



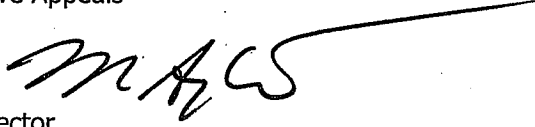
U.S. Citizenship
and Immigration
Services

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Memorandum

TO: Associate Directors
Chief Administrative Appeals
Chief Counsel

FROM: Michael L. Aytes 
Acting Deputy Director

SUBJECT: 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

On December 26, 2007, the President signed the Consolidated Appropriations Act, 2008, Pub. L. 110-161, 121 Stat. 1844 (CAA). In section 691 of Division J (Department of State, Foreign Operations, and Related Programs Appropriations Act) of the CAA, Congress amended the discretionary authority of the Secretary of Homeland Security and the Secretary of State, under section 212(d)(3)(B)(i) of the Immigration and Nationality Act (INA), to exempt the effect of an alien's terrorist activities on his or her inadmissibility to, or removability from, the United States. Additionally, section 691 named certain groups (all of which the Secretaries had previously determined qualified for an exemption under 212(d)(3)(B)) that were not to be considered terrorist organizations under the INA based on terrorist activities conducted prior to enactment of the CAA. It also stated that the Taliban would be considered a Tier I terrorist organization under INA section 212(a)(3)(B)(vi)(I).¹ A copy of the relevant legislation is included as an attachment to this memorandum.

This memorandum explains relevant changes in the law and provides implementation guidance for adjudicating those applications for immigration benefits filed with U.S. Citizenship and Immigration Services (USCIS) that are impacted by this legislation. It also announces exercises of discretionary authority by Secretaries Chertoff and Rice under INA section 212(d)(3)(B)(i), as amended, on June 3, 2008. The memorandum also provides instructions for consideration of these exemptions. A copy of this memorandum should be distributed to all appropriate staff.

¹ INA section 212(a)(3)(B)(vi) has three categories or "tiers" of terrorist organizations, two of which are designated by the Secretary of State and the third of which is undesignated:

"Tier I" – Foreign Terrorist Organizations includes organizations designated by the Secretary of State under INA section 219 (INA section 212(a)(3)(B)(vi)(I)) and, under CAA section 691(d), the Taliban;

"Tier II" – Includes organizations otherwise designated by the Secretary of State as a terrorist organization, after finding that the organization "engages in terrorist activities" under INA section 212(a)(3)(B)(iv)(I)-(VI). (INA section 212(a)(3)(B)(vi)(II)); and

"Tier III" – Undesignated Terrorist Organizations includes a group of two or more individuals, whether organized or not, which engages in, or has a subgroup which "engages in terrorist activities" under INA section 212(a)(3)(B)(iv)(I)-(VI) (INA section 212(a)(3)(B)(vi)(III)).

I. Section 691 of Division J of the CAA

A. Amended discretionary exemption authority under INA section 212(d)(3)(B)(i)

Prior to passage of the CAA, pursuant to INA section 212(d)(3)(B)(i), the Secretary of Homeland Security or the Secretary of State, in consultation with each other and with the Attorney General, could "conclude in such Secretary's sole unreviewable discretion that subsection 212(a)(3)(B)(iv)(VI) shall not apply with respect to material support an alien has afforded to an organization or individual that has engaged in terrorist activity." Section 691(a) of the CAA expands the authority granted under INA section 212(d)(3)(B)(i), allowing the Secretaries of Homeland Security and State, in consultation with each other and the Attorney General, to make a determination to not apply almost all of the terrorism-related provisions under INA section 212(a)(3)(B). The new legislation retains the requirement that once removal proceedings have commenced, only the Secretary of Homeland Security has the authority to apply the exemption.

