



U.S. Citizenship
and Immigration
Services

JAN 23 2010

Memorandum

TO: USCIS Field Leadership

FROM: Lauren Kielsmeier 
Acting Deputy Director

SUBJECT: Implementation of New Discretionary Exemption under INA Section 212(d)(3)(B)(i)
for Activities Related to the INC, KDP and PUK

I. INTRODUCTION

A. Purpose

On September 21, 2009, the Secretary of Homeland Security and the Secretary of State, in consultation with each other and the Attorney General, exercised their authority not to apply the terrorist-related grounds of inadmissibility contained in INA § 212(a)(3)(B) for certain activities and associations involving the Iraqi National Congress (INC), Kurdish Democratic Party (KDP) or Patriotic Union of Kurdistan (PUK).

This document provides guidance to adjudicators who consider applications for immigration benefits filed with USCIS where an applicant is found to be inadmissible or otherwise barred from an immigration benefit for an activity or association with the INC, KDP or PUK. This guidance supplements past guidance regarding the implementation of exemptions for certain cases involving terrorist-related grounds of inadmissibility.¹ Further, this guidance will:

- Discuss the threshold requirements that must be present in order to consider an exemption;
- Describe the factors to consider when determining whether an applicant merits a favorable exercise of the discretionary exemption;

¹ See, Jonathan Scharfen, Deputy Director, USCIS, "Processing the Discretionary Exemption to the Inadmissibility Ground for Providing Material Support to Certain Terrorist Organizations," May 24, 2007; Michael L. Aytes, Acting Deputy Director, USCIS, "Implementation of Section 691 of Division J of the Consolidated Appropriations Act, 2008, and Updated Processing Requirements for Discretionary Exemptions to Terrorist Activity Inadmissibility Grounds," July 28, 2008; and Michael Aytes, Acting Deputy Director, USCIS, "Revised Guidance on the Adjudication of Cases involving Terrorist-Related Inadmissibility Grounds and Amendment to the Hold Policy for such Cases," February 13, 2009.

- Provide guidance on identifying those applicants who may be subject to inadmissibility grounds under INA § 212(a)(3)(B), particularly as encountered in these cases, and will refer to documents with more detailed guidance on these issues;
- Make recommendations on how an adjudicator might elicit sufficient relevant testimony to adjudicate the exemption; and
- Set out oversight and reporting requirements for the implementation of this authority.

B. Delegation of Authority to USCIS

The Secretary delegated to USCIS, in consultation with ICE, the authority to determine whether a particular alien meets the criteria required for the exercise of this discretionary exemption. These exemptions may be applied to immigration benefit and protection applications under the INA, including, but not limited to, asylum, refugee status, adjustment of status, and following to join petitions. An exemption will be applied only after the threshold requirements listed in the exemption are met.²

II. IDENTIFYING INDIVIDUALS SUBJECT TO TERRORIST-RELATED INADMISSIBILITY GROUNDS DUE TO ACTIVITIES OR ASSOCIATIONS WITH THE INC, KDP OR PUK

A. Indicators for Review Prior to and During an Interview/Adjudication

Adjudicators who consider one of these exemptions must be familiar with country conditions information on Iraq related to the INC, KDP and PUK. Adjudicators or any DHS employee may consult the Asylum Virtual Library (AVL) Iraq collection at <http://z02rscow12:8080/docushare/dsweb/View/Collection-5801>. In addition to research products generated by USCIS (see for example “Response to Information Request, Iraq: Information on violent activities of the INC and violent activities of the INC’s constituent groups,” 13 September 2006, USCIS Resource Information Center), USCIS will provide an overview document highlighting the activities of each group. This document will be posted to the AVL.

