



# Immigration: Terrorist Grounds for Exclusion and Removal of Aliens

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## Summary

The Immigration and Nationality Act (INA) spells out a strict set of admissions criteria and exclusion rules for all foreign nationals who come permanently to the United States as immigrants (i.e., legal permanent residents) or temporarily as nonimmigrants. Notably, any alien who engages in terrorist activity, or is a representative or member of a designated foreign terrorist organization, is generally inadmissible. After the September 11, 2001, terrorist attacks, the INA was broadened to deny entry to representatives of groups that endorse terrorism, prominent individuals who endorse terrorism, and (in certain circumstances) the spouses and children of aliens who are removable on terrorism grounds. The INA also contains grounds for inadmissibility based on foreign policy concerns.

The report of the National Commission on Terrorist Attacks Upon the United States (also known as the 9/11 Commission) concluded that the key officials responsible for determining alien admissions (consular officers abroad and immigration inspectors in the United States) were not considered full partners in counterterrorism efforts prior to September 11, 2001, and as a result, opportunities to intercept the September 11 terrorists were missed. The 9/11 Commission's monograph, *9/11 and Terrorist Travel*, underscored the importance of the border security functions of immigration law and policy.

In the 110<sup>th</sup> Congress, legislation was enacted to modify the terrorism-related grounds for inadmissibility and removal, as well as the impact that these grounds have upon alien eligibility for relief from removal. The Consolidated Appropriations Act, 2008 (P.L. 110-161) modified certain terrorism-related provisions of the INA, including exempting specified groups from the INA's definition of "terrorist organization" and expanding immigration authorities' waiver authority over the terrorism-related grounds for exclusion. P.L. 110-257 expressly excludes the African National Congress (ANC) from being considered a terrorist organization, and provides immigration authorities the ability to exempt most terrorism-related and criminal grounds for inadmissibility from applying to aliens with respect to activities undertaken in opposition to apartheid rule in South Africa. Immigration reform is an issue in the 111<sup>th</sup> Congress, and legislative proposals may contain provisions modifying the immigration consequences of terrorism-related activity.

The case of Umar Farouk Abdulmutallab, who allegedly attempted to ignite an explosive device on Northwest Airlines Flight 253 on December 25, 2009, has refocused attention on terrorist screening during the visa process. He was traveling on a multi-year, multiple-entry tourist visa issued to him in June 2008. State Department officials have acknowledged that Abdulmutallab's father came into the Embassy in Abuja, Nigeria, on November 19, 2009, to express his concerns about his son, and that those officials at the Embassy in Abuja sent a cable to the National Counterterrorism Center. State Department officials maintain they had insufficient information to revoke his visa at that time.

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## Introduction

In the years following the September 11, 2001, terrorist attacks, considerable concern has been raised because the 19 terrorists were aliens (i.e., foreign nationals) who apparently entered the United States on temporary visas despite provisions in immigration law intended to bar the admission of suspected terrorists. The report of the National Commission on Terrorist Attacks Upon the United States (also known as the 9/11 Commission) contended that “[t]here were opportunities for intelligence and law enforcement to exploit al Qaeda’s travel vulnerabilities.” The 9/11 Commission maintained that border security was not considered a national security matter prior to September 11, and as a result the consular and immigration officers were not treated as full partners in counterterrorism efforts.<sup>1</sup> The 9/11 Commission’s monograph, *9/11 and Terrorist Travel*, underscored the importance of the border security functions of immigration law and policy.<sup>2</sup>

In the 108<sup>th</sup> Congress, several proposals were introduced in response to the 9/11 Commission’s findings, some of which contained provisions relating to border security,<sup>3</sup> most notably the Intelligence Reform and Terrorism Prevention Act of 2004 (P.L. 108-458). In the 109<sup>th</sup> Congress, the REAL ID Act of 2005 (P.L. 109-13, Division B) included, among other things, a number of provisions related to immigration reform and document security that were considered during congressional deliberations on the Intelligence Reform and Terrorism Prevention Act, but which were ultimately not included.<sup>4</sup>

Under current law, three departments—the Department of State (DOS), the Department of Homeland Security (DHS) and the Department of Justice (DOJ)—play key roles in administering the law and policies on the admission of aliens.<sup>5</sup> DOS’s Bureau of Consular Affairs (Consular Affairs) is the agency responsible for issuing visas, DHS’s Citizenship and Immigration Services (USCIS) is charged with approving immigrant petitions, and DHS’s Bureau of Customs and Border Protection (CBP) is tasked with inspecting all people who enter the United States. DOJ’s Executive Office for Immigration Review (EOIR) has a significant policy role through its adjudicatory decisions on specific immigration cases.

This report focuses on the terrorism-related grounds for inadmissibility and deportation/removal. It opens with an overview of the terror-related grounds as they evolved through key legislation enacted in recent years. The section on current law explains the legal definitions of “terrorist activity,” “engage in terrorist activity,” and “terrorist organization,” and describes the terror-related grounds for inadmissibility and removal. The report then discusses the alien screening process to determine admissibility and to identify possible terrorists, both during the visa issuance process abroad and the inspections process at U.S. ports of entry.

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<sup>1</sup> National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report*, Executive Summary, at 14 (July 2004).

<sup>2</sup> National Commission on Terrorist Attacks Upon the United States, *9/11 and Terrorist Travel* (August 2004).

<sup>3</sup> For further analysis, see CRS Report RL32616, *9/11 Commission: Legislative Action Concerning U.S. Immigration Law and Policy in the 108<sup>th</sup> Congress*, by (name redacted) and (name redacted).

<sup>4</sup> For a detailed analysis of the REAL ID Act, see CRS Report RL32754, *Immigration: Analysis of the Major Provisions of the REAL ID Act of 2005*, by (name redacted), (name redacted), and (name redacted).

<sup>5</sup> Other departments, notably the Department of Labor (DOL) and the Department of Agriculture (USDA), play roles in the approval process depending on the category or type of visa sought, and the Department of Health and Human Services (HHS) sets policy on the health-related grounds for inadmissibility.

# Overview of Terrorist Exclusion

## Grounds for Inadmissibility

With certain exceptions,<sup>6</sup> aliens seeking admission to the United States must undergo separate reviews performed by DOS consular officers abroad and CBP inspectors upon entry to the United States.<sup>7</sup> These reviews are intended to ensure that applicants are not ineligible for visas or admission under the grounds for inadmissibility spelled out in the Immigration and Nationality Act (INA).<sup>8</sup> These criteria are

- health-related grounds;
- criminal history;<sup>9</sup>
- security and terrorist concerns;
- public charge (e.g., indigence);
- seeking to work without proper labor certification;
- illegal entry and immigration law violations;
- ineligible for citizenship; and
- aliens previously removed.

Some grounds for inadmissibility may be waived or are not applicable in the case of nonimmigrants, refugees (e.g., public charge),<sup>10</sup> and other aliens. For aliens seeking to enter temporarily as nonimmigrants, even terrorism grounds for inadmissibility may possibly be waived.<sup>11</sup> As the terrorism grounds for inadmissibility have expanded to cover a broader range of activities and associations, some have believed it appropriate to ensure that immigration authorities are permitted to waive their application in certain circumstances.<sup>12</sup>

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<sup>6</sup> Certain classes of aliens are not required to obtain a visa to enter the United States and are therefore exempt from the consular review process. For example, under the visa waiver program (VWP), nationals from certain countries are permitted to enter the United States as temporary visitors (nonimmigrants) for business or pleasure without first obtaining a visa from a U.S. consulate abroad. See INA § 217; 8 U.S.C. § 1187. For additional background on the VWP, see CRS Report RL32221, *Visa Waiver Program*, by (name redacted).

<sup>7</sup> For background and analysis of alien screening and visa issuance policy, see CRS Report RL31512, *Visa Issuances: Policy, Issues, and Legislation*, by (name redacted).

<sup>8</sup> INA § 212(a); 8 U.S.C. § 1182(a).

<sup>9</sup> For a full discussion of this ground, see CRS Report RL32480, *Immigration Consequences of Criminal Activity*, by Yule Kim and (name redacted).