Under this amended authority, however, the Secretary is precluded from exercising his discretion with regard to the following:

- aliens for whom there are reasonable grounds to believe are engaged in (present activities) or likely to engage in (future activities) terrorist activity (INA section 212(a)(3)(B)(i)(II));
- members of Tier I and Tier II terrorist organizations (designated by the State Department) (INA section 212(a)(3)(B)(i)(V));
- representatives of Tier I and Tier II terrorist organizations (designated by the State Department) (INA section 212(a)(3)(B)(i)(IV)(aa));
- aliens who *voluntarily and knowingly* engaged in terrorist activity on behalf of a Tier I or Tier II organization (INA section 212(a)(3)(B)(i)(I), as defined by INA section 212(a)(3)(B)(iv));
- aliens who *voluntarily and knowingly* endorsed or espoused terrorist activity or persuaded others to do so on behalf of a Tier I or Tier II organization (INA section 212(a)(3)(B)(i)(VII)); and
- aliens who *voluntarily and knowingly* received military-type training from a Tier I or Tier II terrorist organization (INA section 212(a)(3)(B)(i)(VIII)).

These limitations on the Secretary's exemption authority, except for the provision concerning the reasonable grounds to believe an alien is engaged in or likely to engage in terrorist activity, only apply to activities relating to Tier I and Tier II terrorist organizations. The ground of inadmissibility for "is engaging in or is likely to engage in" terrorist activities cannot be exempted regardless of the group involved.

DHS has concluded that the new legislation's prohibition on the exercise of the Secretary's discretion for activities that are undertaken "voluntarily and knowingly" does not preclude the Secretary's previous exercises of authority with regard to material support under duress to a Tier I or Tier II organization. It should be noted that the interpretation of the terms such as "duress," "voluntarily," and "knowingly" are subject to the Secretary's discretion and limited to the unique context of INA section 212(d)(3)(B)(i) of the Act and are not intended to be applied in other contexts.

The new legislation also amends the authority of the Secretaries of Homeland Security and State to determine which organizations should not qualify as Tier III terrorist organizations. The prior version of section 212(d)(3)(B)(i) limited this authority to organizations that fell within the Tier III definition solely because of the activities of a subgroup. Now any Tier III group may be exempted from being defined as a Tier III terrorist organization, with two exceptions:

- groups that have engaged in terrorist activity against the United States or another democratic country; and
- groups that have purposefully engaged in a pattern or practice of terrorist activity that is directed at civilians.

To date, no group has been exempted from being found a Tier III terrorist organization pursuant to this authority under either the prior or current version of the statute.

B. Statutory listing of groups not to be considered terrorist organizations for acts or events occurring prior to December 26, 2007 (date of enactment of CAA)

Section 691(b) of the CAA lists 10 groups that shall not be regarded as terrorist organizations. The provision only applies to the organization's activities or events occurring prior to enactment of the CAA (December 26, 2007), so these organizations may become terrorist organizations again in the future if they engage in terrorist activities. These groups are essentially the same groups previously named by Secretary Chertoff in February and October 2007, in allowing the exemption to be used for material support provided to these organizations. Please note, however, that the new statute refers to appropriate groups "affiliated with the Montagnards," while the Secretary's October 2007 delegation referred specifically to the group FULRO ("Front Unifié de Lutte des Races Opprimées"). The groups listed in the statute are:

- Karen National Union/Karen Liberation Army (KNU/KNLA);
- Chin National Front/Chin National Army (CNF/CNA);
- Chin National League for Democracy (CNLD);
- Kayan New Land Party (KNLP);
- Arakan Liberation Party (ALP);
- Mustangs;
- Alzados;
- Karenni National Progressive Party;
- Appropriate groups affiliated with the Hmong; and
- Appropriate groups affiliated with the Montagnards.

As a result of this legislation, an alien who did any of the following prior to December 26, 2007, or at anytime on or after that date, as long as the organization at issue has not engaged in terrorist activities on or after December 26, 2007, is no longer inadmissible on account of the following terrorist-related grounds of inadmissibility:

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

C. Other changes

Section 691(c) of the CAA makes a technical amendment to correct the cross-reference anomaly in the spouse/child exception at INA section 212(a)(3)(B)(ii) to the spouse and child ground of inadmissibility. The exception now correctly references the ground of inadmissibility for spouses and children at section 212(a)(3)(B)(i)(IX). Section 691(d) designates the Taliban as a Tier I terrorist organization for immigration purposes. Section 691(e) imposes certain additional reporting requirements on DHS with regard to "duress" exemptions. Finally, section 691(f) makes all the amendments in the Act fully retroactive.

