



U.S. Department of Justice
Immigration and Naturalization Service

Office of the Commissioner

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October 31, 2001

MEMORANDUM FOR Regional Directors
Regional Counsel

FROM: James W. Ziglar
Commissioner

SUBJECT: New Anti-Terrorism Legislation

On October 26, 2001, the President signed the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001 (Act). The Act contains a broad package of budgetary and statutory amendments to enable the government to combat more effectively the threat of terrorism. The Act contains a number of significant immigration provisions. This memorandum lists the substantive new provisions and discusses in further detail provisions of particular significance, such as those related to retroactivity and the detention of certain aliens that the Attorney General certifies endanger national security. This memorandum also provides preliminary instructions to field offices concerning how to bring individual cases to the attention of Headquarters for consideration under the new detention provision.

The Act authorizes increased resources for immigration enforcement, amends the Immigration and Nationality Act (INA) relating to the detention and removal of aliens who engage in terrorist activities, and contains provisions to ensure that the immigration status of victims of the September 11 terrorist attacks and their families is not adversely affected as a result of the attacks. The immigration provisions are summarized below by subtitle.

Headquarters will provide additional guidance regarding the implementation of these provisions in the future.

Subtitle A, Sections 401-405:

- authorizes tripling of personnel along the northern border; waives overtime cap applicable to INS employees; authorizes appropriations for improvements in technology to monitor the northern border; requires DOJ and FBI to provide the State Department and INS information from its NCIC files; and requires a DOJ report to Congress on the feasibility of enhancing the FBI's Integrated Automated Fingerprint Identification System as well as other identification systems.

Subtitle B, Section 411:

- broadens the grounds of inadmissibility to include: (a) any representative of a political or social group that publicly endorses terrorist activity in the United States; (b) a person who uses his prominence to endorse terrorist activity, or persuade others to support terrorist activity; (c) spouses and children of persons engaged in terrorism; and (d) anyone the Secretary of State or Attorney General determines has been associated with a terrorist organization and who intends to engage in activities that could endanger the welfare, safety, or security of the United States;
- broadens the definition of "terrorist activity" to include the use of dangerous devices;
- adds a definition of "terrorist organization" that includes: (a) any organization designated under section 219; (b) any organization otherwise designated, upon publication in the Federal Register, by the Secretary of State (after consultation with or at the request of the Attorney General) as a terrorist organization after a finding that the organization commits or incites to commit terrorist activity, prepares or plans a terrorist activity, or gathers information on potential targets for terrorist activity, or that the organization provides material support to further terrorist activity; and (c) a group of two or more individuals, whether organized or not, that commits or incites to commit terrorist activity, prepares or plans a terrorist activity, or gathers information on potential targets for terrorist activity;
- amends the definition of "engage in terrorist activity" – which is conduct that can render an alien inadmissible (under section 212(a)(3)(B)) or deportable (under section 237(a)(4)(B)) – in two principal ways: (a) by clarifying that an alien's solicitation of funds or members for a terrorist organization constitutes "engaging in a terrorist activity," even if the alien did not intend to further terrorist activity and/or did not know that the organization was a terrorist organization; and (b) by providing that an alien "engages in a terrorist activity" by committing an act that the alien knows or reasonably should know affords material support to a terrorist organization, even if the alien did not specifically intend to support terrorist activity and did not know (and should not reasonably have known) that the organization was a terrorist organization.

The statute further provides, however, that an alien's solicitation of funds or members for, or provision of material support to, a terrorist organization will not be deemed "engaging in a terrorist activity" where (i) the organization is at the time of the solicitation or support a non-designated terrorist organization and (ii) the alien demonstrates that he did not know, and should not reasonably have known, that the solicitation or material support would further the organization's terrorist activity.

