

9 FAM 40.32 NOTES

(CT:VISA-734; 05-03-2005)
(Office of Origin: CA/VO/L/R)

9 FAM 40.32 N1 SCOPE OF INA 212(A)(3)(B)

9 FAM 40.32 N1.1 Background and Summary

(CT:VISA-734; 05-03-2005)

- a. The Immigration Act of 1990 (Public Law 101-649) generally amended subsection (a) of Immigration and Nationality Act (INA) 212 by replacing the previous 43 classes of excludable aliens with 9 broad classes, each with subclasses. New INA 212(a)(3)(B), Terrorist Activities, incorporated aspects of former INA 212(a)(27) and (29).
- b. The Antiterrorism and Effective Death Penalty Act of 1996 (Public Law 104-132) expanded the scope of INA 212(a)(3)(B), to make inadmissible, representatives and members of organizations designated by the Secretary under INA 219 as foreign terrorist organizations (FTOs) (See 9 FAM 40.32 N2.3 (1)). That same year, the Illegal Immigration Reform and Immigrant Responsibility Act (Public Law 104-208) amended INA 212(a)(3)(B)(i) again to make inadmissible, any alien who, "under circumstances indicating an intention to cause death or serious bodily harm," incited terrorist activity. The new provision applied retroactively to all such incitement activities, regardless of when they occurred.
- c. Following the terrorist attacks on September 11, 2001, the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT ACT), expanded the scope of INA 212(a)(3)(B) in several important respects:
 - (1) The Secretary was given new authority to designate organizations as terrorist organizations for purposes of INA 212(a)(3)(B) if certain criteria are met. Organizations so designated are listed on the "Terrorist Exclusion List" or "TEL." (See 9 FAM 40.32 N2.3(2)).
 - (2) A definition of "terrorist organization" was added for the first time. Under the definition, three categories of entities are considered "terrorist organizations" for purposes of section INA 212(a)(3)(B):
 - (a) The first category consists of entities designated by the

Secretary of State as "foreign terrorist organizations" (FTOs) under section 219 of the INA.

- (b) The second category consists of entities designated and listed on the "Terrorist Exclusion List" (TEL).
 - (c) The third category consists of undesignated entities that engage in certain terrorist activities. For further discussion of terrorist organizations and the distinction between FTO and TEL entities (see 9 FAM 40.32 N2.3).
- (3) Aliens who are members of designated FTOs are inadmissible. The INA does not require the alien to know that the organization is a terrorist organization. Members of designated organizations on the TEL are also inadmissible, because the Department publishes the list of TEL organizations and therefore will infer that an alien knows or should have known that the entity is a terrorist organization. Members of undesignated terrorist organizations are inadmissible only if the alien knows, or should have known, that the organization engages in certain terrorist activities.
 - (4) Aliens who solicit on behalf of a terrorist organization, or provide material support to a terrorist organization, are inadmissible if
 - (a) The entity was designated as a "terrorist organization" at the time (whether as an FTO or on the TEL) and;
 - (b) The entity was an undesignated "terrorist organization" and the alien is unable to show that he did not know, and should not reasonably have known that the solicitation or materials support would further the organization's terrorist activity.
 - (5) Aliens who publicly endorse terrorist activity may be inadmissible if certain conditions are met. (See 9 FAM 40.32 N 5.1.)
 - (6) Spouses and children of aliens found inadmissible under INA 212(a)(3)(B) may be inadmissible under certain circumstances. (See 9 FAM 40.32 N9.)
 - (7) In general, the USA PATRIOT ACT amendments apply to actions taken by an alien before the date of enactment (October 26, 2001). (See 9 FAM 40.32 N1.2-1(g)).

Note: The USA PATRIOT ACT also added INA 212(a)(3)(F) which makes aliens, who have been associated with a terrorist organization, inadmissible under certain circumstances. (See 9 FAM 40.36.)

9 FAM 40.32 N1.2 Adjudicating Ineligibility Under INA 212(a)(3)(B)

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- a. You must submit, for a security advisory opinion (SAO), all visa applications involving possible ineligibility under INA 212(a)(3)(B) (see 9 FAM 40.32 N3), regardless of whether the applicant's name is in the visa lookout system. The collection and assessment of information regarding ineligibility under INA 212(a)(3)(B) is a collaborative process between post, the Department, and other security agencies in Washington DC. These procedures are designed to deny terrorists entry to the United States while permitting legitimate travel.

Note: The processing of SAO requests arising from potential INA 212(a)(3)(B) inadmissibility may take time, particularly where the case involves other potential grounds of inadmissibility and is therefore subject to additional screening requirements. Guidance for submitting an SAO request in cases involving more than one potential ground of inadmissibility can be found in 9 FAM Appendix G, Chapter 500 Security Opinion.