D. Exercise of Exemption Authority under Section 691(a) of the CAA

On June 2, 2008, Secretaries Chertoff and Rice, in consultation with each other and the Attorney General, exercised their revised authority under INA section 212(d)(3)(B)(i) not to apply exemptible section 212(a)(3)(B) terrorism-related inadmissibility provisions of the INA to individuals for activities or associations connected to each of the 10 groups listed in section 691(b) of the CAA. See section II(B), below for detailed information on these new exemption authorities.

II. Processing cases in which there is a terrorist-related activity connected to one of the ten groups listed in section 691(b) of the CAA

A. Not inadmissible as a matter of law

Given the automatic exemption provided in section 691(b) of the CAA, an alien is not inadmissible under any provision in which "terrorist organization" is an element for any activity occurring prior to December 26, 2007, where the organization in question is one of the 10 groups named in the CAA. As such activities are no longer a basis for inadmissibility, cases involving applicants who engaged in such an activity do not require any special processing (except as may be required by an operational component), expanded supervisory review or completion of the terrorist inadmissibility worksheet.

Aliens who commit any of these same activities on or after December 26, 2007, are not inadmissible under the relevant section of INA section 212(a)(3)(B) unless and until a finding is made that the relevant group meets the definition of a terrorist organization under INA section 212(a)(3)(B)(vi)(III) (Tier III terrorist organization) **for activities carried out by the group on or after December 26, 2007.** If the adjudicator finds information indicating that the relevant group has engaged in terrorist activity on or after December 26, 2007, such that the group meets the INA section 212(a)(3)(B)(vi)(III) (Tier III terrorist organization) definition, the adjudicator will place the case on hold and raise the Tier III determination issue to the USCIS Material Support Working Group (MSWG) via appropriate supervisory channels. The MSWG will communicate to USCIS operational components the determination as to whether or not the group will be considered to meet the Tier III definition.

1. aliens no longer inadmissible for certain activities

Aliens whose immigration applications would have been denied prior to passage of the CAA solely because the alien would be inadmissible for committing one of the following activities prior to December 26, 2007, may now be approved because the alien is no longer inadmissible for those actions as a matter of law:

- Solicited funds or other things of value on behalf of one of these named groups (formerly inadmissible under INA section 212(a)(3)(B)(iv)(IV)(cc));
- Solicited an individual for membership in one of these named groups (formerly inadmissible under INA section 212(a)(3)(B)(iv)(V)(cc));
- Committed an act that provided material support to one of these named groups (formerly inadmissible under INA section 212(a)(3)(B)(iv)(VI)(dd));²
- Was a representative of one of these named groups (formerly inadmissible under INA section 212(a)(3)(B)(i)(IV)(aa));
- Was a member of one of these named groups (formerly inadmissible under INA section 212(a)(3)(B)(i)(VI));
- Persuaded others to support one of these named groups (formerly inadmissible under INA section 212(a)(3)(B)(i)(VII)); or
- Received military-type training from one these named groups (formerly inadmissible under INA section 212(a)(3)(B)(i)(VIII)).

² Aliens previously found inadmissible under this provision for providing material support to one of the groups named in section 691 could be approved before, but only after being found to meet the requirements of one of the Secretary's group-based material support exemptions and the completion of a Material Support Exemption Worksheet.

Decisions issued prior to the enactment of the CAA denying or referring an application because the alien was inadmissible based on one or more terrorist inadmissibility ground(s) that are now inapplicable as a result of the passage of section 691(b) stand, unless reopened by the component with jurisdiction over the adjudication. USCIS adjudicators should favorably consider any reapplication or motion to reopen or reconsider an application previously denied or referred because of a terrorist inadmissibility ground that is now inapplicable, unless other reasons for denial or referral of the application remain applicable. USCIS adjudicators should also favorably consider any fee waiver request.

