



Immigration Law Advisor

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The Immigration Law Advisor is a professional monthly newsletter produced by the Executive Office for Immigration Review. The purpose of the publication is to disseminate judicial, administrative, regulatory, and legislative developments in immigration law pertinent to the mission of the Immigration Courts and Board of Immigration Appeals. It is intended only to be an educational resource for the use of employees of the Executive Office for Immigration Review.

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Differentiating the Material Support and Persecutor Bars in Asylum Claims

Lisa Yu

I. Introduction

An alien's asylum claim rests on severe harm feared or experienced at the hands of governments, militias, terrorist organizations, or violent individuals. In building a case that such harm has occurred, or that there is a reasonable possibility of it occurring, the alien will often present factual situations in which he interacts and is possibly affiliated with a persecutory actor. Identifying these persecutors and their actions is central to many aspects of the asylum claim, as it may be determinative of whether the alien meets his burden to show that he is a refugee, as well as whether he demonstrates that he is not barred from relief. In both the affirmative and defensive contexts, there may be confusion of the most common inadmissibility bars that arise in asylum cases: the persecutor bar, which is collectively made up of three provisions at sections 101(a)(42), 208(b)(2)(A)(i), and 241(b)(3)(B)(i) of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(42), 1158(b)(2)(A)(i), and 1231(b)(3)(B)(i), and the bars relating to terrorist activity, specifically the "material support" bar in sections 212(a)(3)(B)(iv)(VI)(aa)-(cc) of the Act, 8 U.S.C. §§ 1182(a)(3)(B)(iv)(VI)(aa)-(cc).

One of the harsh realities of the cases involving the persecutor and material support bars is that the harm suffered by the alien may become the basis for denying him the protection he is seeking. The circumstances that give rise to each bar are often both disturbing and sympathetic. For example, the Executive Office for Immigration Review ("EOIR") found, and the Fifth Circuit affirmed, that an alien was barred from relief as a persecutor in a case where the alien was arguably merely trying to survive in a failed state.¹ In another case, an alien who donated money to an organization fighting an oppressive regime was deemed to have provided material support to a terrorist organization, though relief was eventually granted.² There has been much criticism of what is seen as unintended

consequences of these bars, with one critic referring to the effects of the material support bar as “Kafkaesque.”³ The amici curiae in *Negusie v. Mukasey*, which was argued before the Supreme Court on November 5, 2008, have argued that some circuits’ reading of the persecutor bar “compound[s] the violation of rights the United States has committed itself to protect[ing].”⁴ While these bars share a penchant for garnering criticism, the analysis of each bar is quite different, and the ramifications to the alien of falling under one, as opposed to the other, can be dire. It is therefore paramount that adjudicators note this possibility of confusion between the bars and proceed carefully.

This article will lay out the “persecutor bar versus material support bar” dilemma that arises in these cases, assessing the confusion between the bars and the differences between them. The article will discuss cases of the Board of Immigration Appeals and the circuit courts to clarify the distinction between the elements that would give rise to the persecutor bar and the material support bar. The article will also touch on some of the ramifications of applying the incorrect bar.

II. Background on the Persecutor and Material Support Bars

A. The Persecutor Bar

The persecutor bar prohibits those who have engaged in the persecution of others from receiving the benefits of asylum or withholding of removal. In explaining the rationale of the 1951 United Nations Convention Relating to the Status of Refugees, 189 U.N.T.S. 150 (1954), 19 U.S.T. 6259, 6278, T.I.A.S. No. 6577 (1968) (“Convention”), and its 1967 Protocol Relating to the Status of Refugees, 19 U.S.T. 6223, T.I.A.S. No. 6577 (Jan. 31, 1967) (“Protocol”), the United Nations High Commissioner for Refugees (“UNHCR”) has issued guidance stating that the rationale for the exclusion clauses in the Convention and Protocol is that “certain acts are so grave as to render their perpetrators undeserving of international protection as refugees.”⁵ An alien cannot meet the definition of a refugee provided in section 101(a)(42) of the Act if he “ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.” In addition, sections 208(b)(2)(A)(i) and 241(b)(3)(B)(i) of the Act specifically bar the Attorney General from granting asylum or withholding of removal to such a person.

B. The Material Support Bar

The development and expansion of the terrorism-related inadmissibility grounds in the Act reflects the Government’s heightened security-awareness post-9/11.⁶ Under the Act, the list of activities that invoke a terrorism-related bar is now quite extensive. As a result, it is easier to find an alien inadmissible, and therefore ineligible for asylum. Section 212(a)(3)(B) of the Act contains the terrorism-related inadmissibility provisions, including the definitions of “terrorist activity”⁷ and “engaging in terrorist activity.” One such means of engaging in terrorist activity is through the provision of “material support.”⁸ Because the breadth of activities that qualify as material support has made this bar one of the most common that arise in the asylum context, the “material support” inadmissibility ground will be the focus of this article.

