Waivers and Exceptions

I. **Waivers**

A. Waivers which require secretary level approval

• *Nonimmigrant visa waiver*:

• A nonimmigrant who is "known or believed" to be inadmissible under either INA § 212(a)(3)(B) or (3)(F) may still be issued a visa despite the inadmissibility. The waiver requires a recommendation by the Secretary of State or a consular office and approval by the Attorney General. *See* INA 212(d)(3)(A)(i).

• In addition, an alien who has a valid entry document or has been granted a waiver of possessing such documents, may be admitted temporarily as a nonimmigrant despite the terrorism-related provisions at the discretion of the Attorney General who has the authority to "proscribe conditions, including extraction of such bonds as may be necessary, to control and regulate the admission and return of inadmissible aliens" under this provision. INA 212(d)(3)(A)(ii).

• *Discretionary exemptions for portions of INA § 212(a)(3)(B)*

• The Secretary of Homeland Security or the Secretary of State, in consultation with the other and the Attorney General, may determine that three of the INA § 212(a)(3)(B) provisions do not apply. INA § 212(d)(3)(B)(i). The three provisions subject to his exemption are:

• material support (***Note:*** *on April 27, 2007, DHS Secretary Michael Chertoff exercised his discretion with respect to material support provided under duress*. The Secretary may revoke this exercise of authority at any time.)
• representatives of groups that endorse or espouse terrorist activity but are not themselves terrorist organizations
• aliens who endorse or espouse terrorist activity or persuade others to do so or to support terrorism

• Note that the use of this exemption by either secretary is discretionary and not subject to review.

• The Secretary of State may not exercise this exemption on behalf of an alien once removal proceedings have been initiated against the alien.

• *Discretionary exemption for undesignated terrorist organization*

• The Secretary of Homeland Security or the Secretary of State can determine that an organization that otherwise qualifies as an

undesignated terrorist organization pursuant to INA § 212(a)(3)(B)(vi)(III) should not be considered as a terrorist organization solely because it has a subgroup that engages in terrorist activity. This decision is made by the Secretary of Homeland Security or the Secretary of State in consultation with the other and the Attorney General and is "in the Secretary's sole unreviewable discretion." INA § 212(d)(3)(B)(i).

B. PATRIOT Act Waiver

• The PATRIOT Act permits the Secretary of State in consultation with the Attorney General to not apply the PATRIOT Act amendments to INA § 212(a)(3)(B) and INA § 212(a)(3)(F) to conduct occurring before the date of enactment, October 26, 2001. This provision requires that the conduct occurred outside of the United States and a "recommendation of a consular officer who has concluded that there is not reasonable ground to believe that the alien knew or reasonably should have known that the actions would further a terrorist activity." *See* INA § 212, Note 1(2006).

• *** Many of the provisions amended by the PATRIOT Act were subsequently amended or renumbered by the REAL ID Act which did not included the same exceptions. It is not clear if the REAL ID Act amendments to the same portions of INA § 212(a)(3)(B) has the effect of overruling the PATRIOT Act provision.

II. Exceptions

A. Reasonable lack of knowledge exception

• The terrorist activities ground of inadmissibility at INA § 212(a)(3)(B) has provisions related to members of undesignated terrorist organizations and those who solicit funds or other things of value for, solicit members for, or provide material support to, an undesignated terrorist organization. In all of these provisions, there is an exception when the alien can "demonstrate by clear and convincing evidence that he did not know, and should not reasonably have known, that the organization was a terrorist organization." INA §§ 212(a)(3)(B)(i)(VI), (iv)(IV)(cc), (iv)(V)(cc) and (iv)(VI)(dd).

• In Matter of S-K-, the BIA concluded that the respondent could not meet the standard of the exception when "there was sufficient evidence in the record to conclude that [the organization] uses firearms and/or explosives to engage in combat with the Burmese military" and therefore qualifies as a terrorist organization. 23 I&N Dec. at 941.

• In a Sixth Circuit case, the court held that the BIA was required to consider evidence regarding the respondent's state of mind such as the alien's youth, stated lack of knowledge of the organization's activities and voluntary disassociation with the organization, when determining whether the exception applied. See Daneshvar v. Ashcroft, 355 F.3d 615, 626 (6th Cir. 2004).

B. Representative of a terrorist organization exception for asylum applicants

• Under section 208(b)(2)(A)(v) of the Act, the terrorism bar to asylum will not apply to an alien who is a representative of either a terrorist organization or a political, social, or other group that endorses or espouses terrorist activity if the Attorney General determines, in his discretion, that there are not reasonable grounds for regarding him as a danger to the security of the United States.

C. Exception for children and spouses

• When the terrorist activity causing the other spouse or parent to be inadmissible, did not occur within the last five years, the spouse or child will not be deemed inadmissible. INA § 212(a)(3)(B)(i).

• With regards to an alien who endorses or espouses terrorist activity or persuades others to endorse or espouse terrorist activity or support a terrorist organization,

• spouses or children will not be deemed inadmissible if the spouse or child should not reasonably have known of the activity causing the other spouse or parent to be found inadmissible. INA § 212(a)(3)(B)(ii)(I).

• spouses or children will not be deemed inadmissible if the consular office or Attorney General has reasonable grounds to believe that the spouse or child has renounced the activity causing the other spouse's or parent's inadmissibility. INA § 212(a)(3)(B)(ii)(II).