<sup>10</sup> All family-based immigrants and employment-based immigrants who are sponsored by a relative must have binding affidavits of support signed by U.S. sponsors in order to show that they will not become public charges.

<sup>11</sup> INA § 212(d)(3)(A); 8 U.S.C. § 1182(d)(3)(A).

<sup>12</sup> See, e.g., Consolidated Appropriations Act, 2008, P.L. 110-161, Div. J, § 691 (expanding waiver authority over terrorism-related grounds for inadmissibility); *International Terrorism: Threats and Responses, Hearings on H.R. 1710, the Comprehensive Antiterrorism Act of 1995, Before the House Comm. on the Judiciary*, 104<sup>th</sup> Cong., 1<sup>st</sup> Sess., 243-244 (1995) (testimony of Jamie S. Gorelick, Deputy Attorney General) (while strongly endorsing greater antiterrorism authority, also observing that it might be in the interest of the United States to allow a member of a terrorist organization to enter in some circumstances).

## Key Legislation

Prior to the Immigration Act of 1990 (P.L. 101-649), there was no express terrorism-related ground for exclusion. Congress added the terrorism ground in the 1990 Act as part of a broader effort to streamline and modernize the security and foreign policy grounds for inadmissibility and removal. Before 1990, certain terrorists were excludable under security grounds, but the 1990 Act opened the door for broader elaboration of what associations and promotional activities could be deemed to be terrorist activities. In part as a response to the 1993 World Trade Center bombing, Congress strengthened the anti-terrorism provisions in the INA and passed provisions that many maintained would ramp up enforcement activities, notably in the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996 (P.L. 104-208) and the Antiterrorism and Effective Death Penalty Act (P.L. 104-132). As part of the Violent Crime Control Act of 1994 (P.L. 103-322), Congress also amended the INA to establish temporary authority for an “S” nonimmigrant visa category for aliens who are witnesses and informants on criminal and terrorist activities. In September 2001, Congress enacted S. 1424 (P.L. 107-45), providing permanent authority for admission under the S visa.

Enacted in October 2001, the USA PATRIOT Act (P.L. 107-56) was a broad anti-terrorism measure that included several important changes to immigration law. Specifically in the context of this report, the USA PATRIOT Act amended the INA to add more terrorism-related grounds for inadmissibility and expand the definitional scope of terms used to describe terrorism-related activities and organizations.

The Enhanced Border Security and Visa Entry Reform Act of 2002 (P.L. 107-173) aimed to improve the visa issuance process abroad as well as immigration inspections at the border. It expressly required the development of an interoperable electronic data system to share information relevant to alien admissibility and removability and the implementation of an integrated entry-exit data system. It also required that, beginning in October 2004, all newly issued visas have biometric identifiers. In addition to increasing consular officers’ access to electronic information needed for alien screening, it expanded the training requirements for consular officers who issue visas.<sup>13</sup>

The Intelligence Reform and Terrorism Prevention Act of 2004 (P.L. 108-458) focused primarily on targeting terrorist travel through an intelligence and security strategy based on reliable identification systems and effective, integrated information-sharing. Its immigration provisions aimed at closer monitoring of persons entering and leaving the United States as well as tightening up the grounds for removal. It also authorized a substantial increase in funding for immigration-related homeland security.

The REAL ID Act (P.L. 109-13, Division B) represented a continuation in the trend to expand the terror-related grounds for exclusion and removal. Of particular relevance to this report, the REAL ID Act expanded the terror-related grounds for inadmissibility and deportability, and amended the definitions of “terrorist organization” and “engage in terrorist activity” used by the INA.

The Consolidated Appropriations Act, 2008 (P.L. 110-161), subsequently modified the application of certain terrorism-related provisions of the INA, including exempting 10 organizations from

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<sup>13</sup> CRS Report RS21438, *Immigration Legislation Enacted in the 107<sup>th</sup> Congress*, by (name redacted).

falling under the definition of “terrorist organization” and expanding immigration authorities’ waiver authority over many terrorism-related INA provisions.

## **Current Law**

Since 1990, certain “terrorism”-related activities by an alien have expressly been grounds for exclusion and removal. Over the years, these grounds have been expanded to expressly cover membership in terrorist organizations, as well as an increasingly broad range of activities in support of terrorism-related activities or entities. Many of the terrorism-related grounds for inadmissibility and deportation use certain terms—that is, “terrorist activity,” “engage in terrorist activity,” and “terrorist organization”—that are expressly defined by the INA to describe particular kinds of conduct or entities. The following sections provide an overview of the terrorism-related terms defined by the INA, as well as the terrorism-related grounds for inadmissibility and deportation.

## **Definitions of Terror-Related Terms in the INA**

Terms including “terrorist activity,” “engage in terrorist activity,” and “terrorist organization” are specifically defined for INA purposes and refer to distinct concepts. As these definitions change, so too does the scope of INA provisions that use them. The term “terrorist activity” refers to certain, specified acts of violence—for example, hijacking an airplane or assassinating a Head of State. “Engaging in terrorist activity” includes both the commission of direct acts of terrorism and certain activities in support of them, such as soliciting participation in a terrorist act. The INA defines “terrorist organization” to include two general categories of groups. The first category includes groups that have been designated as terrorist organizations by the United States, thereby providing public notice of these organizations’ involvement in terrorism. The second category includes other groups that carry out terror-related activities, but have not been designated either because they are operating under the radar or have shifting alliances, or because designating the group as a terrorist organization would jeopardize ongoing U.S. criminal or military operations. The groups belonging to this second category may be called non-designated terrorist organizations.

The terms “engage in terrorist activity” and “terrorist organization” were amended by the REAL ID Act to cast a wider net over groups and persons who provide more discrete forms of assistance to terrorist organizations, particularly with respect to fund-raising and soliciting membership in those organizations. Subsequently, the Consolidated Appropriations Act FY2008 expressly exempted certain groups from being considered “terrorist organizations” and authorized immigration authorities to exempt other groups from being considered “terrorist organizations” when certain criteria were met. The act also specified the Taliban as a “terrorist organization” for INA purposes.

### **Definition of “Terrorist Activity” under the INA**

“Terrorist activity” is defined by INA § 212(a)(3)(B)(iii). In order for an action to constitute “terrorist activity,” it must have been unlawful in the place where it was committed (or, if it would have occurred in the United States, have been unlawful under U.S. law) and involve

- the hijacking or sabotage of an aircraft, vessel, or other vehicle;
- seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained;
- a violent attack upon an internationally protected person (e.g., Head of State, Foreign Minister, or ambassador);<sup>14</sup>
- an assassination;
- the use of any biological agent, chemical agent, or nuclear weapon or device;
- the use of any explosive, firearm, or other weapon or dangerous device (*other than for mere personal monetary gain*), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property;<sup>15</sup> or
- a threat, attempt, or conspiracy to commit any of the foregoing.

### **Definition of “Terrorist Organization” under the INA**

The REAL ID Act expanded the INA’s definition of “terrorist organization” to include a broader range of groups that provide indirect assistance to other groups involved in terrorist activities. Further, the INA’s definition of “terrorist organization” now covers entities that have not directly engaged in terrorist activities or assisted terrorist organizations, but have *subgroups* that do so. For purposes of the INA, a “terrorist organization” may describe groups falling into one of three categories (“Tiers”):

- any group designated by the Secretary of State as a terrorist organization pursuant to INA § 219, on account of that entity threatening the security of U.S. nationals or the national security of the United States (“Tier I”);

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<sup>14</sup> “Internationally protected person” is defined under U.S. law as “(A) a Chief of State or the political equivalent, head of government, or Foreign Minister whenever such person is in a country other than his own and any member of his family accompanying him; or (B) any other representative, officer, employee, or agent of the United States government, a foreign government, or international organization who at the time and place concerned is entitled pursuant to international law to special protection against attack upon his person, freedom, or dignity, and any member of his family then forming part of his household.” 18 U.S.C. § 1116(b)(4).