Adjudicators should review immigration benefit applications for indicators that raise the possibility that an applicant may be described in the inadmissibility grounds at INA § 212(a)(3)(B) based on an association or activity involving the INC, KDP or PUK. Examples of language that may indicate terrorist activity include: “fighter,” “militant,” “soldier,” rebel,” or “*peshmerga*.”³ The adjudicator

² See USCIS Fact Sheet, “Secretaries Napolitano and Clinton Exercise Authority under the Immigration and Nationality Act (INA) to Exempt Individuals Affiliated with Certain Iraqi Groups from Certain Inadmissibility Provisions” (October 19, 2009), which is included as Attachment A to this memorandum and is also available at http://www.uscis.gov/USCIS/Refugee,%20Asylum,%20and%20Int'l%20Ops/Asylum/exempt_iraqi_inadmissibility.pdf; “Signed Exercise of Authority under Section 212(d)(3)(B)(i) of the INA for Individuals Affiliated with the INC, KDP and PUK” (September 21, 2009), which is included as Attachment B to this memorandum and is also available at [http://www.uscis.gov/USCIS/Refugee,%20Asylum,%20and%20Int'l%20Ops/Asylum/Signed_Exercise_Authority_Section_212\(d\)\(3\)\(B\)\(i\)_INA.pdf](http://www.uscis.gov/USCIS/Refugee,%20Asylum,%20and%20Int'l%20Ops/Asylum/Signed_Exercise_Authority_Section_212(d)(3)(B)(i)_INA.pdf)

³ **Note:** Some Iraqi applicants may indicate activities or associations with a “*peshmerga*.” *Peshmerga* means “he who faces death” and is a generic term used to refer to a “fighter” or one who is a member of a local guard force. The term should not automatically be construed as identifying one as a terrorist. If the term is used in a case, one should take

should look for any indication that the applicant: (1) provided food, money, services, shelter, weapons, or transportation to one of these groups; (2) requested others to contribute money or other things of value to one of these groups; (3) asked others to join one of these groups; (4) received military-type training from one of these groups; (5) fought for one of these groups; (6) planned activities/operations or gathered information for one of these groups; or (7) is currently a member of one of these groups. Examples of language that may indicate membership include “member,” “follower,” and “supporter.” Adjudicators should also be alert to oral testimony provided by applicants involving their association or activity with the INC, KDP or PUK.

B. Aliens Whose Inadmissibility for Certain Activities Carried Out on Behalf of These Iraqi Groups May be Exempted as a Matter of Discretion

Aliens whose cases remain on hold solely because they committed one of the activities below on behalf of the INC, KDP and PUK may now be considered for a discretionary exemption of these inadmissibility grounds, if the alien:

- Solicited funds or other things of value on behalf of one of these named groups—INA § 212(a)(3)(B)(iv)(IV)(cc);
- Solicited an individual for membership in one of these named groups—INA § 212(a)(3)(B)(iv)(V)(cc);
- Committed an act that provided material support to one of these named groups—INA § 212(a)(3)(B)(iv)(VI)(dd);
- Was a representative of one of these named groups—INA § 212(a)(3)(B)(i)(IV)(aa);
- Is a member of one of these named groups—INA § 212(a)(3)(B)(i)(VI);
- Persuaded others to support one of these named groups—INA § 212(a)(3)(B)(i)(VII); or
- Received military-type training from one of these named groups—INA § 212(a)(3)(B)(i)(VIII).

Aliens may be exempted from the activities listed below with the requirement that no such activity targeted civilians. Special care must be made in such cases to determine whether civilians were targeted or harmed during the alien’s activities and whether the applicant merits an exemption under the totality of the circumstances, in the exercise of discretion when any of these inadmissibility grounds are present; if the alien:

- Committed or incited to commit, under circumstances indicating an intention to cause death or serious bodily injury, a terrorist activity—INA § 212(a)(3)(B)(iv)(I);
- Prepared or planned a terrorist activity—INA § 212(a)(3)(B)(iv)(II);
- Gathered information on potential targets for terrorist activity—INA Section 212(a)(3)(B)(iv)(III);
- Solicited funds or other things of value for a terrorist activity—INA § 212(a)(3)(B)(iv)(IV)(aa);