2. appropriate groups affiliated with Hmong and Montagnards

As stated above, section 691(b) of the CAA lists 10 groups that shall not be considered to be terrorist organizations on the basis of an act or event occurring prior to enactment of the CAA (December 26, 2007). Eight of the 10 groups listed in section 691(b) of the CAA are specifically named. "Appropriate groups affiliated with the Hmong and Montagnards" will be interpreted as referring to the groups identified in the previous material support exemptions signed by Secretary Chertoff and Secretary Rice in October 2007, without the date restrictions included in the exemption documents. These groups are:

- ethnic Hmong individuals or groups, provided there is no reason to believe that the relevant activities of the recipients were targeted against noncombatants; and
- the Front Unifié de Lutte des Races Opprimées (FULRO) (Montagnard group).

The date restrictions included in these exemptions signed by the Secretaries no longer apply because the statutory designation that these groups are not terrorist organizations under the INA applies to any actions taken by the named groups before the enactment of the statute (December 26, 2007).

B. Aliens whose inadmissibility for certain activities carried out on behalf of one of the ten named groups may be exempted as a matter of discretion

Even with the application of section 691(b) of the CAA, an alien may still be inadmissible because that section applies only to inadmissibility provisions in which "terrorist organization" is an element. For example, any alien who is found to have committed any of the following activities (even if on behalf of any of the 10 groups named in section 691(b)) continues to fall within the grounds of inadmissibility, regardless of when the activity took place:

- has engaged in any of the following (INA section 212(a)(3)(B)(i)(I)) –
 - committed or incited to commit, under circumstances indicating an intention to cause death or serious bodily injury, a terrorist activity (INA section 212(a)(3)(B)(iv)(I));
 - prepared or planned a terrorist activity (INA section 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 section 212(a)(3)(B)(iv)(IV)(aa));
 - solicited an individual to engage in conduct otherwise described in INA section 212(a)(3)(B)(iv)(other than those involving activity carried out on behalf of a "terrorist organization") (INA section 212(a)(3)(B)(iv)(V)(aa)); or
 - committed an act that the alien knows, or reasonably should have known, affords material support
 - for the commission of a terrorist activity (INA section 212(a)(3)(B)(iv)(VI)(aa));
 - to any individual who the alien knows, or reasonably should know, has committed or plans to commit a terrorist activity ("terrorist activity" is defined at INA section 212(a)(3)(B)(iii) (INA section 212(a)(3)(B)(iv)(VI)(bb)); or
- has, under circumstances indicating an intention to cause death or serious bodily harm, incited terrorist activity (INA section 212(a)(3)(B)(i)(III));

- is a representative of a political, social, or other group that endorses or espouses terrorist activity (INA section 212(a)(3)(B)(i)(IV)(bb)); or
- endorses or espouses terrorist activity or persuades others to endorse or espouse terrorist activity (INA section 212(a)(3)(B)(i)(VII)).

Although the alien is inadmissible for these activities, Secretaries Chertoff and Rice have exercised their discretionary authority to allow USCIS to grant exemptions from inadmissibility to otherwise eligible aliens who have engaged in such activities.³ If an alien is found to be subject to one of the above listed inadmissibility provisions for terrorist activity on behalf of or in association with one of the 10 groups listed in section 691(b) of the CAA, the alien may be eligible for exemption from the relevant terrorist activity inadmissibility. In order for the alien's application to be approved, the adjudicator must complete a Terrorist-Related Inadmissibility Exemption Worksheet (see section III below) and a supervisor must concur with the adjudicator's favorable decision.

Decisions issued prior to the effective date of the expanded discretionary authority (June 3, 2008) denying or referring an application because the alien was inadmissible and USCIS did not have the discretionary authority to exempt the alien from that inadmissibility, stand, unless reopened by the component with jurisdiction over the adjudication. USCIS adjudicators should favorably consider any reapplication or motion to reopen or reconsider an application previously denied or referred if USCIS now has the discretionary authority to exempt the alien from inadmissibility and no other reason[s] for denial or referral of the application remain applicable.