<sup>15</sup> In *McAllister v. Attorney General of the United States*, 444 F.3d 178 (3<sup>rd</sup> Cir. 2006), the Third Circuit Court of Appeals discussed some of the situations in which this provision would not apply:

First, the parenthetical phrase “other than for mere personal monetary gain” removes common crimes from the definition by requiring that the offending activity be conducted for reasons other than money. For that reason, offenses like robbery and burglary are not included in the definition. Second, the *mens rea* element of the provision requires the actor to have the specific intent to endanger the safety of individuals or to cause substantial damage to property. Thus, the definition of terrorist activity does not include situations in which an alien has acted in self-defense or in which the alien lacks the capacity to meet the requisite intent. More importantly, none of the aforementioned activities constitute a protected activity outside of the permissible bounds of Congressional regulation.

*Id.* at 186.



- upon publication in the *Federal Register*, any group designated as a terrorist organization by the Secretary of State in consultation with or upon the request of the Attorney General or Secretary of Homeland Security, after finding that the organization engages in terrorist activity (“Tier II”); and
- any group of two or more individuals, whether organized or not, which engages in, or has a subgroup that engages in terrorist activity (“Tier III”).<sup>16</sup>

The Consolidated Appropriations Act, 2008, specifies that the Taliban is considered a Tier I terrorist organization.<sup>17</sup>

### ***Waiver of Application and Inapplicability of “Terrorist Organization” Definition to Members of Certain Groups***

The definition of “terrorist organization” is quite broad, potentially covering any group that either directly engages or has a subgroup that engages in terrorist activity, regardless of whether the group has actually been designated by U.S. authorities as “terrorist.” Possibly complicating matters further is that the INA defines “terrorist activity” and “engage[ing] in terrorist activity” broadly, arguably ignoring the context in which activity occurs and whether such activity is supported by the United States. For example, the use of weapons to endanger the safety of persons or cause substantial damage to property (other than for monetary gain) is considered “terrorist activity.” Accordingly, a pro-democracy group engaged in armed conflict against an oppressive regime could potentially be considered a “terrorist organization” under the INA, even if the group’s activities were supported by the United States, and as a result the persons involved with the group could be inadmissible and ineligible for asylum.<sup>18</sup>

Prior to the enactment of the Consolidated Appropriations Act, 2008, the Secretary of State or Secretary of Homeland Security, following consultation with the other and the Attorney General, had authority to waive the application of this provision with respect to a group that might otherwise constitute a “terrorist organization” solely on account of having a *subgroup* that had engaged in terrorist activity.<sup>19</sup> However, U.S. authorities could *not* waive the application of this provision with respect to any group that had itself “engage[d] in terrorist activity.”<sup>20</sup> Some policymakers expressed concern over the consequences of the limited scope of this waiver authority. In a September 2006 congressional hearing, a State Department representative testified that

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<sup>16</sup> INA § 212(a)(3)(B)(iv); 8 U.S.C. § 1182(a)(3)(B)(iv). The USA PATRIOT ACT previously amended INA § 212 to expand the definition of “terrorist organization” to potentially include terrorist organizations not designated pursuant to INA § 219.

<sup>17</sup> P.L. 110-161, Div. J, § 691(d).

<sup>18</sup> See *In re S-K-*, 23 I. & N. Dec. 936, 941 (BIA 2006) (“Congress intentionally drafted the terrorist bars to relief very broadly, to include even those people described as ‘freedom fighters,’ and it did not intend to give us discretion to create exceptions for members of organizations to which our Government might be sympathetic.”). See also *Khan v. Holder*, 584 F.3d 773, 784-785 (9<sup>th</sup> Cir. 2009) (endorsing the reasoning of the BIA in *In re S-K-*, and also holding that “the definition of ‘terrorist activity’ under the INA does not provide an exception for armed resistance against military targets that is permitted under the international law of armed conflict”).

<sup>19</sup> This waiver provision was added by the REAL ID Act.

<sup>20</sup> INA § 212(a)(3)(B)(iii); 8 U.S.C. § 1182(a)(3)(B)(iii) (2006).

Although Secretarial exercise of the inapplicability authority allows us to make significant progress in reaching some populations in need of resettlement, it does not provide the flexibility required in all refugee cases. For example, Cuban anti-Castro freedom fighters and Vietnamese Montagnards who fought alongside U.S. forces have been found inadmissible on this basis, as have Karen who participated in resistance to brutal attacks on their families and friends by the Burmese regime. The Administration will continue to seek solutions for these groups and to further harmonize national security concerns with the refugee admissions program.<sup>21</sup>

The Consolidated Appropriations Act, 2008, amended the INA to permit appropriate immigration authorities to waive application of the INA's "terrorist organization" definition to any non-designated (i.e., Tier III) group, except when the group has either engaged in terrorist activity against the United States or another democratic country, or purposefully engaged in a pattern of terrorist activity against civilians.<sup>22</sup>

On the basis of activities occurring before the act's date of enactment, section 691(b) of the Consolidated Appropriations Act, Division J, further specified that 10 groups are not considered "terrorist organizations" for INA purposes. These groups are

- the Karen National Union/Karen National Liberation Army (KNU/KNLA);
- the Chin National Front/Chin National Army (CNF/CNA);
- the Chin National League for Democracy (CNLD);
- the Kayan New Land Party (KNLP);
- the Arakan Liberation Party (ALP);
- the Tibetan Mustangs;
- the Cuban Alzados;
- the Karenni National Progressive Party (KNPP);
- appropriate groups affiliated with the Hmong;<sup>23</sup> and
- appropriate groups<sup>24</sup> affiliated with the Montagnards.

Immigration authorities had previously waived the application of the INA's "material support" provision to persons who provided *assistance* to all of the above-listed groups except the Hmong and Montagnards. Until enactment of the Consolidated Appropriations Act, however, *members* of

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<sup>21</sup> Senate Committee on the Judiciary, Subcommittee on Immigration, Border Security and Citizenship, *Hearing on Oversight of U.S. Refugee Admissions and Policy*, 109<sup>th</sup> Cong., 2<sup>nd</sup> sess., September 27, 2006 (testimony of Ellen Sauerbrey, Asst. Sec. for the Bureau of Population, Refugees, and Migration).

<sup>22</sup> P.L. 110-161, Div. J, § 691(a).

<sup>23</sup> Immigration authorities have interpreted the phrase "appropriate groups," when applied to entities affiliated with the Hmong, to include "ethnic Hmong individuals or groups, provided that there is no reason to believe that the relevant activities of the recipients were targeted against noncombatants...." Memorandum from USCIS Acting Deputy Director Michael L. Aytes, 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, Jul. 28, 2008, at 5, available at [http://www.uscis.gov/files/nativedocuments/caa\\_691\\_28\\_july\\_08.pdf](http://www.uscis.gov/files/nativedocuments/caa_691_28_july_08.pdf).

<sup>24</sup> Immigration authorities have interpreted the phrase "appropriate groups," when applied to entities affiliated with the Montagnards, to include the Front Unifié de Lutte des Races Opprimées (FULRO). *Id.* at 5.

these organizations could have faced immigration consequences on account of belonging to groups considered “terrorist organizations.”

P.L. 110-257, which was enacted into law on July 1, 2008, retroactively amended the Consolidated Appropriations Act to include the African National Congress (ANC) among the list of groups not considered “terrorist organizations” for INA purposes.

### **Definition of “Engage in Terrorist Activity” Under the INA**

As discussed previously, the INA treats being “engaged in terrorist activity” as a separate concept from “terrorist activity” itself. The REAL ID Act amended the definition of “engage in terrorist activity” to cover more indirect forms of support for non-designated terrorist organizations. In order to “engage in terrorist activity,” an alien must, either in an individual capacity or as part of an organization,<sup>25</sup>

- commit or incite to commit, under circumstances indicating an intention to cause death or serious bodily injury, a terrorist activity;
- prepare or plan a terrorist activity;
- gather information on potential targets for terrorist activity;
- solicit funds or other things of value for (1) terrorist activity, (2) a designated terrorist organization (i.e., a Tier I or Tier II organization), or (3) a non-designated terrorist organization (i.e., a Tier III organization), unless the solicitor can prove by clear and convincing evidence that he did not know, and should not have reasonably known, that the organization was a terrorist organization;
- solicit another individual to (1) engage in terrorist activity, (2) join a designated terrorist organization, or (3) join a non-designated terrorist organization, unless the solicitor can prove by clear and convincing evidence that he did not know, and should not have reasonably known, that the organization was a terrorist organization; or
- commit an act that the individual knows, or reasonably should know, provides material support to (1) the commission of a terrorist activity, (2) an individual or organization that the individual knows or should reasonably know has committed or plans to commit a terrorist activity, (3) a designated terrorist organization or member of such an organization, or (4) a non-designated terrorist organization or a member of such an organization, unless the actor can demonstrate by clear and convincing evidence that the actor did not know, and should not reasonably have known, that the organization was a terrorist organization.<sup>26</sup>

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<sup>25</sup> An alien can be found to have “engage[d] in terrorist activity” on account of activities taken on behalf of an organization, even if that group has not been deemed a “terrorist organization” for INA purposes. *McAllister*, 444 F.3d at 187 (determination that an alien had “engage[d] in terrorist activity” on account of actions taken as a member of the Irish National Liberation Army (INLA) did not require a determination that the INLA was a “terrorist organization”).