Under section 212(a)(3)(B)(iv)(VI) of the Act, an alien who affords material support for the commission of a terrorist activity to a terrorist organization,⁹ or to an individual who has committed or plans to commit a terrorist activity, is inadmissible, and consequently deportable under section 237(a)(4)(B) of the Act, 8 U.S.C. § 1227(a)(4)(B). Such a person is also ineligible for most immigration benefits, including, but not limited to, asylum.

III. Confusion of the Bars

The persecutor and material support bars both reflect the principle that some actions render individuals unworthy of protection, even if they are found to have suffered persecution in the past or to have a well-founded fear of persecution. Often, the acts that raise one of these bars are similar, leading to confusion between the two. Both bars often arise in the context of an alien describing his own torment at the hands of a government or a violent organization. Ironically, it is often the harm asserted by the alien as the basis of his asylum claim that brings to the adjudicator’s attention that a bar may apply. The persecutor bar is retrospective, serving as punishment for past actions.¹⁰ In contrast, the material support bar, with its broad definitions of terrorist activity manifesting a heightened security-consciousness, also reflects concerns of what an individual’s past might indicate about his future intentions and capabilities.¹¹

The common underpinnings of the circumstances giving rise to both bars makes their conflation

understandable, but the analyses for whether either bar applies are quite different. The rest of this article will contemplate the distinctions between the bars. Distinguishing factors for whether an alien's actions could invoke the persecutor or material support bar include (1) the degree of action being engaged in or supported and the result of that action, (2) mens rea, (3) volition, and (4) the characteristics of the victims targeted. The gray areas prominent in asylum law are apparent here, but case law gives guidance on where lines should be drawn.

IV. Case Law

A. Degree of Action and Result Requirements

Both the persecutor bar and the material support bars can arise with a fairly limited action on the part of the alien. However, the burden on the Government to show that the persecutor bar is applicable is slightly higher than it is to prove that the material support bar applies.

1. The Persecutor Bar

The definition of the term "persecution" is not a clear one.¹² The seminal case on the persecutor bar, *Fedorenko v. United States*, 449 U.S. 490, 512 n.34 (1981), articulates its method of analytical line-drawing as distinguishing between the acts of haircutting (not persecution) and prison guarding (persecution).¹² Attempting to define what persecution is not, the Board has held that "[p]ersecution' within the Act does not encompass all treatment that society regards as unfair, unjust, or even unlawful or unconstitutional." *Matter of V-T-S-*, 21 I&N Dec. 792, 798 (BIA 1997). For example, mere membership in an organization that has engaged in persecution should not be sufficient to bar an alien from relief. *Matter of Rodriguez-Majano*, 19 I&N Dec. 811, 814-15 (BIA1988).

Further, mere association "with an enterprise that engages in persecution is insufficient" on its own to trigger the persecutor bar. *Xu Sheng Gao v. United States Att'y Gen.*, 500 F.3d 93, 99 (2d Cir. 2007). The Second Circuit has found that the conduct must be "active and ha[ve] direct consequences for the victims" in order to qualify as assistance in persecution. *Id.* at 99 (quoting *Zhang Jian Xie v. INS*, 434 F.3d 136, 143 (2d Cir. 2006)). However, personal participation in the persecutory act is not necessarily required to find one barred. In *Higuait v. Gonzales*, 433 F.3d 417 (4th Cir. 2006), the alien worked in military intelligence gathering information

that he was aware led to the torture, imprisonment, and death of political opponents. The alien never directly harmed anyone, but the court found that he was aware that his actions resulted in the persecution of others and concluded that he was barred as having assisted or otherwise participated in persecution.

The Ninth Circuit suggests that the alien's actions must be "integral" to the resulting persecution. *Im v. Gonzales*, 497 F.3d 990, 997 (9th Cir. 2007) (stating that "[w]hile [the alien's actions of opening a cell door prior to interrogation] necessarily preceded the interrogations, it was not 'integral' to them, unlike the translation services at issue in *Miranda Alvarado*" in reversing the Immigration Judge's finding that the alien had assisted in persecution), *withdrawn*, *Im v. Mukasey*, 522 F.3d 966 (9th Cir. 2008) (in light of the Supreme Court's grant of certiorari in *Negusie v. Mukasey*, 128 S. Ct. 1695 (U.S. Mar. 17, 2008) (No. 07-499) (mem.)). That circuit also noted that there must be a purposeful, material assistance for the acts of persecution, which is measured by examining the degree of relation of the alien's acts to the persecution itself. *Miranda Alvarado v. Gonzales*, 449 F.3d 915, 927-29 (9th Cir. 2006). We will see in the examination of the degree of action required to invoke the material support bar that the term "material" used in this persecutor context is much more result-oriented than it is in the material support context.