- Solicited an individual to engage in conduct otherwise described in INA § 212(a)(3)(B)(iv), other than those involving activity carried out on behalf of a “terrorist organization”—INA § 212(a)(3)(B)(iv)(V)(aa);
- Committed an act the alien knows, or reasonably should have known, affords material support for the commission of a terrorist activity—INA § 212(a)(3)(B)(iv)(VI)(aa); or to any individual who the alien knows, or reasonably should know, has committed or plans to commit a terrorist activity—INA § 212(a)(3)(B)(iv)(VI)(bb);
- Has, under circumstances indicating an intention to cause death or serious bodily harm, incited terrorist activity—INA § 212(a)(3)(B)(i)(III);
- Is a representative of a political, social, or other group that endorses or espouses terrorist activity—INA § 212(a)(3)(B)(i)(IV)(bb); or
- Endorses or espouses terrorist activity or persuades others to endorse or espouse terrorist activity—INA § 212(a)(3)(B)(i)(VII).

A spouse or child is inadmissible under INA § 212(a)(3)(B)(i)(IX) if the related alien is inadmissible under § 212(a)(3)(B) for actions occurring within the last five years, unless the spouse or child qualifies for the exception provided under INA § 212(a)(3)(B)(ii). If the activity of the related alien is exempted, the spouse or child may also be exempted from inadmissibility. 212(a)(3)(B) does not require that the alien “actor” who is inadmissible under 212(a)(3)(B) seek admission or a benefit from USCIS. If an adjudicator encounters a case wherein the spouse and/or child of such an actor is before USCIS but the actor is not included, the adjudicator should follow the guidance issued by the USCIS Office of Chief Counsel issued on November 8, 2007, “Authority to apply the material support exemption to certain spouses and children,” which is included as Attachment C to this memorandum.

III. THRESHOLD REQUIREMENTS

In order to be considered for an exemption from the applicability of the terrorist-related inadmissibility provision, an applicant must:

- Establish that he or she is otherwise eligible for the immigration benefit or protection being sought;
- Undergo and pass all required background and security checks;
- Fully disclose, in all relevant applications and interviews with U.S. Government representatives and agents, the nature and circumstances of the activity or association with a terrorist organization; and
- Establish that he or she poses no danger to the safety and security of the United States.

These threshold considerations are the same as those included in the other exercises of the discretionary exemption authority issued previously. USCIS adjudicators are experienced in considering and documenting the review of these threshold considerations.

IV. SPECIFIC FACTORS FOR CONSIDERATION

For those applicants who have met the threshold requirements, adjudicators will consider whether the applicant is eligible for a group-based discretionary exemption. Note that this discretionary authority is applicable regardless of whether the applicant's activities or associations with the INC, KDP or PUK were voluntary or under duress.

Some specific factors for consideration include the nature of the applicant's activities with one of the three groups, including: (1) whether the applicant participated in any violent activities; (2) the frequency of support provided; (3) the applicant's conduct since his or her arrival in the United States; or (4) any other relevant factor.

V. MAKING THE DETERMINATION ON THE EXEMPTION

A. Vetting Cases for Possible Security Risk

USCIS adjudicators will follow existing agency procedures when results of security checks or interviews reveal possible national security risk. This includes coordination with the Fraud Detection and National Security Directorate (FDNS) for possible further review and vetting. If there is a need for vetting with a record holder or deconfliction with law enforcement or intelligence agencies, FDNS Immigration Officers will handle these actions and document results.

B. Prerequisite Training for Adjudicating the Exemption

Given the sensitivity of these cases, each adjudications program must ensure that adjudicators and first and second-line reviewers of these exemptions have received specialized training in the interviewing of and adjudicating benefits for Iraqi nationals. This specialized training is offered by the Refugee Affairs Division (RAD) on a periodic basis, and each program should coordinate through the Material Support Working Group (MSWG—also known as the Terrorist-Related Inadmissibility Grounds or TRIG Working Group) to ensure that a sufficient number of personnel in appropriate offices receive this training.