<sup>26</sup> INA § 212(a)(3)(B)(iv); 8 U.S.C. § 1182(a)(3)(B)(iv).

### ***Waiver of Application of Material Support Provision of “Engage in Terrorist Activity” Definition***

Prior to the enactment of the Consolidated Appropriations Act, 2008, the INA included a provision, found at INA § 212(d)(3)(B), permitting immigration authorities to waive the application of the material support provision of the INA’s “engage in terrorist activity” definition. Under prior law, an alien who provided material support to an individual or organization engaging in terrorist activity would not himself be considered to have “engaged in terrorist activity” for purposes of the INA if the Secretary of State or Secretary of Homeland Security, following consultation with the other and the Attorney General, concluded in his sole, unreviewable discretion that the definition of “engage in terrorist activity” did not apply with respect to the alien’s material support.<sup>27</sup>

This waiver authority was used by the State Department and DHS to permit the consideration of applications for refugee status from aliens abroad and to consider asylum and adjustment of status claims for certain aliens present in the United States who provided material support to terrorist entities.<sup>28</sup> In 2006, the State Department waived the material support provision with respect to three large groups of refugees.<sup>29</sup> In 2007, DHS exercised waiver authority over the material support provision with respect to aliens who gave material support to one of the following eight groups:

- Karen National Union/Karen National Liberation Army (KNU/KNLA);
- Chin National Front/Chin National Army (CNF/CNA);
- Chin National League for Democracy (CNLD);
- Kayan New Land Party (KNLP);
- Arakan Liberation Party (ALP);
- Tibetan Mustangs;
- Cuban Alzados; or
- Karenni National Progressive Party (KNPP).<sup>30</sup>

This waiver applied only to aliens who provided material support to these organizations, not to aliens who were members of these groups. As previously discussed, the Consolidated Appropriations Act, 2008, enacted after the issuance of these waivers, specified that the above-listed groups would not be considered “terrorist organizations” for INA purposes. Accordingly, a person who provided material support to such groups would not be considered to have “engage[d]

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<sup>27</sup> INA § 212(d)(3)(B); 8 U.S.C. § 1182(d)(3)(B) (as amended by §104 of the REAL ID Act).

<sup>28</sup> See Dept. of Homeland Security, Press Release, *Statement by Homeland Security Secretary Michael Chertoff on the Intention to Use Discretionary Authority for Material Support to Terrorism*, January 19, 2007, available at [http://www.dhs.gov/xnews/releases/pr\\_1169465766808.shtm](http://www.dhs.gov/xnews/releases/pr_1169465766808.shtm). Aliens who are inadmissible or deportable on terrorism-related grounds are generally ineligible for asylum. INA § 208(b)(2)(A)(v); 8 U.S.C. § 1158(b)(2)(A)(v).

<sup>29</sup> State Department Office of the Spokesman, Press Release, *The Department of State Decides Material Support Inapplicable to Chin Refugees from Burma*, October 19, 2006, available at <http://www.state.gov/r/pa/prs/ps/2006/74761.htm>.

<sup>30</sup> Exercise of Authority Under Sec. 212(d)(3)(B)(i) of the Immigration and Nationality Act, 72 Fed. Reg. 9954 (March 6, 2007).

in terrorist activity,” regardless of the Secretary of Homeland Security’s prior decision to waive application of this provision.

The material support provision had been interpreted by immigration authorities as generally covering any support given to a terrorist entity, regardless of whether such support was provided due to duress or coercion.<sup>31</sup> DHS had opted not to apply the material support provision to persons who provided material support under duress to a terrorist organization, if a totality of the circumstances was deemed to justify the exemption.<sup>32</sup> In September 2007, the Secretary of Homeland Security exempted from the material support provision certain persons who provided material support under duress to the Revolutionary Armed Forces of Colombia (FARC).<sup>33</sup> In December 2007, DHS issued a similar exemption with respect to persons who provided material support under duress to the National Liberation Army of Columbia (ELN).<sup>34</sup>

The Consolidated Appropriations Act, 2008, replaced this waiver provision with a more general provision, discussed *infra* at “Waiver Authority over Inadmissibility Provisions.” In June 2008, the Secretary of State and the Secretary of Homeland Security exercised waiver authority under INA § 212(d)(3)(B) with respect to aliens associated or affiliated with any of the 10 groups expressly exempted by the Consolidated Appropriations Act from being considered “terrorist organizations” for immigration purposes who were not otherwise granted relief under that exemption,<sup>35</sup> so long as certain criteria are fulfilled. Among other things, the waiver does not apply to aliens whose terrorist activities targeted non-combatants or aliens who pose a danger to the safety and security of the United States.<sup>36</sup>

## **Terrorism-Related Grounds for Inadmissibility or Deportation Under Immigration Law**

Engaging in specified, terrorism-related activity has direct consequences concerning an alien’s ability to lawfully enter or remain in the United States. The INA provides that aliens engaged in terrorism-related activities generally cannot legally enter the United States. If an alien is legally admitted into the United States and subsequently engages in terrorist activity, he is deportable. Even if an alien does not fall under terrorism-related categories making him inadmissible or deportable, he might still be denied entry or removed from the United States on separate, security-related grounds.

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<sup>31</sup> See Note, *Admission Denied: in Support of a Duress Exception to the Immigration and Nationality Act’s “Material Support for Terrorism” Provision*, 20 GEO. IMMIGR. L.J. 437, 458-468 (2006) (discussing decisions by immigration judges interpreting the “material support” provision to cover support given under duress and coercion).

<sup>32</sup> Exercise of Authority Under Sec. 212(d)(3)(B)(i) of the Immigration and Nationality Act 72 Fed. Reg. 9958 (March 6, 2007) (concerning application of material support provision to Tier III organizations); Exercise of Authority Under Sec. 212(d)(3)(B)(i) of the Immigration and Nationality Act 72 Fed. Reg. 26138 (May 8, 2007) (concerning application of material support provision to Tier I and Tier II organizations).

<sup>33</sup> U.S. Citizenship and Immigration Services, Fact Sheet, *USCIS Implements Authority to Exempt Certain Persons Who Provided Material Support under Duress to the Revolutionary Armed Forces of Colombia (FARC)*, September 26, 2007, available online at [http://www.uscis.gov/files/pressrelease/MaterialSupportFS\\_26Sep07.pdf](http://www.uscis.gov/files/pressrelease/MaterialSupportFS_26Sep07.pdf).

<sup>34</sup> Dept. of Homeland Security, Authorization Document, *Authorization to Process Cases Involving the Provision of Material Support to the ELN* (December 18, 2007).

<sup>35</sup> See *supra* at pg. 9.

<sup>36</sup> Exercise of Authority Under Sec. 212(d)(3)(B)(i) of the Immigration and Nationality Act, 73 Fed. Reg. 34770-34776 (June 18, 2008).

