(a)(3)(B)(i)(IX), if the related alien is inadmissible under INA section 212(a)(3)(B), 8 U.S.C. § 1182(a)(3)(B), for actions occurring within the last five years, unless the spouse or child qualifies for one of two statutory exceptions. 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). 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.

Inadmissibility under INA section 212(a)(3)(B)(i)(IX) is unlikely with respect to FMLN and ARENA, given that the organizations ceased to meet the "terrorist organization" definition in 1992 and 1989, respectively.

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.

B. Documenting the Exemption Determination

Using the 212(a)(3)(B) Exemption Worksheet (revised August 10, 2012), adjudicators will document exemption determinations as follows:

- Determine individual 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 "Group Based Exemption" box and enter "FMLN" or "ARENA"; 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.

C. Record-Keeping Requirements

USCIS will maintain records on the number of cases considered under FMLN and ARENA exemptions and the cases' outcomes, 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 prepare the required annual report to Congress.

D. 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.

E. Processing or Continued Hold of Certain Cases

If a case involving an applicant or beneficiary considered under the FMLN or ARENA exemptions does not satisfy all individual threshold requirements for consideration of the exemption and does not meet the requirements of the hold policy, the requested benefit should be denied and the applicant should be issued a Notice to Appear in appropriate cases after review in accordance with standard operating procedures, including USCIS's NTA policy.

If a case does meet the individual 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.

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If it is determined that the case does not meet the individual threshold requirements listed above, but otherwise meets the criteria enumerated under the current hold policy, the application should continue to remain on hold pending future exercises of the Secretary's discretionary exemption authority. This would include cases being held under the current hold policy involving applicants who do not qualify for this exercise of the exemption authority.

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.

Attachments

1. Exercise of Authority under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act (FMLN).
2. Exercise of Authority under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act (ARENA).

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 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 for any activity or association relating to the Farabundo Marti National Liberation Front (FMLN), 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 activities 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 participated in, or knowingly provided material support to, terrorist activities that targeted noncombatant persons or U.S. interests;

(e) has not engaged in terrorist activity in association with FMLN outside the context of civil war activities directed against military, intelligence, or related forces of the Salvadoran Government;

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

(g) 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

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 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 for any activity or association relating to the Nationalist Republican Alliance (*Allianza Republicana Nacionalista*, or ARENA), 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 activities 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 participated in, or knowingly provided material support to, terrorist activities that targeted noncombatant persons or U.S. interests;

(e) has not engaged in terrorist activity in association with ARENA outside the context of civil war activities directed against military, intelligence, or related forces of the Salvadoran Government;

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

(g) 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

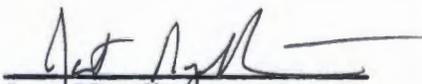
other person). This exercise of authority creates no substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person.

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