

Material Support Bar

by

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Material Support Bar Definition I

A person has “*engaged in terrorist activity*” if he or she “*commits an act that the actor knows, or reasonably should know, affords material support*” to a person engaged in terrorist activity or to a terrorist organization. INA 212(a)(3)(B)(VI).

Material Support Bar Definition II

- The phrase “*material support*” is not defined but includes a list of examples:
 - Safe house
 - Transportation
 - Communication
 - Funds
 - Transfer of funds
 - False documentation
 - Weapons and explosives
 - Training

Material Support Bar Definition III

- “*Terrorist Activity*” under INA 212(a)(3)(B)(iii)(V) is defined as:
 - “the use of any explosive firearms 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 property damage.”

Material Support Bar Definition IV

- ***“Terrorist Organization”***
 - Tier I
 - “Foreign Terrorist Organization” (FROs) and
 - Must be designated as such by the Secretary of State under INA 219
 - Tier II
 - Groups that are “otherwise designated” by the Department of State
- **Tier III**
 - “Group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in, terrorist activity.”
 - Political purpose of the organization (i.e., pro-democracy) & its conduct during the armed conflict (i.e., compliance with the laws of war) are irrelevant.
 - No central government agency to determine whether an organization is, in fact, a Tier III organization.

Material Support Bar Issues

- Whether the statute contemplates a de minimis amount of support to be “*material support*.”
- Whether the statute includes an *implied duress exception* for those who are forced to provide assistance under threat of harm to themselves or others.

Material Support Bar Legislative History

- The “material support” ground for inadmissibility has remained largely unchanged since it was first introduced in 1990.
- The only significant change related to an individual’s required knowledge of a Tier III organization’s “terrorist activity.”
- Under the Patriot Act, the Tier III definition includes an exception if an individual could show that he or she “did not know, and should not reasonably have known, that the act would further the organization’s terrorist activity.”
- Under the Real ID Act of 2005, this exception was narrowed to require that the individual show by “clear and convincing evidence” that he or she “did not know, and should not reasonably have known, that the organization was a terrorist organization.”

Material Support Bar Bar to Refugee Status & Asylum I

- Under the INA, individuals who are inadmissible to the U.S. are generally not eligible for refugee resettlement absent a waiver of inadmissibility ground.
- The impact of the material support bar grew as a matter of law with the expansion of the “terrorist organization” definition itself.
- **With the creation of the Tier III Terrorist Organization definitions, *the material support bar to resettlement, asylum and withholding of removal was expanded.***

Material Support Bar Bar to Refugee Status & Asylum II

- **Family members also subject to material support bar INA 212(a)(3)(B)(i)(VII):**
 - “the spouse or child of an alien who is inadmissible under this section, if the activity causing the alien to be found inadmissible occurred within the last 5 years.”
 - Exceptions:
 - (1) If a spouse or child “did not know or should not reasonably have known of the activity causing the alien to be found inadmissible”
 - (2) If “the consular officer or Attorney General has reasonable grounds to believe has renounced the activity causing the alien to be found inadmissible.”

Material Support Bar Material Support Waiver

- **Definition**
 - INA 212(d)(3)(B)(i) provides that the Secretary of State or the Secretary of Homeland Security, after consultation with each other and the Attorney General, may conclude in such Secretary’s “sole, unreviewable discretion” that the material support ground of inadmissibility “shall NOT apply with regard to any material support an alien afforded to an organization or individual to waive the material support ground of inadmissibility for persons placed in regular removal proceedings.
- **Impact on Refugee Status & Asylum**
 - The waiver authority has not been exercised for any asylum-seeker in the U.S.
 - To date, the Secretary of State exercised this waiver authority only three times.