- adds as a bar to asylum the new ground of inadmissibility for using a position of prominence to endorse terrorist activity or persuade others to support terrorist activity;
- contains an express retroactive application clause mandating the application of these new provisions (a) to actions taken by an alien before, on, or after the date of enactment, (b) to all aliens without regard to the date of the alien's entry or attempted entry, (c) in removal proceedings on or after the date of enactment (except for proceedings in which there has been a final administrative decision before enactment), and (d) to aliens seeking admission to the United States on or after the date of enactment;
- contains an express provision requiring application of sections 212 and 237, as amended, to all aliens who are in exclusion or deportation proceedings on or after the date of enactment (except where there has been an administratively final order issued); and
- allows a waiver of the bar to admission for spouses and children if they did not know or should not reasonably have known the principal alien was engaged in terrorism or if they renounced the terrorist activity.

Subtitle B, Section 412:

- requires mandatory detention of aliens until they are removed or until removal proceedings are terminated in the alien's favor where the Attorney General issues a certification that he has "reasonable grounds to believe" the alien is described in sections 212(a)(3)(A)(i), 212(a)(3)(A)(iii), 212(a)(3)(B), 237(a)(4)(A)(i), 237(a)(4)(A)(iii), or 237(a)(4)(B), or is engaged in any other activity that endangers the national security of the United States, as long as removal or criminal charges are brought within 7 days of arrest.

Subtitle B, Sections 413-418:

- gives the Secretary of State discretion to provide visa record information on a basis of reciprocity to foreign governments to fight international terrorism or other crimes;
- requires the Attorney General to expedite the implementation of the integrated entry and exit data system authorized by Congress in 1996 and includes the Office of Homeland Security in such development;

- requires the Attorney General to fully implement and expand the foreign student monitoring program; and
- requires the Secretary of State to determine if consular shopping is a problem.

Subtitle C, Sections 421-428:

- creates a special immigrant status for people who were in the process of securing permanent residence through a family member who died, was disabled, or lost employment as a result of September 11;
- temporarily extends the derivative status of spouses and minor children of a nonimmigrant who was killed or injured on September 11 if they are in the United States;
- provides remedies for people whose eligibility was adversely affected because they could not meet certain deadlines as a result of September 11 (visa waiver, diversity lottery, immigrant visas, and advance parole);
- Extends voluntary departure periods that expired between September 11 and October 11 by an additional 30 days;
- gives relief to the spouses and children of citizens and lawful permanent residents killed on September 11 by allowing adjudication of permanent resident applications;
- provides an additional period during which a beneficiary of an immigration petition or application that was pending on September 11, and whose 21st birthday occurs in or after September, 2001, will be considered to be a "child" under the INA;
- precludes any immigration benefits under this Subtitle of the Act for anyone culpable for the terrorist attacks on September 11 or any family member of such person.

Effect of Amendments on Inadmissibility and Removal

The new legislation enhances the Government's ability to deport or deny admission and immigration benefits to alien terrorists. Under prior law, representatives (including even officers and commanders) of terrorist organizations were not inadmissible to the United States unless their organization was one of the twenty-eight terrorist organizations currently designated by the Secretary of State under section 219 of the INA. Under the new law, such persons will also be inadmissible if the Secretary of State has determined that the organization is a political, social or other similar group whose public endorsement of acts of terrorist activity undermines United States efforts to reduce or eliminate terrorist activities. Under prior law, members of section 219

designated organizations were inadmissible if the alien knew or should have known the organization was a terrorist organization. The new law makes inadmissible any member of either a section 219-designated terrorist organization or any terrorist organization that the alien knows or should know is a terrorist organization. The new law also adds as grounds for inadmissibility any alien who uses his or her position of prominence to endorse or espouse terrorist activity or to persuade others to support terrorist activity "in a way that the Secretary of State has determined undermines United States efforts to reduce or eliminate terrorist activities," and any alien who has been determined by the Secretary of State or the Attorney General (after consulting one with the other) to have been associated with a terrorist organization and intends while in the United States to engage, even incidentally, in activities that could endanger the welfare, safety, or security of the United States.

Further, under prior law, aliens who engaged in terrorist activity were inadmissible to and deportable from the United States. The term "engaged in terrorist activity" included soliciting funds or members for a terrorist organization. The law, however, did not define terrorist organization. It also did not clearly specify whether an alien's solicitation of funds or members for a terrorist organization constitutes "engaging in a terrorist activity" if the alien did not intend to further terrorist activity and/or did not know that the organization was a terrorist organization. Furthermore, the term "engaged in terrorist activity" included affording material support to a terrorist organization only "in conducting a terrorist activity."