## Grounds for Inadmissibility and Deportation

The INA categorizes certain classes of aliens as inadmissible, making them “ineligible to receive visas and ineligible to be admitted to the United States.”<sup>37</sup> Most recently, these grounds were expanded by the REAL ID Act in 2005, including by making activities such as espousal of terrorist activity and receipt of military-type training from or on behalf of a terrorist organization grounds for exclusion. The REAL ID Act also amended the terrorism-related grounds for deportability of aliens who have already entered the United States, so that these grounds are now the same as those for inadmissibility.<sup>38</sup> The terrorism-related grounds for inadmissibility and deportation are primarily found in INA §§ 212(a)(3)(B) and 237(a)(4)(B). An alien is inadmissible or deportable on terrorism-related grounds if he

- has engaged in a terrorist activity;
- is known or reasonably believed by a consular officer, the Attorney General, or the Secretary of Homeland Security to be engaged in or likely to engage in terrorist activity upon entry into the United States;
- has, under circumstances indicating an intention to cause death or serious bodily harm, incited terrorist activity;
- is a representative of (1) a designated or non-designated terrorist organization; or (2) any political, social, or other group that endorses or espouses terrorist activity;
- is a member of (1) any designated terrorist organization (i.e., a Tier I or Tier II organization); or (2) any non-designated terrorist organization (i.e., a Tier III organization), unless the alien can demonstrate by clear and convincing evidence that the alien did not know, and should not reasonably have known, that the organization was a terrorist organization;
- is an officer, official, representative, or spokesman of the Palestine Liberation Organization;<sup>39</sup>
- endorses or espouses terrorist activity or persuades others to endorse or espouse terrorist activity or support a terrorist organization;
- is the spouse or child of an alien who is inadmissible on terror-related grounds, if the activity causing the alien to be found inadmissible occurred within the last five years, unless the spouse or child (1) did not and should not have reasonably known about the terrorist activity or (2) in the reasonable belief of the consular

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<sup>37</sup> INA § 212(a); 8 U.S.C. § 1182(a).

<sup>38</sup> Prior to the enactment of the REAL ID Act, the terrorism-related grounds for deportation were significantly less broad than the terror-related grounds for inadmissibility. Previously, an alien was deportable on terror-related grounds only if he had engaged or was presently engaged in terrorist activity. INA § 237(a)(4)(B); 8 U.S.C. § 1227(a)(4)(B) (2004). Membership in or association with a terrorist organization, the endorsement or espousal of terrorist activity, or being the spouse or child of an alien who was inadmissible to the United States on terror-related grounds did not provide grounds for deporting an alien legally present in the United States, even if such grounds would make an alien seeking to enter the United States statutorily inadmissible.

<sup>39</sup> “An alien who is an officer, official, representative, or spokesman of the Palestine Liberation Organization is considered, for purposes of this chapter, to be engaged in a terrorist activity.” INA § 212(a)(3)(B), 8 U.S.C. § 1182(a)(B).

officer or Attorney General, has renounced the activity causing the alien to be found inadmissible under this section;<sup>40</sup> or

- has received military-type training, from or on behalf of any organization that, at the time the training was received, was a terrorist organization.<sup>41</sup>

An additional, catch-all provision found at INA § 212(a)(3)(F) provides that association with terrorist organizations may also be grounds for inadmissibility. Any alien who either the Secretary of State or Attorney General, after consultation with the other, determines has been associated with a “terrorist organization and intends while in the United States to engage solely, principally, or incidentally in activities that could endanger the welfare, safety, or security of the United States,” is inadmissible.<sup>42</sup> Pursuant to the REAL ID Act, this provision may also be used to remove an alien who has already been legally admitted into the United States.<sup>43</sup>

### **Waiver Authority over Inadmissibility Provisions**

Prior to enactment of the Consolidated Appropriations Act FY2008, immigration authorities possessed exemption authority over the application of inadmissibility provisions concerning aliens who (1) were representatives of political, social, or other groups that endorse or espouse terrorist activity or (2) endorsed or espoused terrorist activity, or persuaded others to endorse or espouse terrorist activity or support a terrorist organization.<sup>44</sup> However, even prior to the enactment of the Consolidated Appropriations Act, immigration authorities possessed discretionary authority to waive application of the terrorism-related grounds for inadmissibility with respect to aliens seeking to temporarily enter the United States as non-immigrants.<sup>45</sup>

The Consolidated Appropriations Act FY2008 significantly broadened waiver authority over the terrorism-related grounds for inadmissibility. Now, the Secretary of State or Secretary of Homeland Security, in consultation with the other and the Attorney General, may generally waive application of almost all of the terrorism-related inadmissibility provisions contained in INA § 212(a)(3)(B).<sup>46</sup> However, only the Secretary of Homeland Security (not the Secretary of State) may exercise waiver authority with respect to an alien after removal proceedings against the alien are instituted.

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<sup>40</sup> Due to an apparent drafting error, the exception to the inadmissibility ground concerning the spouse or child of an alien who is inadmissible on terrorism-related grounds did not cross-reference the correct INA provision. *See* INA § 212(a)(3)(B)(ii); 8 U.S.C. § 1182(a)(3)(B)(ii) (2006) (citing to INA § 212(a)(3)(B)(i)(VII), which concerns the inadmissibility of aliens who espouse or endorse terrorist activity, rather than INA § 212(a)(3)(B)(i)(IX), which generally makes inadmissible the spouse or child of an alien who is inadmissible on terrorism-related grounds). The Consolidated Appropriations Act FY2008 amended this provision to cross-reference the correct INA provision. P.L. 110-161, § 691(c).

<sup>41</sup> “Military-type training” is defined under 18 U.S.C. § 2339D(c)(1).

<sup>42</sup> INA § 212(a)(3)(F); 8 U.S.C. § 1182(a)(3)(F).

<sup>43</sup> INA § 237(a)(4)(B); 8 U.S.C. § 1227(a)(4)(B).

<sup>44</sup> INA § 212(d)(3)(B); 8 U.S.C. § 1182(d)(3)(B).

<sup>45</sup> INA § 212(d)(3)(A); 8 U.S.C. § 1182(d)(3)(B).

<sup>46</sup> The waiver does not affect the application of INA § 212(a)(3)(F), which permits immigration authorities to exclude associates of terrorist organizations in certain circumstances.

Immigration authorities may *not* waive application of INA § 212(a)(3)(B) with respect to specified categories of aliens. These include aliens who

- are presently engaged or are likely to engage after entry in terrorist activity;
- voluntarily and knowingly engage or have engaged in terrorist activity on behalf of a designated (i.e., Tier I or Tier II) terrorist organization;
- voluntarily and knowingly have received military training from a Tier I or Tier II organization;
- are members or representatives of Tier I or Tier II organizations; or
- voluntarily and knowingly endorse or espouse the terrorist activity of a Tier I or Tier II organization, or convince others to support terrorist activity on behalf of a Tier I or Tier II organization.

While the Consolidated Appropriations Act generally expands immigration authorities' waiver authority, in contrast to prior law, the inadmissibility provision covering aliens who endorse or espouse terrorist activity may no longer be waived in situations where the endorsement or espousal of support concerned the terrorist activities of a Tier I or Tier II terrorist organization.

Although the Secretary of State and Secretary of Homeland Security are expressly accorded authority to waive certain terrorism-related grounds making an alien inadmissible under INA § 212, no similar waiver authority is expressly provided over the terror-related grounds that make an alien deportable under INA § 237, though language in the Consolidated Appropriations Act suggests that the waiver authority is intended to apply to both inadmissible and deportable aliens.<sup>47</sup>

## **Security-Related and Foreign Policy Grounds for Deeming an Alien Inadmissible**

Even if an alien is not found inadmissible or deportable on terror-related grounds, he may nevertheless be removed from the United States or denied entry on separate, security-related grounds. An alien may be deemed inadmissible or deportable if he has engaged, is engaged, or (in the case of an alien not yet admitted into the United States) intends to engage in “any activity a purpose of which is the opposition to, or the control or overthrow of, the Government of the United States by force, violence, or other unlawful means.”<sup>48</sup> In the case of aliens not yet admitted into the United States, either a consular officer or relevant immigration authority may designate an alien inadmissible if he has reasonable grounds to believe that the alien seeks to enter the United States to engage in such conduct.<sup>49</sup>

Further, if the Secretary of State has reasonable grounds to believe an alien's entry, presence, or activities in the United States would have potentially serious adverse foreign policy consequences

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<sup>47</sup> See P.L. 110-161, Div. J, § 691(f) (stating that INA §§ 212(a)(3)(B) and 212(d)(3)(B), as amended by the act, “shall apply to (1) removal proceedings instituted before, on, or after the date of enactment of this section; and (2) acts and conditions constituting a ground for inadmissibility, excludability, deportation, or removal occurring or existing before, on, or after such date”).