Material Support Bar Waiver of Certain Groups

- **Waiver of Certain Groups:** 72 Fed Reg 9954-9957 (3/6/07)
 - Karen National Union & Karen National Liberation Army
 - Chin National Front & Chin National Army
 - Chin National League for Democracy
 - Kayan New Land Party
 - Arakan Liberation Party
 - Tibetan Mustangs
 - Cuban Alzados
 - Karenni National Progressive Party

Material Support Bar Waiver under Duress for Tier III

- INA 212(a)(3)(B)(iv)(VI) will **NOT** apply with respect to material support provided under duress to a terrorist organization, if warranted by the totality of circumstances.
- Considering factors for “*duress*”
 - Whether applicant could have avoided, or took steps to avoid, providing material support
 - The severity & type of harm inflicted or threatened.
 - In cases of threats alone, the perceived imminence of the harm threatened & perceived likelihood the harm would be inflicted
- Considering factors for “*totality of circumstances*”
 - The amount, type & frequency of the material support provided
 - The nature of the activities committed by the terrorist organization
 - The alien’s awareness of those activities
 - The length of time since material support was provided
 - The alien’s conduct since that time
 - Any other relevant factor
- Granted Exemption applies to Future Adjudications under INA.

Material Support Bar Waiver of Tier III - Subgroup

- **Waiver of Tier III determination based on Activities of Subgroup**
 - **Definition**
 - INA 212(d)(3)(B)(i) provides that the Secretary of State or the Secretary of Homeland Security, after consultation with each other and the Attorney General, may conclude in such Secretary's "sole, unreviewable discretion" that the determination that a group is a Tier III Terrorist Organization (INA 212(a)(3)(B)(vi)(III) "shall **NOT** apply to a group solely by virtue of having a subgroup within the scope of that subsection."
 - **Impact on Refugee Status & Asylum**
 - If an individual is barred from refugee resettlement or asylum under a provision of the INA specifically relating to material support to or membership in a Tier III Terrorist Organization, then ***the waiver of the Tier III determination would result in a waiver of the bar to refugee protection.***
 - If the person **personally participated in armed resistance** however, and is inadmissible for having engaged in "terrorist activity," then this ***waiver would NOT result in a lifting of the bar to refugee protection.***

Material Support Bar BIA on Material Support: Matter of S-K-, 23 I&N Dec. 936 (BIA 2006)

- **Facts**
 - The respondent, a native & citizen of Burma, is a Christian & an ethnic Chin. Although the IJ found that Respondent had established a well-founded fear of persecution in order to qualify for asylum, he denied her application for relief because, by providing money & other support to the Chin National Front ("CNF"), an organization which uses land mines & engages in armed conflict with the Burmese government.
 - She donated money for approximately 11 months & attempted to donate other goods such as a camera & binoculars via a friend.
 - Therefore, she was statutorily barred from asylum & from withholding of removal under INA 241(b)(3), and for the protection under CAT.

Material Support Bar
BIA on Material Support:
Matter of S-K-, 23 I&N Dec. 936 (BIA 2006)

Holdings

- The statutory language of INA 212(a)(3)(B) does **NOT** allow “*totality of the circumstances*” test to be employed in determining whether an organization is engaged in terrorist activity, so factors such as an organization’s purposes or goals & the nature of the regime that the organization opposes may not be considered.
- Neither an *alien’s intent* in making a donation to a terrorist organization nor the *intended use of the donation* by the recipient is considered in assessing whether the alien provided “material support” to a terrorist organization under INA 212(a)(3)(B)(iv)(VI).
- The respondent’s contribution of S\$1,000 (Singapore dollars) over an 11-month period to the CNF was sufficiently substantial to constitute material support to an organization, which despite its democratic goals & use of force only in self-defense, is defined by statute as a terrorist organization acting against the Burmese government, so the Respondent is **barred from asylum & withholding of removal**.

Material Support Bar
9th Circuit
Im v. Gonzales, ... F.3d..., 2007 WL 2296778

Facts

- Cambodian alien petitioned for review of the decision the BIA, adopting and affirming decision of IJ, denying applications for asylum & withholding of removal & granting deferral of removal under CAT. He was barred because he had worked as a prison guard which IJ believed rendered him a former persecutor.

Holdings

- The Court of Appeal held that alien’s job as prison guard & acts of leading prisoners to interrogation did not amount to assistance in persecution because alien never beat any prisoner, did not decide who was imprisoned, had no say in which prisoners were interrogated, was not present during interrogation, and never saw a prisoner beaten.
- Aliens are only rendered ineligible for asylum if they have provided **purposeful**, material assistance for the acts of persecution.