C. Analyzing the Applicability of the Exemption

Adjudicators will take the following steps to complete exemption determinations: (1) the adjudicator will first determine whether the applicant has met all threshold eligibility grounds, if so, the adjudicator will describe the applicant's associations or activities with any of the three above-named groups, noting any involvement in violence or other activities of concern; (2) the adjudicator will then document the exemption determination on the 212(a)(3)(B) Exemption Worksheet (rev. date)—when documenting the exemption, adjudicators will check the box marked "Other, Name:" in Section IV of the worksheet (revised: June 2, 2006); (3) the adjudicator will then indicate the name of the group—either INC, KDP or PUK, as appropriate, and indicate "Date authorized for exemption" as "September 21, 2009."

Initially, USCIS will require two levels of review before an exemption determination can be completed based on these exercises of authority. It is anticipated that this level of review will continue for the first 90 days the exemptions are in effect.

D. Headquarters Review and Oversight Procedures

Each HQ component will provide summaries of all exemptions adjudicated under this guidance to the MSWG on a bi-weekly basis for the first 90 days this guidance is in effect, to assure quality and agency-wide consistency in adjudications.

E. Record-Keeping Requirements

USCIS will maintain records on the number of exemptions considered in this category and their outcome, and statistics will be consolidated on a quarterly basis, at a minimum. These statistics will be used to provide information to the interagency, stakeholders, and to inform the required report to Congress.

F. Effect of Exemption on Future Adjudications

Any determination made under this exercise of authority as set out above can inform but shall not control a decision regarding any subsequent benefit or protection application.

G. Processing or Continued Hold of Certain Cases

If a case does not satisfy all threshold requirements for consideration of the exemption, it should be referred to the Immigration Court or denied after appropriate review in accordance with the above procedures.

If a case does meet the threshold requirements, but an exemption is considered and denied, the case should be referred or denied after appropriate review in accordance with the above procedures, unless it is otherwise subject to a hold under the CAA hold policy as revised in the February 13, 2009 directive. Adjudicators should elevate to the appropriate HQ program office any questions or concerns as to whether a particular case shall be placed on hold.

Consistent with the discretionary nature of the exemption authorities, this memorandum is not intended to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States, or its agencies, officers or any other person.

Questions about implementation of these exemptions should be forwarded to the appropriate HQ Division POC who sits on the MSWG.

Attachments (3)



U.S. Citizenship
and Immigration
Services

Fact Sheet

October 19, 2009

Secretaries Napolitano and Clinton Exercise Authority Under the Immigration and Nationality Act (INA) to Exempt Individuals Affiliated with Certain Iraqi Groups from Certain Inadmissibility Provisions

Effective September 21, 2009, Secretary of Homeland Security Janet Napolitano and Secretary of State Hillary Rodham Clinton, following consultation with each other and the Attorney General, exercised their discretionary authority under Immigration and Nationality Act (INA) section 212(d)(3)(B)(i) to exempt qualified individuals, as determined by officials of their respective Departments based on specified standards, from certain inadmissibility grounds in section 212(a)(3)(B) of the INA with respect to activities or associations related to the Iraqi National Congress (INC), the Kurdistan Democratic Party (KDP), and the Patriotic Union of Kurdistan (PUK). This exercise of authority will benefit qualified individuals seeking immigration benefits or protection in the United States who would otherwise be ineligible for the status sought, based on activities or associations related to one of these organizations.

The Secretary of Homeland Security and the Secretary of State have discretion, under the INA, to exempt individuals from most of the INA-defined "terrorist"-related grounds of inadmissibility, which also affect their removability from the United States. This exercise of authority is used to benefit only individuals who pose no risk to the security of the United States.