The new law corrects these deficiencies in three ways. First, it defines terrorist organizations by providing that an organization can be established as a terrorist organization in one of three ways: (1) by Secretary of State designation under section 219; (2) by Secretary of State designation upon Federal Register publication after a finding is made that the organization (a) commits or incites to commit terrorist activity, (b) prepares or plans a terrorist activity, (c) gathers information on potential targets for terrorist activity, or (d) provides material support to further terrorist activity; or (3) by being a group (of two or more persons, whether formally organized or not) that (a) commits or incites to commit terrorist activity, (b) prepares or plans a terrorist activity, (c) gathers information on potential targets for terrorist activity, or (d) provides material support to further terrorist activity.

Second, the law clarifies that an alien's solicitation of funds or members for a terrorist organization constitutes "engaging in a terrorist activity," even if the alien did not intend to further terrorist activity and/or did not know that the organization was a terrorist organization.

Third, the law makes clear that the Government does not have to prove that an alien specifically intended to support an organization's terrorist activity in order to establish his inadmissibility or deportability on the ground that the alien provided "material support" to a terrorist organization. Regardless of his intent, if after the date of designation under section 219 or publication in the Federal Register of the Secretary's other designation, the alien supported an organization that was designated or subject to the published finding by the Secretary of State, he is inadmissible or deportable. Regardless of his intent, if he provided the support to organizations prior to designation or publication or for which no such designation or publication has yet occurred, he is inadmissible or deportable if the Government proves that the organization which he supported was a terrorist organization, unless the alien can establish that he did not

know and should not reasonably have known that his support would further the organization's terrorist activity.

Finally, by expanding the definitions of "engaged in terrorist activity" and "terrorist organization," the law acts to increase the classes of aliens ineligible for certain forms of relief or protection under the immigration laws, such as adjustment of status, release pending deportation, and withholding of removal.

Retroactivity

Sections 411(c)(1) and (2) of the Act provide expressly for retroactive application of all of the amendments in section 411. Pursuant to section 411(c)(1) the amendments expressly apply to (a) to any actions taken by an alien before, on, or after the date of enactment, (b) to all aliens without regard to the date of the alien's entry or attempted entry, (c) in removal proceedings on or after the date of enactment (except for proceedings in which there has been a final administrative decision issued before enactment), and (d) to aliens seeking admission to the United States on or after the date of enactment. This retroactivity provision is comprehensive and inclusive – it applies in all removal cases. In addition, section 411(c)(2) applies expressly to aliens in exclusion and deportation proceedings, and mandates that INA sections 212 and 237, as amended, be applied to all aliens in such proceedings, as if they were in removal proceedings, unless a final administrative order has issued.

Sections 411(c)(3) and (4), however, create a special rule in cases involving designated terrorist organizations. The provisions prevent retroactive application of the provisions making inadmissible any alien who has solicited members or funds for, or provided material support to, a designated terrorist organization where that alien's actions pre-date the designation of the organization, in cases where the alien can demonstrate that he did not know, and should not reasonably have known, that the conduct in question would further the organization's terrorist activity. The provisions further clarify, however, that where the actions in question post-date the designation of the organization, or where the alien cannot demonstrate that he did not know and should not reasonably have known that the conduct in question would further the organization's terrorist activity, then the provisions related to solicitation and material support do apply retroactively. Thus, the key to determining retroactive application in these designated terrorist organization cases will be the date of the designation and the time of the alien's actions, not the date of the enactment of these amendments.