The degree to which an individual need personally participate in the persecution in order to be barred under the persecutor bar is an issue that remains to be settled. Although the circuits adopt different tests for determining whether one has assisted or otherwise participated in persecution, what is common among the courts is that there must have been an act of persecution that the alien can be said to have incited, assisted, or participated in for the persecutor bar to even be considered. This may seem obvious, but it is in marked contrast to the material support bar cases, where an act of terrorism to which the alien can be said to have contributed is not necessarily required.

2. The Material Support Bar

While there must be an act of persecution related to the alien's actions to trigger the persecutor bar, the material support bar arises with a lesser degree of action. In fact, there need not have been an act of terrorism to which the alien must be linked, either directly or indirectly.

Rather, even an act significantly removed from a terrorist activity could bar the alien from receiving asylum. For example, in *Matter of S-K-*, 23 I&N Dec. 936, 942-43 (BIA 2006), the Board found that Congress did not give adjudicators discretion to consider whether an alien's donation or support to a terrorist or terrorist organization was actually used to further terrorist activities. The Board explained this by noting that requiring a link between the support and a terrorist activity would undermine the purpose of the provision, as that would allow terrorist organizations to collect funds or goods for an "ostensibly benign purpose" and then redirect equivalent funds or goods toward terrorist activities. *Id.* at 944.

Further, the amount of material support given need not be large or significant to invoke the bar. The Third Circuit in *Singh-Kaur v. Aschroft*, 385 F.3d 293 (3d Cir. 2004), upheld the Board's determination that an Indian who had provided food and shelter to members of Babbar Khalsa and the International Sikh Youth Federation had provided material support to individuals he knew or reasonably should have known had committed, or planned to commit, a terrorist activity. The court looked to the plain meaning of the terms "material" ("[h]aving some logical connection with the consequential facts"; "significant" or "essential") and "support" ("[s]ustenance or maintenance; esp., articles such as food and clothing that allow one to live in the degree of comfort to which one is accustomed") when evaluating the Board's interpretation of the statute. *Id.* at 298 (quoting *Black's Law Dictionary* 991, 1453 (7th ed. 1999)). Based on the plain language of the terms, and the nonexhaustive nature of the list of examples provided in the statute, the court found that the Board's interpretation that the definition of "material support" included the provision of food and the setting-up of tents was not arbitrary, capricious, or manifestly contrary to the statute. *Id.* at 299. While some circuits take a "totality of the circumstances" approach to the persecutor bar to decide whether one who, for example, tried to escape from guerillas and who purposefully shot away from individuals when the guerillas made him shoot at civilians¹³ has "objectively" participated in persecution, no such mitigating circumstances exist with the material support bar. In *Matter of S-K-*, 23 I&N Dec. at 941, for example, the Board declined to read into the statute an exception for giving support to an organization fighting an illegitimate regime.¹⁴

As compared to the persecutor bar, the burden on the Government to prove that the alien has engaged

in a prohibited activity is much lower with the material support bar. For example, the provision of medical care, an act widely understood to be an ethical obligation of medical professionals, has been deemed to constitute "material support."¹⁵ It is worth noting, though, that, although it has not been ruled out that small acts of assistance can constitute material support, this issue is not entirely settled. In *Matter of S-K-*, 23 I&N Dec. at 945, the Board stated that "it is certainly plausible" that material support includes "virtually all forms of assistance, even small monetary contributions." Under this argument, assistance to terrorist groups would be covered "irrespective of any showing that [the act is] independently 'material.'" *Id.* However, the Board also stated that "the respondent's contrary argument that 'material' should be given independent content is by no means frivolous." *Id.* The Board declined to resolve the issue in *Matter of S-K-*, stating that, under either approach, the respondent's donations of S\$1100 (Singapore dollars), or US\$685, constituted material support. *Id.*

B. Mens Rea

1. The Persecutor Bar

Mens rea requirements also distinguish the bars. It is unclear whether knowledge that one's acts are persecutory is required to find a person barred as a persecutor, but at least two circuits have so held. The First Circuit found that there is a presumption that the bar does not apply in cases where the alien lacks culpable knowledge about the persecution, even if the objective effect of his actions was to assist in persecution. *Castaneda-Castillo v. Gonzales*, 488 F.3d 17, 22 (1st Cir. 2007) (holding that "presumptively the persecutor bar should be read not to apply" to the petitioner if his testimony that he knew nothing of plans for a massacre that his actions objectively assisted was believable). The Second Circuit also found that the alien must have sufficient knowledge that his actions may assist in persecution to make those actions culpable. *See Xu Sheng Gao*, 500 F.3d at 102 ("[O]n this record, we are . . . unable to conclude that [petitioner] had the requisite level of knowledge that his acts assisted in persecution to sustain a finding that he was a 'persecutor' under the statute."). The Ninth Circuit has found that "determining whether a petitioner 'assisted in persecution' requires a particularized evaluation of both personal involvement and purposeful assistance in order to ascertain culpability." *Miranda Alvarado*, 449 F.3d at 927.