Before exempting an alien from inadmissibility under the expanded group-based exemption authority described above, adjudicators must determine that there is no reason to believe that the relevant terrorist activities of the alien were targeted against noncombatant persons, and that the alien:

- is otherwise eligible for the benefit or protection sought;
- has undergone and passed all relevant background and security checks;
- has fully disclosed to U.S. government representatives and agents, the nature and circumstances of each activity or association falling within the scope of INA section 212(a)(3)(B);
- poses no danger to the safety and security of the United States; and
- is warranted to be exempted from the relevant inadmissibility provision by the totality of the circumstances.⁴

A spouse or child is inadmissible under INA section 212(a)(3)(B)(i)(IX) if the related alien is inadmissible under INA section 212(a)(3)(B) for actions occurring within the last five years, unless the spouse or child qualifies for the exception provided under INA section 212(a)(3)(B)(ii). If the activity of the related alien is exempted, the spouse or child may also be exempted from inadmissibility.

With issuance of this memo, previous guidance that required two levels of supervisory review for the approval of a group-based exemption is rescinded.⁵ Such exemptions now only require one level of supervisory review, as documented on the Terrorist-Related Inadmissibility 212(a)(3)(B) Exemption Worksheet, in order to be approved. Each division responsible for implementing group-based exemptions will ensure both that supervisors are sufficiently trained to carry out their review in an appropriate manner, and that quality assurance review will be conducted to identify any training needs.

³ See *Exercise of Authority under Section 212(d)(3)(B)(i)*, June 3, 2008, attached.

⁴ See USCIS Memorandum, "Processing the Discretionary Exemption to the Inadmissibility Ground for Providing Material Support to Certain Terrorist Organizations," May 24, 2007, for instruction concerning the exercise of discretion through consideration of the totality of the circumstances.

⁵ Duress-based material support exemptions still require two levels of review before approval.

Pursuant to this directive, adjudicators no longer need to withhold adjudication of cases involving activities associated with the 10 groups listed in section 691(b) of the CAA.⁶ Cases previously held under this category of the March 26, 2008, memo, as well as new cases encountered, should receive consideration under the new exemption authority and be processed according to program-specific instructions consistent with the INA as amended and this directive.

III. New 212(a)(3)(B) (terrorist-related inadmissibility) Exemption Worksheet

The 212(a)(3)(B) Exemption worksheet (rev. June 2, 2008), issued with this document, replaces the Material Support Exemption worksheet. The worksheet is required for all USCIS cases in which a terrorist-related inadmissibility exemption is considered. The worksheet has been updated to include the changes in exemption authority resulting from the CAA and the June 3 exercises of discretionary authority.

A category has been added to Section IV of the worksheet: "Individual Exemptions Authorized by DHS Headquarters." The category is only to be used when accounting for those exemptions for individual cases that have been decided by Secretary Chertoff or his designee at DHS headquarters. The box provided should not be checked unless the USCIS official checking the box has been informed of DHS headquarters approval. Generally, supervisory personnel upon instruction from headquarters program personnel will complete this section of the worksheet.

While each adjudicating component is responsible for providing detailed instruction(s) about completion of this worksheet and the USCIS Material Support Working Group will ensure that the worksheet is filled out consistently throughout USCIS, the following points are applicable to all USCIS adjudicators filling out the form.

- USCIS may not grant a benefit or relief to an alien who is inadmissible under INA section 212(a)(3)(B) unless the worksheet is completed.
- A worksheet is not complete until the adjudicating officer has completed all relevant sections of the worksheet except for Section VI (Reviewer's Decision).
- A worksheet is not complete until the adjudicating officer, the first-line reviewing officer and the second-line reviewing officer (if applicable) have signed it in the appropriate blocks in Sections V and VI.
- A worksheet is not complete until all boxes in Section II (Threshold Eligibility) have been checked.
- Adjudicators must provide a concise description of the actions making the alien inadmissible and identify the section of law under which he or she is inadmissible in Section III (Facts of the Case).
- When considering an exemption for an alien who has provided material support to a terrorist organization, the adjudicator must describe the type of support, including to whom the support was provided, what type of support was provided, the date of each provision of support (to the extent possible) and how often support was provided in Section III (Facts of the Case).
- When filling out Section IV for a Group-Based exemption, adjudicators must check the box corresponding to the correct group.⁷ When filling out Section IV for a Duress-Based exemption, adjudicators must check the appropriate box, identify the group by Tier (I, II, or III), name, or if no name, by activity relative to the applicant. Adjudicators should also describe any factors relevant to the determination that the material support was or was not provided under duress.⁸

⁶ See USCIS Memorandum, "Withholding Adjudication and Review of Prior Denials of Certain Categories of Cases Involving Association with, or Provision of Material Support to, Certain Terrorist Organizations or Other Groups," March 26, 2008.