<sup>48</sup> INA §§ 212(a)(3)(A), 237(a)(3)(A), 8 U.S.C. §§ 1182(a)(3)(A), 1227(a)(3)(A).

<sup>49</sup> INA § 212(a)(3)(A); 8 U.S.C. § 1182(a)(3)(A).



for the United States, that alien may be deemed inadmissible or deportable.<sup>50</sup> However, aliens who are officials of foreign governments or purported foreign governments, or who are candidates for foreign office, are not inadmissible or deportable solely on account of their beliefs or statements.<sup>51</sup> Other aliens may not be deported or denied entry into the United States on account of their past, current, or expected beliefs, statements, or associations, if such beliefs, statements, or associations would be lawful within the United States, unless the Secretary of State personally determines that those aliens' admission would compromise a compelling United States foreign policy interest.<sup>52</sup> No similar limitation on removal is provided for aliens who are inadmissible or deportable on the separate, terrorism-related grounds concerning (1) espousal of terrorist activity or (2) association with a terrorist organization.

## Screening Aliens for Admissibility

### Visa Issuance

Personal interviews are required for all prospective legal permanent residents and are generally required for foreign nationals seeking nonimmigrant visas.<sup>53</sup> Pursuant to the Intelligence Reform and Terrorist Prevention Act of 2004, an in-person consular interview is required for most applicants between the ages of 14 and 79 for nonimmigrant visas. Consular officers use the Consular Consolidated Database (CCD) to screen visa applicants. Over 82 million records of visa applications are now automated in the CCD, with some records dating back to the mid-1990s.<sup>54</sup> Since February 2001, the CCD has stored photographs of all visa applicants in electronic form, and more recently the CCD has begun storing 10-finger scans. In addition to indicating the outcome of any prior visa application of the alien in the CCD, the system links with other databases to flag problems that may affect the issuance of the visa. The CCD is the nexus for screening aliens for admissibility, notably screening on terrorist security and criminal grounds.<sup>55</sup>

### Terrorist Screening

For some years, consular officers have been required to check the background of all aliens in the "lookout" databases, specifically the Consular Lookout and Support System (CLASS). In 2003, Homeland Security Presidential Directive/HSPD-6 transferred certain terrorist watch list functions previously performed by the Department of State's Bureau of Intelligence and Research to the Terrorist Screening Center (TSC), the entity that ultimately became the National

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<sup>50</sup> INA § 212(a)(3)(C); 8 U.S.C. § 1182(a)(3)(C).

<sup>51</sup> INA §§ 212(a)(3)(C)(ii), 237(a)(4)(C)(ii); 8 U.S.C. §§ 1182(a)(3)(C)(ii), 1227(a)(4)(C)(ii).

<sup>52</sup> INA §§ 212(a)(3)(C)(iii), 237(a)(4)(C)(ii); 8 U.S.C. §§ 1182(a)(3)(C)(iii), 1227(a)(4)(C)(ii).

<sup>53</sup> 22 C.F.R. § 42.62. Personal interview waivers may be granted only to children under age 14, persons 79 years or older, diplomats and representatives of international organizations, aliens who are renewing a visa they obtained within the prior 12 months, and individual cases for whom a waiver is warranted for national security or unusual circumstances. 22 C.F.R. § 41.102.

<sup>54</sup> According to the Department of State's Office of Legislative Affairs, consular officers have stored photographs of nonimmigrant visa applicants in an electronic database for over twelve years. These data are now in the CCD.

<sup>55</sup> For more on alien screening procedures and policy, see CRS Report RL31512, *Visa Issuances: Policy, Issues, and Legislation*, by (name redacted).

Counterterrorism Center (NCTC).<sup>56</sup> NCTC has direct access to CCD and CLASS, as do the relevant DHS immigration and Department of Justice law enforcement agencies.<sup>57</sup>

The Security Advisory Opinion (SAO) system requires a consular officer abroad to refer selected visa cases for greater review by intelligence and law enforcement agencies.<sup>58</sup> The current interagency procedures for alerting officials about foreign nationals who may be suspected terrorists, referred to in State Department nomenclature as Visa Viper, began after the 1993 World Trade Center bombing and were institutionalized by enactment of the Enhanced Border Security and Visa Entry Reform Act of 2002. If consular officials receive information about a foreign national that causes concern, they send a Visa Viper cable (which is a dedicated and secure communication) to the NCTC. In 2009, consular posts sent approximately 3,000 Visa Viper communications to NCTC.<sup>59</sup>

In a similar set of SAO procedures, consular officers send suspect names, identified by law enforcement and intelligence information (originally certain visa applicants from 26 predominantly Muslim countries), to the FBI for a name check program called Visa Condor.<sup>60</sup> There is also the “Terrorist Exclusion List” (TEL), which lists organizations designated as terrorist-supporting and includes the names of individuals associated with these organizations.<sup>61</sup>

## **Controlled Technologies**

With procedures distinct from the terrorist watch lists, consular officers screen visa applicants for employment or study that would give the foreign national access to controlled technologies, that is, those that could be used to upgrade military capabilities, and refer foreign nationals from countries of concern (e.g., China, India, Iran, Iraq, North Korea, Pakistan, Sudan, and Syria) to the FBI and other key federal agencies.<sup>62</sup> This screening is part of a name-check procedure known as Visa Mantis, which has the following stated objectives: (1) stem the proliferation of weapons of mass destruction and missile delivery systems; (2) restrain the development of destabilizing conventional military capabilities in certain regions of the world; (3) prevent the transfer of arms

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<sup>56</sup> The White House, Homeland Security Presidential Directive/HSPD-6, *Subject: Integration and Use of Screening Information* (Washington, September 16, 2003). It ordered the creation of the Terrorist Screening Center (TSC) to consolidate terrorist watch lists. It was issued on September 16, 2003, and directed the operations to begin on December 1, 2003.

<sup>57</sup> Unclassified congressional staff briefing by Assistant Secretary of State Janice Jacobs, January 11, 2010. For background, see Testimony of Maura Harty, Assistant Secretary of State for Consular Affairs, National Commission on Terrorist Attacks Upon the United States, *U.S. Government Agencies Aimed at Improving Border Security*, hearing, January 26, 2004.

<sup>58</sup> U.S. Congress, Senate Committee on Foreign Relations, Subcommittee on International Operations and Terrorism, *The Post 9/11 Visa Reforms and New Technology: Achieving the Necessary Security Improvements in a Global Environment*, hearing, October 23, 2003.

<sup>59</sup> Unclassified congressional staff briefing by Assistant Secretary of State Janice Jacobs, January 11, 2010.

<sup>60</sup> U.S. Congress, Senate Committee on Foreign Relations, Subcommittee on International Operations and Terrorism, *The Post 9/11 Visa Reforms and New Technology: Achieving the Necessary Security Improvements in a Global Environment*, hearing, October 23, 2003.

<sup>61</sup> For background and analysis, see CRS Report RL32120, *The "FTO List" and Congress: Sanctioning Designated Foreign Terrorist Organizations*, by (name redacted).

<sup>62</sup> U.S. General Accounting Office (now the U.S. Government Accountability Office), *Export Controls: Department of Commerce Controls Over Transfers of Technology to Foreign Nationals Needs Improvement*, GAO-02-972 (September 2002).

and sensitive dual-use items to terrorist states; and (4) maintain U.S. advantages in certain militarily critical technologies.

## **Biometric Visas**

Aliens who are successful in their request for a visa are then issued the actual travel document.<sup>63</sup> Since October 2004, all visas issued by the United States use biometric identifiers (e.g., scans of the right and left index fingers) in addition to the digitized photograph that has been collected for some time.<sup>64</sup> These biometric data are available through the CCD, which links with the United States Visitor and Immigrant Status Indicator Technology (US-VISIT), DHS's automated entry and exit data system, at the time the visa is issued.