2. The Material Support Bar

The knowledge requirement in the material support context is clear. Section 212(a)(3)(B)(iv)(VI) of the Act requires that to be found barred for having given material support, the alien must know or reasonably should know that the actions he is taking affords material support “(aa) for the commission of a terrorist activity; (bb) to any individual who the actor knows, or reasonably should know, has committed or plans to commit a terrorist activity; (cc) to a [Tier I or II] terrorist organization; or (dd) to a [Tier III terrorist 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.” Therefore, there are two defenses relating to mens rea in the material support context. First, it is a defense that the alien did not know and reasonably should not have known that his or her actions afforded material support, regardless of the organization’s classification. Second, with respect to Tier III terrorist organizations, it is a defense that the alien did not know and reasonably should not have known that the organization in question was a terrorist organization, even if the alien did realize that his or her actions afforded material support. The second defense might be difficult to invoke, however, as the decision to provide material support often is given in response to a violent threat, rendering the alien aware of the organization or individual’s violent capabilities or intentions.

C. Volition

1. The Persecutor Bar

The Supreme Court granted certiorari in *Negusie v. Mukasey*, 128 S. Ct. 1695,¹⁶ on the issue whether there is an implicit duress defense to the persecutor bar in the Act. No circuit court has explicitly found that a duress defense exists to having assisted or otherwise participated in persecution. However, some circuits have used a totality of the circumstances test to find that where the alien was forced to participate in persecution, along with other mitigating factors, it cannot be said that the alien has objectively participated in persecution. See, e.g., *Hernandez v. Reno*, 258 F.3d 806 (8th Cir. 2001).¹⁷ In contrast, the question whether there is an implied duress defense to the material support bar has been asked and answered with a resounding “No.”

2. The Material Support Bar

The material support bar contains no explicit duress exemption, and the Board and the courts have not read one into the statute.¹⁸ Section 212(d)(3)(B) (i) of the Act does provide, however, that the Secretaries of the Departments of State and of Homeland Security (“DHS”), after consultation with each other and the Attorney General, have authority to make available exemptions for certain terrorist-related inadmissibility grounds. Thus far, the Secretary of DHS has exercised this authority five times to make available exemptions for the following types of cases, two of which consider duress: where material support is given under duress to *any* Tier III (undesignated) terrorist organization and to *specified* Tier I or Tier II (designated) terrorist organizations.¹⁹ The only organizations that have been named under this waiver authority are the FARC, AUC and ELN, all groups operating in Colombia.²⁰ The Secretary of DHS has also exercised his authority to create exemptions for aliens whose actions, affiliations or associations, are related to 1 of 10 specifically named groups, regardless of whether duress was involved.

D. Target of Action

1. The Persecutor Bar

The persecutor bar necessarily refers to the persecution of personal victims. What remains unclear is the extent to which the alien must have a specific intent to harm another person on account of a protected ground. The Board has recognized the principle that “[a] finding of persecution requires some degree of intent on the part of the persecutor to produce the harm that the applicant fears in order that the persecutor may overcome a belief or characteristic of the applicant.” *Matter of Rodriguez-Majano*, 19 I&N Dec. at 815. Courts are divided over this issue. In *Bah v. Ashcroft*, 341 F.3d 348 (5th Cir. 2003), the Fifth Circuit found that the alien need not have an individual intent to harm others on account of a protected ground in order to be found barred as a persecutor. However, in *Hernandez v. Reno*, 258 F.3d 806, the Eighth Circuit found that assessing whether the persecutor bar applies requires a particularized evaluation of an individual’s behavior, including, among other things, whether an alien shared the persecutor’s motives.

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FEDERAL COURT ACTIVITY

CIRCUIT COURT DECISIONS FOR JANUARY 2009

by John Guendelsberger

The United States Courts of Appeals issued 389 decisions in January 2009 in cases appealed from the Board. The courts affirmed the Board in 349 cases and reversed or remanded in 40, for an overall reversal rate of 10.3%. The Second and Ninth Circuits together issued 68% of all the decisions and 50% of the reversals. The Third Circuit had the highest reversal rate at 35.3%. There were no reversals from the First, Fourth, Sixth, Seventh, and Tenth Circuits.