The exemption authority can be exercised in favor of an alien seeking a benefit or protection under the INA who has been determined to be otherwise eligible for the benefit or protection but for the relevant involvement with one of the three organizations. In order to be considered for the recently signed exemption, the applicant must satisfy the relevant agency authority that he or she:

- (a) has undergone and passed relevant background and security checks;
- (b) has fully disclosed, in applications and/or interviews with U.S. government representatives and agents, the nature and circumstances of activities or associations falling within the scope of the terrorist activity-related grounds of the INA;
- (c) has not participated in, or knowingly provided material support to, terrorist activities that targeted noncombatant persons;
- (d) poses no danger to the safety and security of the United States; and
- (e) warrants an exemption from the relevant inadmissibility provision in the totality of the circumstances.

The exemption authority can only be applied to aliens whose activities relate to the INC, KDP, or PUK. Implementation of the exemption authority determination will be made by U.S. Citizenship and Immigration Services (USCIS), in consultation with U.S. Immigration and Customs Enforcement (ICE), or by U.S. consular officers, as applicable, who shall ascertain, to their satisfaction, and in their discretion, that the particular applicant meets the criteria set forth above.

Attachment A: Implementation of New Discretionary Exemption
under INS Section 212(d)(3)(B)(i) for Activities Related to the INC, KDP and PUK

This exercise of authority may be revoked as a matter of discretion and without notice at any time with respect to any and all persons subject to it. Any determination made under this exercise of authority as set out above can inform but shall not control a decision regarding any subsequent benefit or protection application, unless such exercise of authority has been revoked.

The signed "Exercise of Authority Under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act" for individuals affiliated with the INC, KDP and PUK may be found on the USCIS.gov website.

-USCIS-

[Billing Code]

DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

DEPARTMENT OF STATE

Office of the Secretary

Exercise of Authority under Section 212(d)(3)(B)(i) of the Immigration and

Nationality Act

AGENCY: Office of the Secretary, DHS; Office of the Secretary, DOS.

ACTION: Notice of determination.

Authority: 8 U.S.C. 1182(d)(3)(B)(i).

The Secretary of Homeland Security and the Secretary of State, following consultations with the Attorney General, hereby conclude, as a matter of discretion in accordance with our respective authorities under section 212(d)(3)(B)(i) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(d)(3)(B)(i), as amended, as well as the foreign policy and national security interests deemed relevant in these consultations, that section 212(a)(3)(B) of the INA, 8 U.S.C. 1182(a)(3)(B), excluding subclause (i)(II), shall not apply, with respect to an alien, for any activity or association relating to the Patriotic Union of Kurdistan (PUK), provided that the alien satisfies the relevant agency authority that the alien:

(a) is seeking a benefit or protection under the INA and has been determined to be otherwise eligible for the benefit or protection;

- (b) has undergone and passed relevant background and security checks;**
- (c) has fully disclosed, in applications and/or interviews with U.S. government representatives and agents, the nature and circumstances of activities or associations falling within the scope of section 212(a)(3)(B) of the INA, 8 U.S.C. 1182(a)(3)(B);**
- (d) has not participated in, or knowingly provided material support to, terrorist activities that targeted noncombatant persons;**
- (e) poses no danger to the safety and security of the United States; and**
- (f) warrants an exemption from the relevant inadmissibility provision in the totality of the circumstances.**

Implementation of this determination will be made by U.S. Citizenship and Immigration Services (USCIS), in consultation with U.S. Immigration and Customs Enforcement (ICE), or by U.S. consular officers, as applicable, who shall ascertain, to their satisfaction, and in their discretion, that the particular applicant meets each of the criteria set forth above.

This exercise of authority may be revoked as a matter of discretion and without notice at any time with respect to any and all persons subject to it. Any determination made under this exercise of authority as set out above can inform but shall not control a decision regarding any subsequent benefit or protection application, unless such exercise of authority has been revoked.

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

procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person.