## **Terrorist Travel**

The Intelligence Reform and Terrorist Prevention Act of 2004 established an Office of Visa and Passport Security in the Bureau of Diplomatic Security of the Department of State, headed by a person with the rank of Deputy Assistant Secretary of State for Diplomatic Security. The Deputy Assistant Secretary and appropriate Department of Homeland Security officials are tasked with preparing a strategic plan to target and disrupt individuals and organizations at home and in foreign countries that are involved in the fraudulent production, distribution, or use of visas, passports and other documents used to gain entry to the United States. This strategic plan is to emphasize individuals and organizations that may have links to domestic terrorist organizations or foreign terrorist organizations as defined by INA. The Office also analyzes methods used by terrorists to travel internationally, particularly the use of false or altered travel documents to illegally enter foreign countries and the United States, and it advises the Bureau of Consular Affairs on changes to the visa issuance process that could combat such methods, including the introduction of new technologies.

The Intelligence Reform and Terrorism Prevention Act of 2004 (P.L. 108-458) required the Secretary of DHS, in consultation with the Secretary of State, to submit to Congress a plan to ensure that DHS and DOS acquire and deploy to all consulates, ports of entry, and immigration services offices, technologies that facilitate document authentication and the detection of potential terrorist indicators on travel documents. The law further required that the plan address the feasibility of using such technologies to screen passports submitted for identification purposes to a United States consular, border, or immigration official.

By 2007, it appeared that DHS had not yet established the terrorist travel program mandated by §7215 of P.L. 108-458. As a consequence, §503 of the Implementing Recommendations of the 9/11 Commission Act of 2007 (P.L. 110-53) requires the Secretary to establish the program within 90 days of enactment and to report to Congress within 180 days on the implementation of the program. The act further requires that the Assistant Secretary for Policy at DHS (or another official that reports directly to the Secretary) be designated as head of the terrorist travel program and outlines specific duties to be carried out by the head of the program.

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<sup>63</sup> For a full discussion of biometric visas, see congressional distribution memorandum, *Biometric and Laser Visas: Background and Current Policy*, by (name redacted), August 19, 2004.

<sup>64</sup> Section 414 of the USA PATRIOT ACT (P.L. 107-56) and Section 303 of the Enhanced Border Security and Visa Reform Act (P.L. 107-173) require that visas and other travel documents contain a biometric identifier and are tamper-resistant.

## Admissibility at Ports of Entry

### Border Inspections

The INA requires the inspection of all aliens who seek entry into the United States; possession of a visa or another form of travel document does not guarantee admission into the United States.<sup>65</sup> As a result, all persons seeking admission to the United States must demonstrate to a CBP inspector that they are a foreign national with a valid visa and/or passport or that they are a U.S. citizen.<sup>66</sup> There are 327 official ports of entry in the United States, including 15 preclearance offices in Canada, Ireland, and the Caribbean. For FY2008, CBP reported inspecting approximately 409 million individuals (citizens as well as foreign nationals) at land, air, and sea ports of entry.<sup>67</sup> Because many foreign nationals are permitted to enter the United States without visas, notably, as discussed above, through the VWP, border inspections are extremely important for those having their initial screening at the port of entry.<sup>68</sup>

Primary inspection at the port of entry consists of a brief interview with a CBP officer, a cursory check of the traveler's documents and a query of the Interagency Border Inspection System (IBIS).<sup>69</sup> If the inspector is suspicious that the traveler may be inadmissible under the INA or in violation of other U.S. laws, the traveler is referred to a secondary inspection. During secondary inspections, travelers are questioned extensively and travel documents are further examined. Several immigration databases are queried as well, including lookout databases.

### US-VISIT

Under the US-VISIT system, certain foreign nationals are required to provide fingerprints, photographs or other biometric identifiers upon arrival in the United States. US-VISIT has grown from a photograph and two-finger biometric system for immigration identification<sup>70</sup> to the major identity management and screening system for DHS. CBP inspectors are currently taking a digital photograph and scanning 10 fingerprints from each foreign national who presents him or herself at designated ports of entry. According to DHS, US-VISIT operates and maintains two major automated identification systems in support of its mission: the Automated Biometric

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<sup>65</sup> CRS Report RL32399, *Border Security: Inspections Practices, Policies, and Issues*, by (name redacted) et al.

<sup>66</sup> CRS congressional distribution memorandum, *Western Hemisphere Travel Initiative*, by Ruth Wasem, (name redacted), Susan Epstein, Todd Tatelman, and (name redacted), April 26, 2006.

<sup>67</sup> U.S. Department of Homeland Security, *U.S. Customs and Border Protection (CBP) Fiscal Year 2008 Performance and Accountability*, Washington, DC, February 2009.

<sup>68</sup> For further background, see CRS Report RS21899, *Border Security: Key Agencies and Their Missions*, by (name redacted).

<sup>69</sup> IBIS is a broad system that interfaces with the FBI's National Crime Information Center (NCIC), the Treasury Department's Enforcement and Communications System (TECS II), the former INS's National Automated Immigration Lookout System (NAIS) and Non-immigrant Information System (NIIS) and the DOS's Consular Consolidated Database (CCD), Consular Lookout And Support System (CLASS) and TIPOFF terrorist databases. Because of the numerous systems and databases that interface with IBIS, the system is able to obtain such information as whether an alien is admissible, an alien's criminal information, and whether an alien is wanted by law enforcement.

<sup>70</sup> DHS regulations exempted about 20 categories of individuals from providing biometric identifiers upon entry to or exit from the United States; however, the CBP inspector retains discretion to collect an alien's biometric information. CRS Report RL32234, *U.S. Visitor and Immigrant Status Indicator Technology (US-VISIT) Program*, by Lisa M. Seghetti and (name redacted).

Identification System (IDENT) for biometric data, and the Arrival and Departure Information System (ADIS) for biographic data.<sup>71</sup>

## **Pre-inspection**

To keep inadmissible aliens from departing for the United States, IIRIRA required the implementation of a pre-inspection program at selected locations overseas. At these foreign airports, U.S. immigration officers inspect aliens before their final departure to the United States. IIRIRA also authorized assistance to air carriers at selected foreign airports to help in the detection of fraudulent documents. The Intelligence Reform and Terrorist Prevention Act of 2004 directed DHS to expand the pre-inspection program at foreign airports to at least 15 and up to 25 airports, and submit a report on the progress of the expansion by June 30, 2006. The act also directed DHS to expand the Immigration Security Initiative, which places CBP inspectors at foreign airports to prevent people identified as national security threats from entering the country. The law required that at least 50 airports participate in the Immigration Security Initiative by December 31, 2006.

## **Expedited Removal under INA § 235(c)**

Pursuant to INA § 235(c), in cases where the arriving alien is *suspected* of being inadmissible on security or related grounds, including terror-related activity, the alien may be summarily excluded by the regional director with no further administrative right to appeal. The Attorney General shall review such orders of removal.<sup>72</sup> If the Attorney General concludes on the basis of confidential information that the alien is inadmissible on security or related grounds under § 212(a)(3) of the INA, and determines after consulting with appropriate U.S. security agencies that disclosure of such information would be prejudicial to the public interest, safety, or security, the regional director of the CBP is authorized to deny any further inquiry as to the alien's status and either order the alien removed or order disposal of the case as the director deems appropriate.<sup>73</sup>

Generally, an alien's removal to a particular country is withheld upon a showing that his life or freedom would be threatened in that country because of his race, religion, nationality, membership in a particular social group, or political opinion.<sup>74</sup> However, an alien is, with limited exception, ineligible for this remedy if, *inter alia*, he has been convicted of an aggravated felony or "there are reasonable grounds to believe that the alien is a danger to the security of the United States."<sup>75</sup> Pursuant to U.S. legislation implementing the U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), all aliens—including those otherwise ineligible for withholding of removal and/or subject to expedited removal on security or related grounds such as terror-related activity—may not be removed to a country where they would more likely than not be tortured.<sup>76</sup>

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<sup>71</sup> U.S. Department of Homeland Security, National Protection and Programs Directorate, *United States Visitor and Immigrant Status Indicator Technology, Fiscal Year 2010 Congressional Justification*, February 2009.

<sup>72</sup> INA § 235(c)(2)(A); 8 U.S.C. § 1225(c)(2)(A).