The chart below provides the results from each circuit for January 2009 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	%
1st	5	5	0	0.0
2nd	95	87	8	8.4
3rd	34	22	12	35.3
4th	15	15	0	0.0
5th	15	11	4	26.7
6th	12	12	0	0.0
7th	4	4	0	0.0
8th	7	6	1	14.3
9th	169	157	12	7.1
10th	4	4	0	0.0
11th	29	26	3	10.3
All:	389	349	40	10.3

This was an atypical month in that the usually modest reversal rate in the Third Circuit spiked to over 35%, while the Second and Ninth Circuit reversal rates dropped well below their usual levels. Six of the twelve Third Circuit reversals came in motions to reopen based upon a claim of a material change in country conditions by a Chinese parent who had given birth to a second child in the United States. In each case the court remanded for further consideration of documents accompanying the motion to reopen. The other six cases included two reversals on the adverse credibility determination in asylum claims; a case in which corroboration requirements were not properly applied;

a case in which the pattern and practice issue was not addressed; a Convention Against Torture determination in which inadequate consideration was given to a judicial recommendation against removal; and a case involving rescission of adjustment of status beyond the 5-year deadline in section 246(a) of the Act, 8 U.S.C 1256(a).

Five of the Twelve reversals in the Ninth Circuit addressed asylum determinations. Of these, two found fault with the adverse credibility determination; two more found that the 1-year filing bar for asylum or its exceptions were not properly applied; and another found that the Board affirmed a past persecution finding when no such finding had been made by the Immigration Judge. The Ninth Circuit also reversed two denials of motions to reopen, one involving tolling of the time limit for ineffective assistance of counsel, and the other involving whether proper notice of hearing was afforded. Other reversals involved aggravated felony grounds and eligibility for adjustment of status.

The Second Circuit reversed in five asylum cases, including three credibility determinations; a case in which the Board was found to have engaged in fact-finding; and one involving designation of the country of removal. The other reversals included two motions to reopen and the denial of a continuance in which the Board provided insufficient rationale.

John Guendelsberger is Senior Counsel to the Board Chairman and is currently serving as a temporary Board Member.

RECENT COURT DECISIONS

Second Circuit

Hoodho v. Holder, __F.3d__, 2009 WL 279654 (2d Cir. Feb. 6, 2009): The Second Circuit dismissed an appeal from an Immigration Judge's removal order that was based on a concession of removability by the respondent's attorney. The court dismissed the respondent's argument that he was not removable, as the issue was already resolved by his prior concession. The court further found that 8

C.F.R. § 1240.10(c) authorizes an Immigration Judge to accept such concessions, as long as no issues of law or fact remain. Lastly, the court found that the attorney's concession did not constitute "egregious circumstances." *Hoodho*, 2009 WL 279654 at *1.

Third Circuit

Liu v. Attorney General of U.S., __F.3d__, 2009 WL 250102 (3d Cir. Feb. 4, 2009): The Third Circuit dismissed an appeal from the Board's denial of a motion to reopen to reapply for asylum based on the birth of two U.S. citizen children. Following the Board's precedent decision in *Matter of C-W-L-*, 24 I&N Dec. 346 (BIA 2007), the court held that after the conclusion of removal proceedings, an asylum application must be filed in conjunction with a motion to reopen, and it must meet the required regulatory criteria. The court thus upheld the Board's denial of the respondent's untimely motion for failing to establish the necessary changed country conditions required to excuse the late filing.

Zheng v. Attorney General of U.S., __F.3d__, 2009 WL 398257 (3d Cir. Feb. 19, 2009): In an en banc decision, the court reversed the prior holding of a divided panel, which had upheld *Matter of C-Y-Z-*, 23 I&N Dec. 693 (A.G. 2004), in finding that the spouse of an individual subjected to a forcible abortion or sterilization is per se entitled to refugee status. The court noted that a spouse may still qualify for asylum by independently establishing a well-founded fear of persecution based on his or her own "other resistance" to the coercive family planning policy.

Fifth Circuit

Gomez-Palacios v. Holder, __F.3d__, 2009 WL 388943 (5th Cir. Feb. 18, 2009): The Fifth Circuit dismissed an appeal challenging the denial of a respondent's motion to rescind an in absentia order of removal where he did not receive notice of the hearing. The court noted that both parties agreed that the respondent did not receive the hearing notice, but it rejected the respondent's argument that this fact alone entitled him to reopening. While also rejecting as extreme DHS's position that attempted delivery of the notice per se constitutes constructive notice, the court found constructive notice here, as the facts clearly established that the failure to receive notice was caused by the respondent's own negligence in failing to comply with his obligation to inform the immigration court of his current address.