⁷ The other category is intended for use only if the authority for another group-based exemption is exercised. At the time of this memo, "other" is inapplicable.

⁸ See USCIS Memorandum, "Processing the Discretionary Exemption to the Inadmissibility Ground for Providing Material Support to Certain Terrorist Organizations," May 24, 2007, for listing of factors relevant to discretion.

- Explanations must be provided in Section V (Adjudicator's Decision) in the appropriate space, for each case in which an exemption is considered but not granted.

IV. Other exemptions

A. Duress based exemptions

To date the Secretaries have only exercised their authority under the CAA in individual cases and for the above-discussed expanded group exemptions. Existing exercises of discretionary authority made prior to the CAA for material support afforded under duress to Tier III terrorist organizations,⁹ and for material support afforded under duress to Tier I and Tier II terrorist organizations,¹⁰ remain valid. For all such cases in which an exemption for material support provided under duress to a terrorist organization is considered, the adjudicating officer will complete the 212(a)(3)(B) Exemption Worksheet (rev. June 2, 2008), and the decision must undergo two levels of review before issuance. Such decisions no longer require Material Support Working Group concurrence or review before issuance.¹¹ Each division adjudicating such cases is responsible for developing procedures for a two-level review process that ensures consistency in decision-making and identification of issues appropriate for elevation to the USCIS MSWG for discussion and guidance. Division procedures must also provide for an appropriate mechanism to gather statistics on cases considered for and granted exemptions in order for USCIS to comply with Congressional reporting requirements.

B. Cases on hold pursuant to March 26, 2008 directive

As indicated above, the CAA expanded the authority of the Secretaries to exempt inadmissibility in certain cases not covered by existing exercises of authority. On March 26, 2008, USCIS issued instructions to place certain categories of cases on hold and to review certain categories of cases denied or referred on or after December 26, 2007.¹² As indicated above, it is no longer necessary to hold cases involving individuals whose terrorist-related inadmissibility involved acts connected to the 10 groups listed in section 691(b) of the CAA. However, but for that instruction, the March 26, 2008, memorandum remains valid and cases falling within the remaining hold categories should be held.

Attachments:

1. Section 691 of Division J (Department of State, Foreign Operations, and Related Programs Appropriations Act) of the Consolidated Appropriations Act, 2008, Pub. L. 110-161, 121 Stat. 1844.
2. Exercise of Authority under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act, June 3, 2008
3. Terrorist-Related Inadmissibility Exemption Worksheet (rev. June 2, 2008)

⁹ See *Exercise of Authority Under Sec. 212(d)(3)(B)(i) of the Immigration and Nationality Act*, Effective February 26, 2007

¹⁰ See *Exercise of Authority Under Sec. 212(d)(3)(B)(i) of the Immigration and Nationality Act*, Effective April 27, 2007. Note that, to date USCIS has been authorized to adjudicate exemptions for individuals who have afforded material support to Tier I and Tier II terrorist organizations only in cases in which the support was afforded to three Colombian groups: the Revolutionary Armed Forces of Colombia (FARC); the National Liberation Army of Colombia (ELN); and the United Self-Defense Forces of Colombia (AUC).

¹¹ See USCIS Memorandum, "Processing the Discretionary Exemption to the Inadmissibility Ground for Providing Material Support to Certain Terrorist Organizations," May 24, 2007, which mandated Material Support Working Group Review for 90 days after implementation.

¹² See USCIS Memorandum, "Withholding Adjudication and Review of Prior Denials of Certain Categories of Cases Involving Association with, or Provision of Material Support to, Certain Terrorist Organizations or Other Groups," March 26, 2008.