- b. Information you provide in SAO requests or in response to inquiries from Washington DC is essential to the review process. For example, your assessment of the credibility of an applicant's response to questions concerning possible provision of material support to a terrorist organization can be the key factor in determining whether the alien is inadmissible. Please bring all relevant information to the Department's attention as early as possible in the process.
- c. The Department of Homeland Security (DHS) is a key player in this process. Section 428 of the Homeland Security Act of 2002 (Public Law 107-296), gives the Secretary of DHS the authority to refuse visas in accordance with law, and the Memo of Understanding (MOU) Between the Secretaries of State and Homeland Security Concerning the Implementation of Section 428 explicitly acknowledges that the Secretary of DHS may do so independently of the SAO process. As a practical matter, however, DHS normally registers any concerns or objections it may have regarding a particular visa application through the SAO process. If the Department and a third agency cannot agree on whether there is sufficient information to support a visa denial, the case is referred to the Secretary of DHS who decides whether the facts support a denial of the visa in accordance with law.

9 FAM 40.32 N1.2-1 Consider the following when adjudicating cases falling within the purview of INA 212(a)(3)(B)

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- a. In general, an alien is inadmissible if the alien engages in any of the activities listed in INA 212(a)(3)(B)(i) regardless of when the activity took place and regardless of whether the activity ultimately resulted in a terrorist attack;
- b. In some cases, an alien's status alone may render the alien inadmissible. For example, a member of a designated FTO is inadmissible even if the alien was not involved in any way with the organization's terrorist activities. (See 9 FAM 40.32 N6);
- c. Publicly endorsing terrorism or inciting terrorist activity may be grounds for inadmissibility; these provisions are carefully tailored. Pay close attention to the conditions that must be present to find that an alien's public statements render the alien inadmissible (see 9 FAM 40.32 N5.1);
- d. When a provision requires a finding by the Secretary, as opposed to a consular officer, that finding is made by the Department, not at post;
- e. There are now three categories of terrorist organizations for purposes of INA 212(a)(3)(B):
 - (1) Entities designated by the Secretary of State as "foreign terrorist organizations" under section 219 of the INA (FTOs);
 - (2) Entities designated and listed on the "Terrorist Exclusion List" (TEL); and
 - (3) Undesignated entities that fall within the definition set forth in INA 212(a)(3)(B)(vi)(III). Whether an alien's involvement with a terrorist organization renders the alien inadmissible will in some cases depend on the categorization of the terrorist organization concerned (see 9 FAM 40.32 N1.1).
- f. When ineligibility under INA 212(a)(3)(B) is established, you may recommend a waiver of the ineligibility under INA 212(d)(3)(A) or, in material support cases, recommend that the Secretary of State exercise her authority to limit the application of the material support provisions in a particular case. (See 9 FAM 40.32 N2.2 exceptions.) If we concur that a waiver or other action is appropriate we will seek Department of

Homeland Security (DHS) concurrence (see 9 FAM 40.32 N9);

- g. Section 411(c)(4) of the USA PATRIOT ACT authorizes the Secretary of State in consultation with the Secretary of Homeland Security to determine that the USA PATRIOT ACT amendments will not apply with respect to an alien's activities taken outside the United States and prior to the date of enactment (October 26, 2001). The Secretary can exercise this authority only if a consular officer recommends that she do so in a particular case, based upon the officer's determination that there is not reasonable ground to believe the alien knew or reasonably should have known that the actions would further a "terrorist activity." CA/VO/L/C and L can assist you with determining whether an alien is ineligible only because of an amendment to INA 212(a)(3)(B) made by the USA PATRIOT ACT.
- h. You are in a unique position to learn about potential terrorist activities and individuals who may be involved in such activities. Accordingly, consular officers should bring information on possible terrorists who are not current visa applicants to the attention of the post's Visas Viper Committee for possible reporting to the Department, utilizing the "VISAS VIPER" procedure (see 9 FAM 40.37); and
- i. Nonimmigrant visa classification has been created for aliens, including aliens found inadmissible under INA 212(a)(3)(B), who possess critical information relating to terrorist and criminal activities. See 9 FAM 41.83. The Secretary of State must report all visa denials under INA 212(a)(3)(B) to the appropriate committees of Congress, along with a brief description of the factual basis for the denial. (See 9 FAM 40.32 N1.3 Grounds of Ineligibility Under INA 212(a)(3)(B)).

9 FAM 40.32 N1.3 Grounds of Ineligibility Under INA 212(a)(3)(B)

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With the enactment of the USA PATRIOT ACT, the terrorism-related grounds for inadmissibility are now extremely broad. Pay close attention to the language in INA 212(a)(3)(B)(i) as well as to the definitions of "terrorist activity" and "engage in terrorist activity" (see INA 212(a)(3)(B)(iii) and (iv)), and 9 FAM 40.32 N2). In general, an alien is inadmissible under INA 212(a)(3)(B) if the alien:

- (1) Has engaged in a terrorist activity;
- (2) Is known by a consular officer or the Secretary of Homeland

Security to be engaged in or likely to engage after entry in a terrorist activity, or the consular officer or the Secretary of Homeland Security has reason to believe this is the case;

- (3) Has incited terrorist activity, under circumstances indicating an intention to cause death or serious bodily harm (see 9 FAM 40.32 N6);
- (4) Is a representative of:
 - (a) A foreign terrorist organization designated by the Secretary under INA 219 (FTO) (see 9 FAM 40.32 N5),
 - (b) A political, social or other similar group whose public endorsement of acts of terrorist activity the Secretary of State has determined undermines United States efforts to reduce or eliminate terrorist activities (see 9 FAM 40.32 N5) (note that this determination cannot be made by a consular officer);
- (5) Is a member of a foreign terrorist organization designated by the Secretary of State under INA 219 (FTO), or which the alien knows or should have known is a terrorist organization (see 9 FAM 40.32 N5).