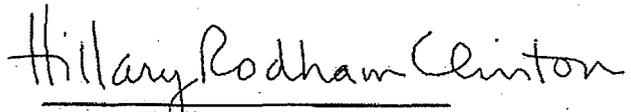
In accordance with section 212(d)(3)(B)(ii) of the INA, 8 U.S.C. 1182(d)(3)(B)(ii), a report on the aliens to whom this exercise of authority is applied, on the basis of case-by-case decisions by the U.S. Department of Homeland Security or by the Department of State, shall be provided to the specified congressional committees not later than 90 days after the end of the fiscal year.

This determination is based on an assessment related to the national security and foreign policy interests of the United States as they apply to the particular persons described herein and shall not have any application with respect to other persons or to other provisions of U.S. law.

Dated: 9-21-09



Jane's Napolitano,
Secretary of Homeland Security.



Hillary Rodham Clinton,
Secretary of State.

Attachment C: Implementation of New Discretionary Exemption under INA Section 212(d)(3)(B)(i) for Activities Related to the INC, KDP and PUK

Office of the Chief Counsel

U.S. Department of Homeland Security
20 Massachusetts Avenue, Room 4210
Washington, DC 20529



U.S. Citizenship and
Immigration Services

November 8, 2007

MEMORANDUM

TO: Lori Scialabba
Associate Director, Refugee, Asylum, and International Operations

FROM: Lynden D. Melmed
Chief Counsel 

SUBJECT: Authority to apply material support exemption to certain spouses and children

You have requested an opinion on whether U.S. Citizenship and Immigration Services (USCIS) has legal authority to apply the material support exemption where the individual seeking protection is the spouse or child of an alien who has afforded material support, but the alien who afforded the material support is not seeking an immigration benefit. For the reasons set forth below, we conclude that allowing principal applicants, as well as derivatives, to benefit from the material support exemption when a spouse or parent has provided material support is consistent with INA sections 212(a)(3)(B)(i)(IX) and 212(d)(3)(B)(i), and with the Secretary's exercises of discretion not to apply subsection 212(a)(3)(b)(iv)(VI) with respect to material support provided by an alien under certain circumstances.

Background

The issue has arisen in connection with a case that involves an Iraqi woman, who worked for an American company in Iraq, who fled to Jordan without her family. After her departure from Iraq, members of a Tier III terrorist organization kidnapped her son, and her husband was forced to pay ransom for his release. The refugee applicant would be inadmissible under INA section 212(a)(3)(B)(i)(IX) as the spouse of an alien who is inadmissible under INA section 212(a)(3)(B)(i) for an activity that occurred within the last five years unless a material support duress exemption can be applied to the material support afforded by her husband and exercised on her behalf. We understand that this fact pattern has also arisen for Burmese children of persons

Attachment C: Implementation of New Discretionary Exemption under INA Section 212(d)(3)(B)(i) for Activities Related to the INC, KDP and PUK

who provided material support to a named Tier III organization, where the parents are not requesting refugee status.

Analysis

According to the procedures set forth in the USCIS Memorandum regarding Processing the Discretionary Exemption to the Inadmissibility Ground for Providing Material Support to Certain Terrorist Organizations (May 24, 2007), the exemption process may be used to determine whether the *derivative* of a petitioner or principal applicant will be found inadmissible where the petitioner or principal applicant provided material support. See page 1, note 1 and page 3, note 6. For example, if a petitioner is granted a material support exemption, his spouse and children would not be inadmissible under INA section 212(a)(3)(B)(i)(IX) as the spouse or child of a person who has engaged in terrorist activity, and these family members would be eligible for derivative benefits. That situation, however, is somewhat different from the one in which the alien who afforded material support is not before us, but his or her spouse and/or children are. Under INA section 212(d)(3)(B)(i)(IX), an alien is inadmissible if he or she is the spouse or child of another alien who is inadmissible for terrorist activity within the last 5 years. This provision does not require that the alien who committed terrorist activity be seeking admission or a benefit from USCIS. It would be an exceptionally narrow reading of the terrorism bar to conclude that the bar only applies to spouses and children if the principal alien is seeking to enter the country. It is therefore clear that the agency may - indeed, must - in certain cases determine the admissibility of an alien who is not before the agency.