Attorney General Certification and Detention

Section 412 of the Act adds a new section 236A to the INA relating to the detention of aliens who are certified by the Attorney General as endangering national security. Under new section 236A(a)(1) of the INA, the Attorney General shall detain any alien whom he certifies until that alien is removed, until the Attorney General determines that the alien is no longer an alien who may be certified, or until the alien is finally determined not to be removable, as long as

criminal or removal charges are issued within 7 days of his arrest. In order to make such a certification under new section 236A(a)(3), the Attorney General must have “reasonable grounds to believe” that the alien is engaged in any activity that endangers the national security of the United States, or that the alien is described in any of the following INA provisions concerning security or terrorism-related grounds of removal and/or inadmissibility: INA § 212(a)(3)(A)(i) (entry to violate any law relating to espionage or sabotage), § 212(a)(3)(A)(iii) (entry to oppose, control or overthrow the government of the United States by force, violence, or other unlawful means), § 212(a)(3)(B) (inadmissibility grounds related to terrorism), § 237(a)(4)(A)(i) (has engaged in activity to violate any law relating to espionage, sabotage, or the unlawful exportation of goods, technology, or sensitive information), § 237(a)(4)(A)(iii) (has engaged in any activity to oppose, control or overthrow the government of the United States by force, violence, or other unlawful means), or § 237(a)(4)(B) (alien who has engaged in terrorist activity).

Once the Attorney General certifies that there are reasonable grounds to believe that an alien is described in any of the enumerated provisions and the alien is detained, section 236A(a)(5) requires the Attorney General, through the applicable INS district or federal criminal prosecutors, to file removal or criminal charges against the alien within seven days. If the alien is not charged under either the INA or a criminal statute within that time, the Attorney General must release the alien. Every six months while the alien is detained pursuant to the certification, the Attorney General must review the certification to determine whether it should be revoked. The alien may request each six months in writing that the Attorney General reconsider the certification and may submit documents or other evidence in support of that request. Even where there is no likelihood that the alien will be removed in the reasonably foreseeable future, so long as the Attorney General does not revoke the certification, the alien shall be detained.

Only the Attorney General or the Deputy Attorney General has the authority to make the certification. This authority cannot be delegated to any other official in the Department of Justice, EOIR, or INS. Thus, once an alien is detained pursuant to an Attorney General (or Deputy Attorney General) certification and charges have been filed within seven days of the alien’s arrest, INS cannot release the alien from detention unless and until the Attorney General revokes the certification, the alien is removed, or the alien is finally determined not to be removable.

Please note that the new certification and detention provisions do not alter the recently amended regulatory requirements regarding the period of time for which an alien can otherwise be held in custody prior to a decision to issue a charging document. See 66 Fed. Reg. 48334 (Sept. 20, 2001). As amended, 8 C.F.R. § 287.3(d) requires that the INS determine whether or not to issue a notice to appear within 48 hours for anyone arrested without warrant unless an emergency or other extraordinary circumstance prevents making that determination within the 48-hour period. The seven-day provision in section 236A(a)(5), however, can extend the time allotted by the regulation in any case where the Attorney General makes the new statutory certification.

In cases where the Attorney General issues a certification, and after removal proceedings are completed, in those cases where the alien has been ordered removed but his or her removal is unlikely in the reasonably foreseeable future, the alien may be continued in detention for

additional periods of up to six months, but only if the alien's release would threaten national security or the safety of the community or any person. The Attorney General must review every six months whether the certification should be revoked. If the Attorney General decides to revoke the certification, the alien may be released under appropriate conditions as determined by the Attorney General, unless release is otherwise prohibited by law. The alien may request reconsideration of the certification every six months and may submit evidence in support of his or her release. Any alien in custody as a result of the Attorney General's certification under section 236A, may seek review of his or her detention as well as review of the certification decision itself, by habeas corpus in federal court, but can appeal an adverse decision made by a district court, regardless of the district, only to the United States Court of Appeals for the District of Columbia, whose rulings will control in all federal districts nationwide.

More detailed guidance on the implementation of this new statute will follow. In the meantime, if any District or local office detains an alien who appears to be a candidate for certification under the provisions of new section 236A, they should immediately notify Executive Associate Commissioner for Field Operations, Michael A. Pearson, or his designee, through their chain of command, and should consult with their District or Sector Counsel. Any legal questions should be raised through channels to Deputy General Counsel Dea Carpenter.