Note: The PATRIOT ACT inserted "or" before the phrase "which the alien knows or should have known is a terrorist organization" in INA 212(a)(3)(B)(i)(V). Although some commentators and publishers of the INA have treated this as a scrivener's error and have moved the "or" to the end of the subparagraph, the Department has not adopted the scrivener's error interpretation. (It has interpreted the insertion of "or" into the provision as expanding the scope of this subparagraph;

- (6) Has used the alien's position of prominence within any country to endorse or espouse terrorist activity, or to persuade others to support terrorist activity or a terrorist organization in a way that the Secretary of State has determined undermines United States efforts to reduce or eliminate terrorist activities. (See 9 FAM 40.32 N6.)

Note: A consular officer cannot make this determination;

- (7) Is the spouse or child of an alien who is inadmissible under INA 212(a)(3)(B) if the activity causing the alien to be found inadmissible occurred within the last five years, unless:
 - (a) The spouse or child did not know or should not reasonably have known of the activity causing the alien to be found

inadmissible under INA 212(a)(3)(B) (see 9 FAM 40.32 N9),
or

- (b) The consular officer or Secretary of Homeland Security has reasonable grounds to believe the spouse or child has renounced the activity causing the alien to be found inadmissible under this section (see 9 FAM 40.32 N 9).
- (8) Is an officer, official, representative or spokesperson of the Palestine Liberation Organization (PLO). (See 9 FAM 40.32 N7.)

9 FAM 40.32 N2 DEFINITIONS

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Specific definitions of "terrorist activity" and "engage in terrorist activity" as used in INA 212(a)(3)(B)(i) are set forth in INA 212(a)(3)(B)(iii) and (iv). The scope of these definitions is quite broad; actions falling within the definitions are summarized below.

9 FAM 40.32 N2.1 "Terrorist Activity"

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"Terrorist activity" means any of the following acts, if illegal where *it is* committed, or which would be unlawful if committed in the United States under the laws of the United States or any State:

- (1) The hijacking or sabotage of any conveyance (regardless of type);
- (2) The seizing or detaining, and the threat to kill, injure, or continue to detain any person in order to compel a third party to act or to refrain from acting as a condition for releasing the detained individual;
- (3) A violent attack upon an internationally protected person (as defined in 18 U.S.C. 1116(b)(4)) or upon his or her liberty;
- (4) An assassination;
- (5) The use of any biological or chemical agent, nuclear weapon or device, or explosive or firearm or other weapon or dangerous device (other than for mere personal monetary gain) with intent to endanger, directly or indirectly, the safety of another individual or individuals or to cause substantial property damage; or

- (6) A threat, attempt, or conspiracy to do any of the above actions.

Note: "Assassination" is not a defined term in the statute. If post encounters a situation that it believes might be an assassination, it must submit the case to Washington for review, noting in particular the relevant facts that lead the officer to believe that the case is different from an ordinary crime of murder.

9 FAM 40.32 N2.2 "Engage in Terrorist Activity"

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- a. The term "engage in terrorist activity" means, as an individual or as a member of a group, too:
 - (1) Commit or incite to commit, in such a way as to indicate an intention to cause death or serious bodily injury, a terrorist activity;
 - (2) Prepare or plan a terrorist activity;
 - (3) Gather information on potential targets for terrorist activity;
 - (4) Solicit funds or other things of value for a terrorist activity or solicit any individual to engage in terrorist;
 - (5) Solicit funds or other things of value for a designated terrorist organization (FTO or TEL), or solicit any individual for membership in a designated terrorist organization;
 - (6) Solicit funds or other things of value for, or solicit any individual for membership in, an undesignated terrorist organization as defined in INA 212(a)(3)(B)(vi)(III) (a group of two or more individuals, whether organized or not, which engages in certain terrorist activities), unless the alien can show that the alien did not know, and should not reasonably have known, that the solicitation would further the organization's terrorist activity;
 - (7) Commit an act that the actor knows, or reasonably should know, affords material support for the commission of a terrorist activity;
 - (8) Commit an act that the actor knows, or reasonably should know, affords material support to any individual who the actor knows, or reasonably should know, has committed or plans to commit a terrorist activity;
 - (9) Commit an act that the actor knows, or reasonably should know,

affords material support to a designated terrorist organization (FTO or TEL); or

- (10) Commit an act that the actor knows, or reasonably should know, affords material support to an undesignated terrorist organization as defined in INA 212(a)(3)(B)(vi)(III) (group of two or more individuals, whether organized or not, which engages in certain terrorist activities) unless the alien can show that the alien did not know, and should not reasonably have known, that the act would further the organization's terrorist activity.

b. **NOTE:** "Material support" includes, but is not limited to providing:

- (1) A safe house
- (2) Transportation
- (3) Communications
- (4) Funds
- (5) Transfer of funds or
- (6) Other material financial benefit
- (7) False documentation
- (8) Identification; or
- (9) Weapons including:

- (a) Chemical
- (b) Biological, or
- (c) Radiological weapons, explosives or training

c. With regard to paragraph (9) above, an alien is covered if the alien afforded material support to an organization that was a designated terrorist organization (FTO or TEL) at the time. The requirement that an alien knew or should have known that he was supporting terrorist activity was dropped by the USA PATRIOT Act because of recognition that money is fungible. Thus, providing support (monetary or otherwise) to a terrorist-linked organization for charitable or other non-terrorist purposes can free up the organization's other resources for use in terrorist activities.

d. If an alien afforded material support to an undesignated "terrorist organization" (as defined in INA 212(a)(3)(B)(vi)(III)), the alien is covered unless the alien demonstrates that the alien did not know, and should not reasonably have known at the time the material support was provided, that the act would further the organization's terrorist activity. In short, the terrorist exclusion now broadly reaches financial contributions to terrorist organizations regardless of their purpose and regardless of when they were made; contributions to designated terrorist

organizations are treated more severely than contributions to organizations that were not designated at the time the contribution was made.

Exception: The Secretary of State, after consultation with the Secretary of Homeland Security, or the Secretary of Homeland Security, after consultation with the Secretary of State, may decide in a particular case not to apply the material support provisions to material support afforded to an organization or individual that has committed terrorist activity, prior to October 26, 2001 (the date the USA PATRIOT ACT went into effect). This determination is at the sole discretion of either the Secretary or the Secretary of Homeland Security and may not be reviewed.

9 FAM 40.32 N2.3 "Terrorist Organization"

(CT:VISA-734; 05-03-2005)

For the purposes of determining whether an alien has used the alien's position of prominence within any country to persuade others to support a terrorist organization (INA 212(a)(3)(B)(i)(VI)), and defining "engage in terrorist activities" (INA 212(a)(3)(B)(iv)), "terrorist organization" means any of the following three kinds of entities:

- (1) An organization designated by the Secretary of State as a "foreign terrorist organization" (FTO) under INA 219 (organizations currently designated as FTOs and information concerning the criteria for designation and the designation process can be found on the *Coordinator for Counterterrorism's* (S/CT) website. A designation under INA 219 has implications under U.S. criminal law and under federal asset-blocking laws and regulations, as well as under the INA. Aliens who engage in certain activities in connection with these organizations can be rendered inadmissible under the INA.
- (2) An organization designated by the Secretary of State based upon a finding that the organization engages in the first three categories of activities described in INA 212(a)(3)(B)(iv) (see 9 FAM 40.32 N2.2), or provides material support to further terrorist activities. (The list of organizations so designated is known as the Terrorist Exclusion List (TEL) and can be found, along with information regarding the designation process, on the *Coordinator for Counterterrorism's* (S/CT) website. Unlike an FTO designation, a TEL designation only has immigration implications; it does not trigger criminal penalties or asset blocking, but aliens who engage in certain activities in connection with the organization may be rendered inadmissible under the INA.

- (3) An organization that has not been designated but is a group of two or more individuals, whether organized or not, that engages in the activities described in the first three categories of activities described in INA 212(a)(3)(B)(iv). Post should submit detailed information on the group's organization and activities to the Department in its request for an SAO if post believes an alien may be inadmissible due to the alien's relationship with such a group.

Note: Additional information on terrorist organizations is available at the [United Nations Committee 1267](#) website maintained by the United Nations.

Note: In cases where consular officers must determine whether an alien knows or should have known that an organization is a terrorist organization, officers must consider several factors. First, facts particular to the individual, such as his or her residence, profession, or education, may permit a conclusion that the applicant knows, or should have known, that the organization is a terrorist organization. Secondly, officers must consider whether information about an organization is so widely known in the area that most persons know that the organization is engaged in terrorist activities. Other factors may also be relevant. With regard to designated organizations (FTO or TEL), knowledge can be inferred from the fact that the names of FTOs and the TEL organizations have been published in the Federal Register, that designations are publicized widely, and that the names and aliases of designated organizations are available to applicants at post. All posts MUST place prominently on bulletin boards in waiting areas the list of FTOs and TEL organizations. Finally, officers must consider whether information about an organization is so widely known in the area that most persons know that the organization is engaged in terrorist activities. Other factors may also be relevant.

9 FAM 40.32 N3 Security Advisory Opinion Mandatory

(CT:VISA-734; 05-03-2005)

- a. The Department's security advisory opinion, requested by means of a "VISAS DONKEY" request, is required for any visa application involving possible ineligibility under INA 212(a)(3)(B) to ensure consistency and uniformity of interpretation and to allow input from other interested U.S. Government agencies. (For procedural guidance, [see 9 FAM Appendix G, 500 Security Advisory Opinions.](#))
- b. You must submit a SAO Donkey request if any doubts exist regarding an applicant's eligibility on security grounds.