Under INA section 212(d)(3)(B)(i), the Secretary "may conclude...that subsection (a)(3)(B)(IV)(vi) (the material support provision) *shall not apply with respect to any material support* an alien afforded to an organization or individual that has engaged in terrorist activity (emphasis added)." This provision applies the exemption authority to an act (i.e., the material support afforded) and does not require that the alien who provided the material support be the alien before the agency. Thus, the conclusion that the Secretary's exemption authority may be applied to material support afforded by an alien not before the agency, but which affects the admissibility of an alien that is before the agency, is consistent with the statute.

Secretary's Exercise of Discretion

The Secretary of Homeland Security has recognized that, despite the fact that they do not represent a threat to our homeland security, a select group of foreign nationals have been unable to pursue the protections provided by our refugee and asylum laws because they have been uniquely victimized by terrorist groups. As a result, the Secretary has exercised his discretionary authority to permit consideration of applications from some aliens who have provided material support to groups while under duress.

The Secretary's memoranda exercising his exemption authority do not directly address the current fact pattern. These Secretary's memoranda state that the exemption authority "shall apply to an alien who...is seeking a benefit or protection under the Act..." but they do not specify whether the

Attachment C: Implementation of New Discretionary Exemption under INA Section 212(d)(3)(B)(i) for Activities Related to the INC, KDP and PUK

alien who provided material support must be the alien before the agency.¹ We read this requirement to mean that for the exemption authority to be exercised, the alien *benefited* by the exemption must be before the agency. For example, the exemption may be applied to material support afforded by a husband who is not before the agency to the benefit of his wife who is applying for refugee status (assuming, of course, that the wife applying for refugee status meets the criteria laid out in the relevant exercise on the exemption authority).

This conclusion raises the issue of fact finding in making a determination regarding the admissibility of an alien who is not before us. This challenge is of course not unique to this situation, as the application of INA section 212(a)(3)(B)(i)(IX) already requires the agency to determine whether an alien is inadmissible for terrorist activity irrespective of whether that alien is seeking admission. We also note that the exercise of the Secretary's exemption authority is discretionary, and that the burden is on the alien to show that he or she is eligible for and should be granted the exemption. For duress-based exemptions, the alien must show that the exemption should be granted in the totality of the circumstances. If an adjudicator does not have sufficient information, or believes that the alien has not met this burden, the exemption should be denied.

Should the alien, referred to previously, who provided the material support rendering his wife inadmissible under INA section 212(a)(3)(B)(i)(IX) ever appear before the agency to seek a benefit or protection, the agency at that time would consider the prior grant of the exemption anew, even if it concerned the act that had been exempted previously. If information provided by that alien called into question any of the information provided by his wife, or the previous exemption granted to his wife, the grant of the previous exemption could be reconsidered at that time and, if appropriate, USCIS could pursue termination of refugee status under 8 U.S.C. 1157(c)(4).

Conclusion

Allowing principal applicants to benefit from the material support exemption when a spouse or parent not before us has provided material support, thus rendering the principal applicant inadmissible under INA § 212(a)(3)(B)(i)(IX), is consistent with INA § 212(d)(3)(B)(i) and within the Secretary's exercises of the exemption authority to date. Thus, spouses and children of aliens who are inadmissible for the provision of material support and who are therefore inadmissible themselves may be considered for the exercise of the exemption authority with respect to the material support provided by the spouse or parent.

¹ The language contained in the Secretary's October 5, 2007, exercise of authority with respect to material support afforded to the Front Unifié de Lutte des Races Opprimées (FULRO) is somewhat different in that it applies only to material support provided prior to December 31, 1992. Therefore, the inadmissibility ground at INA § 212(a)(3)(B)(i)(IX), which refers to activities occurring in the last 5 years, would not arise in material support cases being considered for this exemption.