



February 23, 2011

PM-602-0030

## Policy Memorandum

SUBJECT: Implementation of New Discretionary Exemption Under INA Section 212(d)(3)(B)(i) For the Receipt of Military-Type Training Under Duress

### Purpose

On January 7, 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 military-type training inadmissibility ground to certain aliens who received such training under duress. *See* Attachment 1. This document guides U.S. Citizenship and Immigration Services (USCIS) adjudicators on implementation of the Secretary's situational exemption.<sup>1</sup>

### 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 has received military-type training (as defined in section 2339D(c)(1) of title 18, United States Code) from or on behalf of any organization that, at the time the training was received, was a terrorist organization. In turn, INA section 212(d)(3)(B)(i) authorizes the Secretary to exempt certain terrorism-related grounds of inadmissibility (TRIG). On January 7, 2011, the Secretary issued an exemption that authorizes

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<sup>1</sup> 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 (military-type training) 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(F).

This document 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 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.

USCIS, in consultation with Immigration and Customs Enforcement (ICE), not to apply the inadmissibility ground to certain aliens who, under duress, received military-type training from a terrorist organization. This exemption may be applied to immigration benefit 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 military-type training ground of inadmissibility.

### **Implementation**

#### **I. Identifying Individuals Subject to Terrorism-Related Inadmissibility Grounds Due to the Receipt of Military-Type Training Under Duress**

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 \(RAIO\) Research: Country Conditions by Region/Country](#) and/or the research information made available through and authorized by their HQ components.<sup>2</sup> 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.

Adjudicators should be alert for indications - in benefit applications, supporting documentation, and testimony - that an applicant's actions may be described in INA section 212(a)(3)(B)(i)(VIII) for the receipt of military-type training from or on behalf of any organization that, at the time the training was received, was a terrorist organization, when these activities were performed under duress. While this exemption is limited to the receipt of military-type training under duress, adjudicators should be alert for and elicit information about all TRIG-related activities or associations.

#### **II. Aliens Whose Inadmissibility for the Receipt of Military-Type Training Under Duress May Be Exempted as a Matter of Discretion**

##### *Duress only*

USCIS may consider a discretionary exemption only for those cases in which receipt of military-type training occurred under duress. Voluntary receipt of military-type training is not covered by this exemption.<sup>3</sup> Duress is established if the military-type training activities occurred in

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<sup>2</sup> DHS employees may access the [RAIO-Virtual Library's RAIO Research](#).

<sup>3</sup> No exemption is needed for voluntary military-type training received from or on behalf of any of the organizations statutorily exempted from TRIG consideration by section 691(b) of Division J of the Consolidated Appropriations Act, 2008, Pub. L. 110-161, 121 Stat. 1844 ("CAA") unless the organization has been determined to have engaged

response to a *reasonably-perceived threat of serious harm*.<sup>4</sup> To determine whether duress exists, adjudicators must consider the following, non-exhaustive list of factors: whether the applicant reasonably could have avoided, or took steps to avoid, receiving military-type training, including whether the applicant left or escaped the training at the earliest opportunity, if one presented itself; the severity and type of harm inflicted or threatened and to whom the harm was directed; and the perceived imminence of the harm threatened and the perceived likelihood that the harm would be inflicted. A threat of serious harm need not be expressly communicated or demonstrated; an alien may reasonably perceive a threat from the context and circumstances of his or her encounter with a terrorist organization.

#### *Conduct Exempted and Military-Type Training Defined*

The Secretary's Exercise of Authority provides that "subsection 212(a)(3)(B)(i)(VIII) of the INA, 8 U.S.C. 1182(a)(3)(B)(i)(VIII), shall not apply, with respect to an alien, who received military-type training under duress from, or on behalf of, a terrorist organization...". Further, the definition of military-type training will be applied as it appears in 18 U.S.C. section 2339D(c)(1), which provides that "the term 'military-type training' includes training in means or methods that can cause death or serious bodily injury, destroy or damage property, or disrupt services to critical infrastructure, or training on the use, storage, production, or assembly of any explosive, firearm or other weapon, including any weapon of mass destruction (as defined in section 2232a(c)(2))."<sup>5</sup>

An alien is subject to the military-type training inadmissibility ground only if the relevant organization was a terrorist organization "at the time the training was received." INA § 212(a)(3)(B)(i)(VIII). Adjudicators must analyze the organization's activities to determine whether it was a terrorist organization at the time the alien received the training. This exemption is not limited to undesignated terrorist organizations as defined at INA section 212(a)(3)(B)(vi)(III) (Tier III organizations) but also includes terrorist organizations as defined at INA sections 212(a)(3)(B)(vi)(I) and (II) (Tier I and Tier II organizations).