- c. Sources of evidence indicating that an applicant may be ineligible under INA 212(a)(3)(B) include the completed visa application, the applicant's statements, the results of name checks and advisory opinion requests (when required), checks of CLASS and post files, and any available outside information.
- d. If you believe an applicant who previously was found ineligible is now eligible, a security advisory opinion must be submitted explaining why the ineligibility should no longer apply (e.g., the applicant is no longer a member of a terrorist organization).
- e. You must also submit a SAO request if you wish to recommend a waiver. (See 9 FAM 40.32 N9.)

9 FAM 40.32 N4 PREPARING OR PLANNING TERRORIST ACTIVITY RENDERS ALIEN INELIGIBLE; ROLE OF LEADERS

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- a. As indicated in 9 FAM 40.32 N2.2, the preparation or planning of a terrorist activity constitutes "engaging in terrorist activity," pursuant to INA 212(a)(3)(B)(iv)(II). We presume that an applicant who holds a leadership position in an organization that has engaged in a terrorist activity is excludable by virtue of his or her ability to exercise command or control over the activities of the organization, even without direct evidence of the applicant's active involvement in the planning or preparation of a specific terrorist act. An individual who participates in determining the policy and goals of an organization is generally responsible for any terrorist activities that members undertake in order to implement those policies or to achieve those goals. Of course such applicants may also be ineligible on other grounds, such as being representatives or members of terrorist organizations. (See 9 FAM 40.32 N5.)
- b. When submitting such cases for the Department's mandatory security advisory opinion, you should devote particular attention to reporting the level and nature of the applicant's position within the hierarchy of the organization. If you believe that the alien has rebutted the usual presumption and did not exercise control in the organization, despite his or her leadership position, include in your SAO request, any available information on the applicant's inability to exercise control over the organization or relevant subsidiary entities, and information on why the applicant did not know, or was not in a position to have known, about the

organization's terrorist activity.

9 FAM 40.32 N5 MEMBERSHIP IN, OR SERVING AS A REPRESENTATIVE OF CERTAIN TERRORIST ORGANIZATIONS IS A GROUND FOR INADMISSIBILITY

9 FAM 40.32 N5.1 Membership in Certain Terrorist Organizations

(CT:VISA-734; 05-03-2005)

- a. An alien who is currently a member of an organization designated by the Secretary of State as a foreign terrorist organization (FTO) under INA 219 is inadmissible.
- b. An alien is also inadmissible if the alien is currently a member of a foreign terrorist organization, i.e., an organization that has not been designated under INA 219 but nevertheless is foreign and meets the definition of "terrorist organization" in section 212(a)(3)(B)(vi), provided the alien knows or should have known that the organization to which the alien is member is a terrorist organization. This could include a terrorist organization on the TEL list, or any other foreign organization that engages in terrorist activities.

Note: The PATRIOT ACT inserted "or" before the phrase "which the alien knows or should have known is a terrorist organization" in INA section 212(a)(3)(B)(i)(V). Although some commentators and publishers of the INA have treated this as a scrivener's error and have moved the "or" to the end of the subparagraph, the Department has not adopted the scrivener's error interpretation. It has interpreted the insertion of "or" into the provision as expanding the scope of this subparagraph.

Note: Once you have determined that an alien is a member of an FTO (an organization designated as a foreign terrorist organization under INA 219), the alien is inadmissible. You need not consider whether the alien "knows or should have known" that the organization is a terrorist organization.

- c. Although knowledge is an element for inadmissibility based on membership in TEL organizations, you generally may infer knowledge if an applicant is a member of a TEL organization that is foreign because the list of TEL organizations is published.

- d. INA 212(a)(3)(B)(vi)(III) also permits you, in consultation with the Department, to determine that some undesignated organizations may be terrorist organizations. Such organizations are terrorist organizations if they have:
- Committed or incited to commit, under circumstances indicating an intention to cause death or serious bodily injury, a terrorist activity;
 - Prepared or planned a terrorist activity; or
 - Gathered information on potential targets for terrorist activity.
- e. When you believe an alien is a member of such an organization, you must submit detailed information on the group's activities in your request for an SAO. Because an alien who is a member of such an organization is inadmissible only if he or she knew, or should have known, that the entity is a terrorist organization, you must address whether the alien knew, or should have known, about the organization's activities.

9 FAM 40.32 N5.2 Representatives of Certain Terrorist Organizations

(CT:VISA-734; 05-03-2005)

- a. An alien who is a representative of:
- (1) a foreign terrorist organization that the Secretary of State has designated under INA 219; or
 - (2) a political, social, or similar group whose public endorsement of acts of terrorist activity the Secretary of State has determined undermines United States efforts to reduce or eliminate terrorist activities, is ineligible for a visa under INA 212(a)(3)(B)(i)(IV), even if the alien has not been directly involved in any terrorist acts.

Note a consular officer cannot make the determination of whether the alien's endorsement undermines U.S. efforts.

- b. An alien who is an officer, official, representative, or spokesperson of the Palestine Liberation Organization (PLO) is considered to be "engaged in a terrorist activity" and is ineligible. (See 9 FAM 40.32 N5.3.)