Seventh Circuit

Duad v. Holder, __F.3d__, 2009 WL 331289 (7th Cir. Feb. 12, 2009): The Seventh Circuit dismissed the respondent's appeal challenging the Immigration Judge's denial of her application for non-LPR cancellation of removal. She specifically argued that the Immigration Judge's reliance on hearsay evidence denied her of due process. The court held that it was without jurisdiction to review the discretionary determinations of an Immigration Judge. It further found that "[n]othing in the due process clause . . . precludes the use of hearsay evidence in administrative immigration proceedings." *Id.* at *3.

Ninth Circuit

Sun v. Mukasey, __F.3d__, 2009 WL 292561 (9th Cir. Feb. 9, 2009): The Ninth Circuit granted the respondent's appeal from the Board's denial of her motion to reopen proceedings based on her eligibility to adjust status under the Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1941 (codified at 42 U. S. C. § 13981), The court found that it did not need to address the Board's determination that the respondent had not met her burden of establishing ineffective assistance of her prior counsel under *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1997). Rather, it found that reopening was warranted by evidence that the respondent exercised "admirable" due diligence from the time she discovered the error, thus entitling her to equitable tolling under the court's holding in *Iturribarria v. INS*, 321 F.3d 889, 897-99 (9th Cir. 2003).

Soto-Olarte v. Holder, __F.3d__, 2009 WL 426409 (9th Cir. Feb. 23, 2009): The court sustained the appeal of an asylum applicant from Peru whose appeal challenging the Immigration Judge's adverse credibility finding had been dismissed by the Board. The court found the Immigration Judge's credibility finding flawed, where the Immigration Judge failed to question the respondent about the inconsistencies or provide an opportunity to reconcile them and also failed to consider an explanation provided by the respondent for some of the inconsistencies. The court further found the Board's decision flawed for making only an incomplete and passing mention of the explanations and for failing to address them in a reasoned manner. The court further found error in the Immigration Judge's stated alternative basis for denying asylum, as such alternative finding failed to consider the

respondent's testimony as credible for purposes of such finding. However, in remanding the case, the court stated that the Board need not necessarily deem the respondent to be credible.

REGULATORY UPDATE

74 Fed. Reg. 5899 (2009)

DEPARTMENT OF HOMELAND SECURITY
8 CFR Part 274a

Documents Acceptable for Employment Eligibility Verification

ACTION: Interim rule; delay of effective date.

SUMMARY: U.S. Citizenship and Immigration Services (USCIS), Department of Homeland Security (DHS), is extending the effective date of its interim final rule "Documents Acceptable for Employment Eligibility Verification," for 60 days, from February 2, 2009 to April 3, 2009. This temporary extension will provide DHS with an opportunity for further consideration of this rule. USCIS also is extending the comment period for this rule for 30 days.

DATES: This document is effective January 30, 2009. The effective date of the interim rule amending 8 CFR Part 274a, published on December 17, 2008, at 73 FR 76505, is delayed until April 3, 2009. Written comments must be submitted on or before March 4, 2009.

74 Fed. Reg. 7993 (2009)

DEPARTMENT OF HOMELAND SECURITY
U.S. Citizenship and Immigration Services
8 CFR Part 274a

Employment Authorization and Verification of Aliens Enlisting in the Armed Forces

ACTION: Final rule.

SUMMARY: The Department of Homeland Security (DHS) is amending its regulations governing the employment authorization of aliens and the employment eligibility verification process. This rule provides for employer-specific employment authorization for certain aliens lawfully enlisted into the U.S. Armed Forces (Armed Forces), and those whose enlistment the Secretary with jurisdiction over such Armed Force has determined would be vital to the national interest. This rule also adds the military identification card to the list of documents acceptable for establishing employment eligibility and iden-

tity for the Employment Eligibility Verification Form (Form I-9), but only for use by the Armed Forces to verify employment eligibility of aliens lawfully enlisted in the Armed Forces. This rule is necessary to conform DHS regulations to existing statutory authorities regarding the enlistment of aliens by the Armed Forces.

DATES: Effective date. This rule is effective on February 23, 2009.

Differentiating the Material Support con't

2. The Material Support Bar

By contrast, in the material support bar context, there is no need for the actions of the alien to have a nexus to a statutorily protected characteristic. In fact, there need not be any personal victim, as a qualifying action to which the alien provided material support could be targeted against a physical object or space, such as a military installation. *See* section 212(a)(3)(B)(iii)(V) of the Act.