<sup>73</sup> See 8 C.F.R. § 235.8(b)(1).

<sup>74</sup> INA § 241(b)(3); 8 U.S.C. § 1231(b)(3).

<sup>75</sup> INA § 241(b)(3)(B); 8 U.S.C. § 1231(b)(3)(B).

<sup>76</sup> Foreign Affairs Reform and Restructuring Act, P.L. 105-277, § 2242. For further discussion, see CRS Report RL32276, *The U.N. Convention Against Torture: Overview of U.S. Implementation Policy Concerning the Removal of* (continued...)

## Latest Legislative Actions

Legislation was enacted in the 110<sup>th</sup> Congress to modify the terrorism-related grounds for inadmissibility and removal, as well as the impact that these grounds have upon alien eligibility for relief from removal. As previously discussed, the Consolidated Appropriations Act, 2008 (P.L. 110-161), enacted in December 2007, modified certain terrorism-related provisions of the INA, including by exempting specified groups from the INA's definition of "terrorist organization" and significantly expanding immigration authorities' waiver authority over the terrorism-related grounds for exclusion. P.L. 110-257, which was enacted into law on July 1, 2008, limits application of the terrorism-related grounds for inadmissibility with respect to the African National Congress (ANC) and certain ANC Members. Specifically, P.L. 110-257 expressly exempts the ANC from the INA's definition of "terrorist organization." The act also provides the Secretary of State and the Secretary of Homeland Security, in consultation with the other and the Attorney General, with authority to exempt most of the terrorism-related<sup>77</sup> and criminal grounds for inadmissibility from applying to aliens with respect to activities undertaken in opposition to apartheid rule in South Africa.<sup>78</sup> Further, federal authorities are required to take all necessary steps to ensure that databases used to determine admissibility to the United States are updated so that they are consistent with the exemptions provided to aliens for anti-apartheid activity. Immigration reform is an issue in the 111<sup>th</sup> Congress, and legislative proposals may contain provisions modifying the immigration consequences of terrorism-related activity.

## Recent Concerns

### Case of Umar Farouk Abdulmutallab

The case of Umar Farouk Abdulmutallab, who allegedly tried to take down Northwest Airlines Flight 253 on December 25, 2009, has refocused attention on terrorist screening during the visa issuance process. The 23-year-old Nigerian national allegedly tried unsuccessfully to ignite an explosive device on an incoming flight to Detroit. U.S. consular officers in London, where Abdulmutallab was a student at University College London, had issued him a multi-year, multiple-visit tourist visa in June 2008. According to a State Department spokesman: "At the time that his visa was issued, there was nothing in his application nor in any database at the time that would indicate that he should not receive a visa. He was a student at a very reputable school. He had plenty of financial resources, so he was not an intending immigrant. There was no derogatory information about him last year—last June—that would indicate that he shouldn't get a visa, so we issued the visa."<sup>79</sup>

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(...continued)

*Aliens*, by (name redacted).

<sup>77</sup> The act does not permit the exemption of INA § 212(a)(3)(B)(ii), which bars the admission of an alien who immigration authorities have reason to believe is currently engaged in or is likely to engage after entry in terrorist activity.

<sup>78</sup> The act also contains a provision expressing the sense of Congress that this provision should be used to exempt the anti-apartheid activities of aliens who are current or former officials of the government of the Republic of South Africa.

<sup>79</sup> Ian Kelly, *On-the-Record Briefing*, U.S. Department of State, Washington, DC, December 28, 2009.

The suspect's father, a wealthy banker and former Nigerian government official, had reportedly contacted U.S. officials to indicate his concern about his son's welfare and involvement in Islamic fanaticism. State Department officials have reported that the father came into the Embassy in Abuja, Nigeria, on November 19, 2009, to express his concerns about his son and that the consular officials at the Embassy in Abuja sent a cable to the National Counterterrorism Center (NCTC).<sup>80</sup> They relied on the standard interagency procedures for screening suspected terrorists, referred to as Visa Viper.<sup>81</sup> State Department officials acknowledge that a consular officer misspelled Abdulmutallab when conducting the name check in the CCD and as a result did not report in the Visa Viper that Abdulmutallab had received a visa in 2008. This error was reportedly corrected in a Visa Viper cable sent November 25, 2009.<sup>82</sup>

## Visa Revocation

Some have questioned whether the Embassy in Abuja, Nigeria, or other U.S. consular officials had sufficient authority and justification to revoke the visa issued to Abdulmutallab in London as a result of the information his father provided. According to a State Department spokesman: "[T]he information in this VISAS VIPER cable was insufficient for this interagency review process to make a determination that this individual's visa should be revoked."<sup>83</sup> While consular officers have the authority to issue and to revoke visas on terrorist grounds, they defer to the NCTC to identify suspected terrorists and designate known terrorists.<sup>84</sup>

After a visa has been issued, the consular officer as well as the Secretary of State has the discretionary authority to revoke a visa at any time.<sup>85</sup> A consular officer must revoke a visa if

- the alien is ineligible under INA §212(a) as described above to receive such a visa, or was issued a visa and overstayed the time limits of the visa;
- the alien is not entitled to the nonimmigrant visa classification under INA §101(a)(15) definitions specified in such visa;
- the visa has been physically removed from the passport in which it was issued; or
- the alien has been issued an immigrant visa.<sup>86</sup>

The Foreign Affairs Manual (FAM) instructs: "in making any new determination of ineligibility as a result of information which may come to light after issuance of a visa, the consular officer must seek and obtain any required advisory opinion." This applies, for example, to findings of ineligibility under "misrepresentation," "terrorist activity," or "foreign policy." FAM further instructs: "pending receipt of the Department's advisory opinion, the consular officer must enter

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<sup>80</sup> Ian Kelly, *On-the-Record Briefing*, U.S. Department of State, Washington, DC, December 28, 2009.

<sup>81</sup> For a more complete discussion of terrorist watch lists and the role of the National Counterterrorism Center, see CRS Report RL33645, *Terrorist Watchlist Checks and Air Passenger Prescreening*, by (name redacted) and (name redacted).

<sup>82</sup> Unclassified congressional staff briefing by Assistant Secretary of State Janice Jacobs, January 11, 2010.

<sup>83</sup> Ian Kelly, *On-the-Record Briefing*, U.S. Department of State, Washington, DC, December 28, 2009.

<sup>84</sup> The White House, Homeland Security Presidential Directive/HSPD-6, *Subject: Integration and Use of Screening Information* (Washington, September 16, 2003). This directive transferred certain terrorist watch list functions previously performed by the Department of State's Bureau of Intelligence and Research to the entity that became the National Counterterrorism Center.

<sup>85</sup> INA § 221(i); 8 U.S.C. §1201(i).

<sup>86</sup> 22 C.F.R. §41.122 Notes N1.

the alien's name in the CLASS under a quasi-refusal code, if warranted.<sup>87</sup> According to DOS officials, they sometimes prudentially revoke visas (i.e., they revoke a visa as a safety precaution).<sup>88</sup> When a consular officer suspects that a visa revocation may involve U.S. law enforcement interests, FAM instructs the consular officer to consult with law enforcement agencies at post and inform the State officials of the case, to permit consultations with potentially interested entities before a revocation is made.<sup>89</sup> The rationale for this consultation is that there may be legal or intelligence investigations that would be compromised if the visa were revoked and that law enforcement and intelligence officials may prefer to monitor the individual to further investigate his actions and associates.

Visa revocation has been a ground for removal in INA §237(a)(1)(B) since enactment of P.L. 108-458 in December 2004. That provision (§5304 of P.L. 108-458) permits limited judicial review of removal if visa revocation is the sole basis of the removal.

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<sup>87</sup> 22 C.F.R. § 41.122 Notes PN3.

<sup>88</sup> Testimony of Janice L. Jacobs, Deputy Assistant Secretary of State for Visa Services, in U.S. Congress, Senate Committee on the Judiciary, Subcommittee on Immigration, Border Security and Citizenship, *Visa Issuance, Information Sharing and Enforcement in a Post-9/11 Environment: Are We Ready Yet?* hearing, July 15, 2003.

<sup>89</sup> 22 C.F.R. § 41.122 Notes PN9.2-1.



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