9 FAM 40.32 N5.3 Representative Defined

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A "representative" is defined in INA 212(a)(3)(B)(v) as "an officer, official, or spokesman of an organization, and any person who directs, counsels, commands, or induces an organization or its members to engage in terrorist activity."

9 FAM 40.32 N5.4 Member Defined

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- a. INA 212(a)(3)(B) does not define membership. In some cases, membership will be clear because of information that the individual took an oath or performed some act that is a prerequisite of membership. We do not consider that a formal induction is necessary to a finding of membership, however. We instead believe that membership should be determined in light of all relevant facts, including, but not limited to, the following:
- (1) Acknowledgment of membership;
 - (2) Frequent association with other members;
 - (3) Participation in the organization's activities, even if lawful;
 - (4) Actively working to further the organization's aims and methods in a way suggesting close affiliation constituting membership;
 - (5) Occupying a position of trust in the organization, past or present;
 - (6) Receiving financial support from the organization, e.g., scholarships, pensions, salary;
 - (7) Contributing money to the organization (note that although a single contribution may not establish membership, post should provide the Department with all available information on contributions to terrorist organizations);
 - (8) Determination of membership by a competent court;
 - (9) Voluntarily displaying symbols of the organization; or
 - (10) Receiving honors and awards given by the organization.
- b. These factors will have to be considered in their entirety, and may or may not be sufficient in isolation to support a finding of membership. For example, while contributing money to an organization does not in itself necessarily indicate membership, it may indicate membership in certain situations.

- c. The law is written in the present tense, requiring that a person be a member of a terrorist organization at the time of application to be inadmissible. Since only current, not past, membership is a basis for exclusion; these factors will also have to be assessed to determine whether they reasonably indicate that membership is current. Generally, if you can conclude that the alien was a member in the past, current membership can be inferred unless the visa applicant can establish that he or she is no longer a member. Terrorist organizations vary in their practices; some allow members to leave the organization, others do not. The organization's practices will, in part, determine if membership, once established, has been terminated. Termination of membership will usually be shown by changes in the person's attitudes, actions, associations, and activities over time. A single event, such as a self-serving resignation, would not usually establish that an applicant's membership has ended. We may, in some cases, be able to develop information about membership practices of a particular group. You should also use your knowledge and that of other sections at post to address the issue of whether or not it is likely that the alien is no longer a member of a terrorist organization. Include this information in the SAO request.

9 FAM 40.32 N6 ADVOCACY OF TERRORISM NOT ALWAYS EXCLUSIONARY

9 FAM 4.32 N6.1 Advocacy of Terrorism May Render An Alien Inadmissible Under Two Scenarios:

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- a. Incitement With Intent to Cause Bodily Harm--An alien is inadmissible under INA 212(a)(3)(B)(i)(III) if he or she has, under circumstances indicating an intention to cause death or serious bodily harm, incited terrorist activity. "To incite" is variously defined as to urge to action; to provoke and urge on; or to arouse; it connotes speech that is not merely an expression of views but that directs or induces action, typically in a volatile situation. "Incitement" in the context of INA 212(a)(3)(B) is speech that induces or otherwise moves another person to undertake a terrorist activity. Normally speech will not rise to the level of "inciting" unless there is a clear link between the speech and an actual effort to undertake the terrorist activity. The applicant may have incited terrorist activity, however, even if a terrorist attack does not actually occur (e.g.,

because an attempt to commit such activity is thwarted).

- b. An applicant who has “incited” terrorist activity must also have acted in circumstances indicating an intention to cause death or serious bodily harm to be inadmissible under INA 212(a)(3)(B). In other words, the alien’s speech must not only have induced others to undertake terrorist activity, but it must also have been made with the specific intent that such activity would result in death or serious bodily injury. Therefore, in a case under INA 212(a)(3)(B) where the only basis for ineligibility is incitement of terrorist activity, you will need to carefully consider the relevant circumstances in determining whether there is reasonable ground to believe that the applicant incited terrorist activity, and, if so, whether he or she did so with the requisite intent to cause death or serious bodily harm.

9 FAM 4.32 N6.2 Examples of Incitement with Intent to Cause Bodily Harm

(CT:VISA-734; 05-03-2005)

Incitement and the requisite intent could be inferred in the following situations:

- (1) Widespread opposition to Country A's policies and actions lead to a series of protests, some violent, outside Country A's embassy in Country B.

The applicant goes to the embassy, stands on a box, and shouts to the crowd to join him in standing up to Country A and humiliating it. Shortly afterwards, when he sees an embassy vehicle approaching, he yells: “Don’t let them in! Make them pay for what they have done!” The crowd blocks the car; and removes occupants (including a diplomat working at Country A’s embassy), from the car, beating them severely, and taking them hostage.

Analysis: Diplomatic hostage-taking and violent attacks on diplomats are terrorist activities. Given the alien’s urging the crowd to stop the embassy vehicle and “make them pay,” a consular officer would have reasonable ground to believe that the applicant’s speech incited terrorist activity. The alien’s “make them pay” statement, when viewed against the backdrop of previous violent protests and his general comments about standing up to Country A and humiliating it, would provide the consular officer with reasonable ground to believe that the applicant intended to cause

death or serious bodily harm.