#### *Threshold Eligibility*

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

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in terrorist activity after December 26, 2007. If the organization at issue has not been determined to have engaged in terrorist activity after December 26, 2007, but information in an application indicates that the organization was forcing individuals to undergo military-type training under duress, adjudicators should consult the appropriate headquarters program office for additional guidance.

<sup>4</sup> Scharfen memorandum (May 24, 2007), at 5.

<sup>5</sup> Original statutory text indicates section "2232a(c)(2)", though probably should read section "2332a(c)(2)".

circumstances of each instance of military-type training and any other TRIG activity or association;

- Establish that he or she has not received training that itself poses a risk to the United States or United States interests (e.g., training on production or use of a weapon of mass destruction, as defined by 18 U.S.C. Section 2332a(c)(2), torture, or espionage); and
- Establish that he or she poses no danger to the safety and 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. When considering the totality of the circumstances, factors to be considered, in addition to the duress-related factors stated above, may include, among others: the length and nature of the military-type training provided; the amount, type, frequency, and nature of the organization's terrorist activities; the alien's awareness of those activities; whether the applicant participated in any violent activities; the alien's conduct since the time of the military-type training; the length of time since the training was received; the alien's conduct since such training occurred; and any other relevant factors.

## **III. Making the Exemption Determination**

### **A. 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.<sup>6</sup> 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 been 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 through 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.

### **C. Documenting the Exemption Determination**

Using the 212(a)(3)(B) Exemption Worksheet (revised Jan. 12, 2011), adjudicators will document exemption determinations as follows:

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<sup>6</sup> A spouse or child is not inadmissible under INA section 212(a)(3)(B)(i)(IX) if (1) s/he 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).

- 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 “Situation Exemption” box and then the “Military-Type Training Under Duress” 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.

#### **D. Record-Keeping Requirements**

USCIS will maintain records on the number of cases considered under this 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 members, stakeholders, and the Congress.

#### **E. Effect of Exemption on Future Adjudications**

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

#### **F. Processing or Continued Hold of Certain Cases**

If a case (1) falls entirely outside the scope of this exercise authority (e.g., voluntary military-type training), or (2) does not satisfy certain threshold requirements<sup>7</sup>, 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.<sup>8</sup>

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.

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<sup>7</sup> 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.

<sup>8</sup> 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.

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 military-type 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.

#### **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 or suggestions regarding this PM should be forwarded to the appropriate component representative on the USCIS TRIG Working Group.

#### **Attachment:**

1. Exercise of Authority under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act (Military-Type Training Under Duress)

**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 subsection 212(a)(3)(B)(i)(VIII) of the INA, 8 U.S.C. 1182(a)(3)(B)(i)(VIII), shall not apply, with respect to an alien, who received military-type training (as defined in section 2339D(c)(1) of title 18, United States Code) under duress from, or on behalf of, a terrorist organization as described in subsection 212(a)(3)(B)(vi), 8 U.S.C. 1182(a)(3)(B)(vi), 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 each instance of military-type training 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 received training that itself poses a risk to the United States or United States interests (e.g., training on production or use of a weapon of mass destruction, as defined by 18 U.S.C. Section 2332a(c)(2), torture, or espionage);

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

(f) 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 determining whether the military-type training was received under duress, the following factors, among others, may be considered: whether the applicant reasonably could have avoided, or took steps to avoid, receiving military-type training, including whether the applicant left or escaped the training at the earliest opportunity, if one presented itself; the severity and type of harm inflicted or threatened and to whom the harm was directed; and the perceived imminence of the harm threatened and the perceived likelihood that the harm would be inflicted.

When considering the totality of the circumstances, factors to be considered, in addition to the duress-related factors stated above, may include, among others: the length



and nature of the military-type training provided; the nature of the activities committed by the terrorist organization; the alien's awareness of those activities; the alien's conduct since the time of the military-type training; and any other relevant factor.

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.

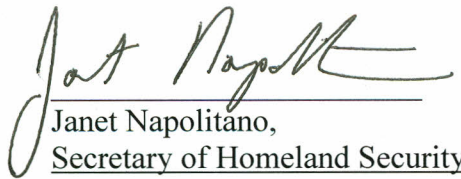
This exercise of authority shall not be construed to prejudice, in any way, the ability of the U.S. government to commence subsequent criminal or civil proceedings in accordance with U.S. law involving any beneficiary of this exercise of authority (or any other person). This exercise of authority creates 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: January 7, 2011

  
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Janet Napolitano,  
Secretary of Homeland Security