V. Significance for Adjudicators and Aliens

The distinctions between these bars can often have a significant effect on an alien's ability to obtain asylum. As this article explored, there is no duress defense to the persecutor bar. Further, with respect to the persecutor bar, it is unclear whether there need be knowledge that the acts engaged in are persecution on the part of the alien or whether the alien must be motivated to harm a victim on account of one of the statutorily protected grounds. Finally, the persecutor bar will generally require a degree of action on the part of the alien at least greater than a level of action that would typically be considered to be de minimus activity.

In contrast, there currently is an exemption available for aliens who gave material support under duress in certain situations, even though very minor actions have been classified as material support. There is also, in some circumstances, a mens rea requirement with the material support bar that the alien knew or should have reasonably known that the group or individual assisted was a terrorist group or individual engaging in terrorist activity. In other words, the burden on the Government is at least as great with respect to every element of the persecutor bar, except for the volition requirement, as it is with regard to the material support bar. Given these varying standards and analyses on multiple aspects of whether either of these

bars applies, there must be a case-specific analysis when facts suggest that a bar may arise.

Of course, there is no reason why both the persecutor bar and the material support bar cannot apply to the same activity. However, the frequent similarities in the underlying facts alerting adjudicators to the potential triggering of these bars can easily produce the misapplication of a particular bar or an analysis that incorrectly uses the wrong bar requirements. This has usually been marked by finding that the most tangential assistance to persecution invokes the persecutor bar, when that lack of a de minimus exception for standard of action required is more attuned to the lower standard of action requirement of the material support bar.

Asylum cases often present horrifying factual scenarios in which people make decisions and take actions that we would normally not think a moral or good person would pursue. The nature of communal and terrorist-ridden conflicts presents many challenges for fact-finders and adjudicators tasked with identifying and analyzing asylum claims. For adjudicators encountering situations in which an alien has helped a party that may have harmed someone else or engaged in any kind of violent activity, there needs to be serious reflection on which bar, if any, may apply. This will require looking at the form of the action, the extent to which action is taken, against whom it is taken, whether there was the required mens rea, and whether the act was voluntary. As with all aspects of the asylum claim, making an accurate finding on which bar may apply could make the difference between protection and return, and therefore life and death.

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1. See *Bah v. Ashcroft*, 341 F.3d 348 (5th Cir. 2003). In this case, the alien was forced to join the Revolutionary United Front (“RUF”) in Sierra Leone after they killed his family. As a member of the RUF, the alien subsequently participated in acts of persecution, including chopping the heads and limbs off of civilians. The Immigration Judge found, and the Board and the Fifth Circuit affirmed, that the alien had been persecuted, but he could not meet the definition of a refugee because he had assisted or otherwise participated in persecution.

2. *Matter of S-K*, 23 I&N Dec. 936 (BIA 2006), remanded, *Matter of S-K*, 24 I&N Dec. 289 (A.G. 2007), and clarified, *Matter of S-K*, 24 I&N Dec. 475 (BIA 2008) (finding that the material support bar did not apply in light of section 691(b) of the Consolidated Appropriations Act, 2008, Div. J of Pub. L. No. 110-161, 121 Stat. 1844, 2365 (“CAA”), which declared that 10 organizations are no longer to be considered terrorist organizations for acts occurring before the December 26, 2007, date of enactment).

3. Human Rights First, *Abandoning the Persecuted: Victims of Terrorism and Oppression Barred from Asylum* 8 (Sept. 26, 2006) (quoting George Rupp, International Rescue Committee).

4. Brief of *Amici Curiae* Human Rights First, et al. in Support of Petitioner, *Negusie v. Mukasey*, 128 S. Ct. 1695 (U.S. Mar. 17, 2008) (No. 07-499) (mem.) at 5, 2008 WL 2597010, at *5.

5. United Nations High Commission for Refugees, *Guidelines On International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees*, 15 Int’l J. Refugee L. 492, 493 (2003) (“UNHCR Guidelines”).

6. The Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, added to the existing security-related exclusion grounds an inadmissibility provision specifically for those engaged in terrorist activity. The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, created the process by which the Government could classify organizations as terrorist organizations, rendering individuals involved with these organizations ineligible for asylum. The USA PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 272, expanded the definition of “terrorist activity” and the kinds of organizations that could constitute foreign terrorist organizations. The REAL ID Act of 2005, Div. B of Pub. L. No. 109-13, 119 Stat. 302, amended section 212 of the Act and the terrorist inadmissibility ground even further by expanding what it means to be engaged in terrorist activity.

7. Under section 212(a)(3)(B)(iii) of the Act, “terrorist activity” means

any activity which is unlawful under the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the laws of the United States or any State) and which involves any of the following:

(I) The hijacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle).