- (2) The applicant, a professor, is a strong nationalist whose lectures regularly blame "foreigners" for his country's problems and argues that the only solution to these problems is that "foreigners" should be driven out of the country. During the school year, the press reports that some of the students at the school have been purchasing weapons and seeking to obtain and manufacture explosives. Police notify the faculty that they are investigating several students for weapons-related offenses. At the end of a week of particularly strong anti-foreign sentiment, the applicant gives a special lecture entitled "A Call to Action." With the knowledge that the students under investigation are in the audience, the applicant begins his lecture with: "The time has come for action!" He then reiterates throughout his lecture that: "The only solution to the country's problems is to purge our great land of these foreigners once and for all through whatever means necessary." Shortly thereafter, some of his students detonated a truck bomb outside a restaurant frequented by foreign nationals, killing several foreign nationals and injuring many restaurant employees.

Analysis: The use of any explosive with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property is a terrorist activity. In the example, the applicant helps foster anti-foreign sentiments and then, during a particularly tense period, urges students to act to drive "foreigners" from the country "through whatever means necessary." Under these circumstances, you would have reasonable ground to believe that the applicant's speech incited terrorist activity. The fact that the applicant knew that several students likely had access to weapons and/or explosives and that those students were in attendance at his special lecture would provide you with reasonable ground to believe that the applicant intended to cause death or serious bodily harm.

Note: The Patriot Act amended INA 212(a)(3)(B)'s definition of engaging in terrorist activity to also include incitement (see INA 212(a)(3)(B)(iv)(I)). As a result, a person who is inadmissible under INA 212(a)(3)(B)(i)(III) for inciting terrorist activity will also now be inadmissible under INA 212(a)(3)(B)(i)(I), for committing a terrorist activity.

- (3) **Public Endorsement** - An alien may be excludable if the alien uses the alien's position of prominence with any country to endorse or espouse terrorist activity, or to persuade others to support terrorist activity or a terrorist organization, in a way that the

Secretary of State has determined undermines United States efforts to reduce or eliminate terrorist activities. This provision does not require a finding of specific intent (as is the case in the incitement provisions discussed in paragraph (1) above); rather it is directed at irresponsible expressions of opinion by prominent aliens who are able to influence the actions of others. An example might be a community leader who publicly praised Al Qaida in the wake of a terrorist attack for which it claimed responsibility, and who urged the community not to cooperate with efforts by law enforcement officials to bring those responsible to justice. You may not find an alien inadmissible under this provision without the necessary determination by the Secretary of State. Accordingly, if you believe that an alien in a position of prominence may be inadmissible under this provision, report all of the relevant facts to us and request a determination of whether the alien's activities undermine U.S. efforts to reduce or eliminate terrorist activities. Referral to the Department in such cases ensures that relevant foreign policy and national security concerns are considered.

9 FAM 40.32 N7 THE PALESTINE LIBERATION ORGANIZATION (PLO)

(CT:VISA-734; 05-03-2005)

Any alien who is an officer, official, representative, or spokesperson of the PLO is considered to be engaged in terrorist activity and therefore inadmissible under INA 212(a)(3)(b)(i). INA 212(a)(3)(B)(i) applies only to those individuals who are currently PLO officers, officials, representatives, or spokespersons. Applicants who no longer occupy such positions, and persons who are merely current or former members or employees, but are not officers, officials, representatives, or spokespersons, are not ineligible under this section. You should be alert to the possibility, however, that such applicants may be ineligible under INA 212(a)(3)(B) for other reasons, such as having participated in preparing, planning, or conducting terrorist activities.

9 FAM 40.32 N7.1 Security Advisory Opinions for PLO Officials

(CT:VISA-734; 05-03-2005)

- a. As with all cases of possible ineligibility under INA 212(a)(3)(B), you must submit a security advisory opinion request for any applicant whom you believe may be an officer, official, representative, or spokesperson of the PLO. Such SAO requests should be directed to CA/VO/L/C and NEA, and should include "KPAL" and "PLO" on the TAGS line of the cable. (For further procedural guidance, *(see 9 FAM Appendix G, 500 Security Advisory Opinions)*. You may occasionally be uncertain as to whether an applicant's duties within a PLO member organization (see 9 FAM 40.32 N7.2-2) qualify him or her as an officer, official, representative, or spokesperson. In such cases, submit in your SAO request as much relevant information as possible regarding the nature of the position, including a discussion of the applicant's level of responsibility within the organization, and the applicant's duties.
- b. You must submit for security advisory opinions, the cases of applicants previously found ineligible under former INA 212(a)(28)(F) for PLO-related affiliation and/or activities. We have found that while some applicants were denied visas solely because of PLO membership (no longer a ground of ineligibility), others were involved in activities that continue to render them ineligible.

9 FAM 40.32 N7.2 Composition of The Palestine Liberation Organization (PLO)

9 FAM 40.32 N7.2-1 Administrative Structure of the PLO

(CT:VISA-734; 05-03-2005)

The PLO is an umbrella organization composed of several groups with diverse ideologies that have, as their common goal, the achievement of a Palestinian state. The PLO's policy is set by its parliament, the Palestine National Council (PNC), which is made up of representatives from the PLO constituent groups as well as of independent members. The principal decision-making body is the 15 member Executive Committee that meets regularly and functions much like a cabinet.

9 FAM 40.32 N7.2-2 PLO Member Organizations

(CT:VISA-734; 05-03-2005)

- a. The list that follows includes the groups that are currently considered to belong to the PLO because of their participation in the PNC (*see 9 FAM 40.32 N7.2-1*) and their general adherence to its policy dictums. It is provided solely to assist consular officers in adjudicating visa eligibility under INA 212(a)(3)(B)(i). This list is subject to change and is, therefore, not necessarily comprehensive. Consular officers should therefore resolve any doubts regarding an organization's PLO affiliation by submitting the case to CA/VO/L/C for a security advisory opinion.
- b. PLO Member Organizations:
 - (1) Fatah;
 - (2) Western Sector; and,
 - (3) Force 17;
 - (4) Popular Front for the Liberation of Palestine (PFLP);
 - (5) Democratic Front for the Liberation of Palestine (DFLP);
 - (6) Hawatmah Faction; and,
 - (7) Abd Rabbu Faction;
 - (8) Palestine Liberation Front (PLF);
 - (9) Abu Abbas Faction; and,
 - (10) Tal'at Yaqub Faction;
 - (11) Arab Liberation Front (ALF); and
 - (12) Palestinian People's Party Popular Struggle Front.

9 FAM 40.32 N7.2-3 Officials of the Palestinian Authority

(CT:VISA-734; 05-03-2005)

Being an official of the Palestinian Interim Self-Governing Authority does not, in itself, make an applicant ineligible under INA 212(a)(3)(B)(i). The PLO and the Palestinian Authority are considered to be distinct entities for visa purposes. An alien who is an officer, official, representative, or

spokesperson for the PLO continues to be ineligible under INA 212(a)(3)(B). Representatives or members of the constituent groups of the PLO that are designated by the Secretary of State as foreign terrorist organizations (FTOs) under INA 219 are ineligible for visas under INA 212(a)(3)(B)(i)(IV) or (V), and those who are members of TEL organizations may be ineligible as well under INA 212(a)(3)(B)(i)(V). You must resolve any doubts about ineligibilities under this section by submitting a request for a security advisory opinion to CA/VO/L/C.

9 FAM 40.32 N8 SPOUSES AND CHILDREN OF AN INADMISSIBLE ALIEN

(CT:VISA-734; 05-03-2005)

- a. Spouses and children of aliens found inadmissible under INA 212(a)(3)(B) are also inadmissible if the activity causing the alien to be inadmissible occurred within the last five years. There are exceptions to this inadmissibility, however.
- b. Submit for a security advisory opinion, all cases of potential inadmissibility.
- c. This ground of inadmissibility does not apply to a spouse or child who did not know or should not reasonably have known of the alien's activity causing the alien to be found ineligible. It also does not apply if you or the Secretary of Homeland Security finds that there are reasonable grounds to believe the spouse or child has renounced the activity causing the alien to be found ineligible.
- d. You must question such spouses and children to ascertain facts relevant to these issues. For example, ask whether a spouse or child separated from the principal alien because of the activity or has lived separately and independently from the principal alien for the period to time during which the principal alien engaged in the activities that render the principal inadmissible. Whether the spouse or child reported the principal alien's activities to law enforcement or other anti-terrorism authorities and cooperated in efforts to capture or thwart the principal alien would also be highly relevant.

9 FAM 40.32 N9 INA 212(D)(3)(A) WAIVERS MUST BE REQUESTED BY THE DEPARTMENT

(CT:VISA-734; 05-03-2005)

While inadmissibility under INA 212(a)(3)(B) may be waived pursuant to INA 212(d)(3)(A) for nonimmigrant applicants, there is no waiver for immigrant visa applicants. You may request that a finding of INA 212(a)(3)(B) inadmissibility be waived in a particular case. Such requests must be submitted to the Department. We will forward the request with a recommendation to Department of Homeland Security (DHS) Washington that the waiver be granted if we conclude that a waiver would be appropriate. Your assessment of whether a waiver is appropriate is carefully considered and should be provided in all cases. You may not request waivers from DHS attaches at post.

Note: We may request a waiver from DHS on our own initiative if we believe a waiver is appropriate under the circumstances in a particular case. We will advise you whenever a waiver has been approved, and you must annotate the visa in accordance with 9 FAM 41.111 Notes.

9 FAM 40.32 N10 REPORTS TO CONGRESS

(CT:VISA-734; 05-03-2005)

Section 128 of Public Law 102-138 of October 28, 1991, added to the law a permanent requirement that the Secretary of State report, on a timely basis, to the Judiciary Committees of the House and Senate, the House Foreign Affairs Committee, and the Senate Foreign Relations Committee every denial of a visa "on grounds of terrorist activity". Because we submit reports on a quarterly basis, we have interpreted the term "on a timely basis" to mean within three months following visa denial under INA 212(a)(3)(B).