(II) The 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.

(III) A violent act upon an internationally protected person (as defined in section 1116(b)(4) of title 18, United States Code) or upon the liberty of such a person.

(IV) An assassination.

(V) The use of any—(a) biological agent, chemical agent, or nuclear weapon or device, or (b) 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.

(VI) A threat, attempt, or conspiracy to do any of the foregoing.

8. “Material support” includes providing a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training. Section 212(a)(3)(B)(iv)(VI) of the Act.

9. According to section 212(a)(3)(B)(vi) of the Act, a terrorist organization is an organization—

(I) designated under section 219;

(II) otherwise designated, upon publication in the Federal Register, by the Secretary of State in consultation with or upon the request of the Attorney General or the Secretary of Homeland Security, as a terrorist organization, after finding that the organization engages in the activities described in subclauses (I) through (VI) of clause (iv); or

(III) that is a group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in, the activities described in subclauses (I) through (VI) of clause (iv).

10. See UNHCR Guidelines, *supra* note 5.

11. See Won Kidane, *The Terrorism Exception to Asylum: Managing the Uncertainty in Status Determination*, 41 U. Mich. J.L. Reform 669, 682 (2008).

12. See Edward R. Grant, *Persecution and Persecutors: No Bright Lines Here*, Immigration Law Advisor, Vol. 1., No. 8 (Aug. 2007). This article by sets out these gray areas thoroughly and they need not be repeated here.

13. In *Fedorenko v. United States*, 449 U.S. at 512 n.34, the Supreme Court stated:

[A]n individual who did no more than cut the hair of female inmates before they were executed cannot be found to have assisted in the persecution of civilians. On the other hand, there can be no question that a guard who was issued a uniform and armed with a rifle and a pistol, who was paid a stipend and was regularly allowed to leave the concentration camp to visit a nearby village, and who admitted to shooting at escaping inmates on orders from the commandant of the camp, fits within the statutory language about persons who assisted in the persecution of civilians.

14. See *Hernandez v. Reno*, 258 F.3d 806 (8th Cir. 2001), where the alien was forced to join a guerrilla group and participate in violence and killing under threat of death. The court considered the facts that the alien disobeyed orders to shoot directly at villagers, did not share any persecutory motives, and escaped at the earliest opportunity in finding that the alien was not subject to the persecutor bar.

15. The Board revisited *Matter of S-K* after the CAA provided “automatic relief” for members of 10 named groups, among them the Chin National Front (CNF), declaring that it was not a “terrorist organization” for any actions taking place before the CAA’s December 26, 2008, enactment date. Consequently, the alien’s provision of money to the CNF is not an act of

material support to a “terrorist organization” and she is not barred from asylum. *Matter of S-K*, 24 I&N Dec. 475.

16. See Leonard S. Rubenstein, *Doctors Without Refuge*, Wash. Post, Mar. 5, 2007, A15.

17. In *Negusie v. Mukasey*, the Court granted certiorari to consider whether the persecutor bar applies to an alien whose involvement in persecutory acts is involuntary because he engaged in the conduct as a result of credible threats of death or serious bodily harm. Oral argument in the case was held on November 5, 2008.

18. See also Derek C. Julius, *Splitting Hairs: Burden of Proof, Voluntariness, and Scienter Under the Persecutor Bar to Asylum*, Immigration Law Advisor, Vol. 2, No. 3 (Mar. 2007).

19. See U.S. Dep’t of State, U.S. Dep’t of Homeland Security, and U.S. Dep’t of Health and Human Services, Proposed Refugee Admissions for Fiscal Year 2006 4 (2005), (noting the difficulties in achieving a balance between humanitarian and national security objectives).

20. The exemption authority has also been exercised for 10 specified groups (the 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); Karenni National Progressive Party (KNPP); Tibetan Mustangs; Cuban Alzados; appropriate groups affiliated with the Hmong and Montagnards), regardless of whether the support was given under duress, and then further, for aliens affiliated or associated with those same 10 identified groups who remained inadmissible despite the CAA’s “automatic relief” provision that restricted the definition of “terrorist organization” under section 212(a)(3)(B)(vi)(III) of the Act to not include these 10 named groups.

21. See Exercise of Authority Under Sec. 212(d)(3)(B)(i) of the Immigration and Nationality Act, 72 Fed. Reg. 9958 (Mar. 6, 2007) (effective Feb. 26, 2007); Exercise of Authority Under Sec. 212(d)(3)(B)(i) of the Immigration and Nationality Act, 72 Fed. Reg. 26,138-39 (May 8, 2007) (effective Apr. 27, 2007).

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