



Asylum 201 for Afghans: Bars to Asylum and Common Concerns

Faiza W. Sayed, *Assistant Professor of Law, Director of the Safe Harbor Clinic, Brooklyn Law School*

Parastoo G. Zahedi, *Immigration Attorney at Law Office of Zahedi, Member of American Immigration Lawyers Association (AILA) Board of Governors*

Rachel Zoghlin Bautista, *Associate Director, Pro Bono & Partnerships, HIAS*

Presentation Overview

- Welcome and Introductions
- Overview of Bars to Asylum
- Introduction to TRIG: Terrorism Related Inadmissibility Grounds
 - What is TRIG?
 - Consequences of TRIG
 - Exceptions and Exemptions to TRIG Findings
 - Strategies around TRIG
 - Hypotheticals
- Q&A

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OVERVIEW OF BARS TO ASYLUM

Elements of Asylum in the U.S.

Well-founded fear of future persecution, based on

Past persecution

or

Risk of future persecution

On account of at least one of five protected grounds:

Race

Religion

Nationality

Political
opinion
(actual/
imputed)

Membership
in a
particular
social group

Persecutor is government actor or non-governmental actor that government is unwilling or unable to control

Bars to Applying for Asylum

- Did not file within one year of entry (OYFD)
- Previously denied asylum by IJ or BIA
- Can be removed to a “safe third country” per bilateral/multilateral agreement
- **Exceptions** (8 CFR §§208.4(a)(4), (a)(5)):
 - “changed circumstances” either in country/applicant’s life
 - “extraordinary circumstances” prevented compliance w/ OYFD, like illness, disability, IAC, *holding other status/parole*, etc.

Bars to a Grant of Asylum

- **Conviction for a “Particularly Serious Crime”**
- **Commission of a “Serious Nonpolitical Crime”**
- **Danger to Security of the US**
- **Firmly Resettled Elsewhere Prior to Arrival**
- **Persecutor Bar***
- **Terrorist Activity***

Bars to a Grant of Asylum

■ Conviction for a “Particularly Serious Crime”

- Matter of Frentescu, 18 I&N Dec. 244 (BIA 1982) (finding that a PSC is more serious than a SNPC, and relevant factors to consider include: nature of conviction, circumstances and facts underlying conviction, type of sentence imposed, whether the individual constitutes a danger to the community)
- Matter of N-A-M-, 24 I&N Dec. 336 (BIA 2007) (conviction need not be for an “aggravated felony” under INA to be considered a PSC).
- * * Matter of G-S-S-, 26 I&N Dec. 339 (BIA 2014) (mental health not a factor in determining whether conviction is for PSC).
 - **Practice Pointer:** Matter of B-Z-R-, 28 I&N Dec. 424 (AG 2021) may alter this holding.
 - Imm Defense Project / Harvard Immigration Refugee Clinic very useful resource (2018)

Bars to a Grant of Asylum

■ Commission of a “Serious Nonpolitical Crime”

- Derives from Article 1F of the Refugee Convention
- Matter of W-E-R-B-, 27 I&N Dec. 795 (BIA 2020) (INTERPOL Red Notice is reliable evidence for serious nonpolitical crime bar to asylum).
- Matter of E-A-, 26 I&N Dec. 1 (BIA 2012) (IJ should balance the seriousness of the criminal acts against political aspect of the conduct)

■ Danger to Security of the US

■ Firmly Resettled in Another Country Prior to Arrival

- 8 CFR §208.15: If, (1) prior to arrival in the US, entered into another country (2) offer or receipt, of (3) permanent resident status, citizenship, or other type of permanent resettlement.
- Matter of A-G-G-, 25 I&N Dec. 486 (BIA 2011) (establishes 4-part framework for analysis)

Bars to a Grant of Asylum

■ **Firmly Resettlement (cont.)**

- Matter of A-G-G-, 25 I&N Dec. 486 (BIA 2011) (establishes 4-part framework for analysis)
 - (1) Officer bears the burden of presenting prima facie evidence of offer of firm resettlement, relying on direct or, if direct is not available, indirect evidence.
 - (2) If prima facie evidence, applicant must be given the opportunity to rebut.
 - (3) Officer must weigh the totality of the evidence and make determination whether evidence of offer of firm resettlement has been rebutted.
 - (4) If officer finds applicant was firmly resettled, burden shifts to the applicant to establish an exception.
- Exceptions: (1) Restrictive conditions, 8 CFR 208.15(b); (2) Flight from persecution and no significant ties, 8 CFR 208.15(a).

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WHAT IS THE PERSECUTOR BAR AND TRIG? (TERRORISM RELATED INADMISSIBILITY GROUNDS)

Persecutor Bar

- Any applicant who has “ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion” is barred from receiving asylum.
 - INA § 208(b)(2)(A)(i).
- Viability of duress as a defense – up in the air
 - Matter of Negusie, 27 I&N Dec. 347 (BIA 2018): limited duress defense available
 - Matter of Negusie, 28 I&N Dec. 120 (A.G. 2020): AG vacated the 2018 Board decision
 - Matter of Negusie, 28 I&N Dec. 399 (A.G. 2021): AG Garland referred the case to himself
- Must explore persecutor bar where applicant has ever served in the military, particularly if the military was known to violate human rights at the time or where the applicant guarded prisoners.

Terrorism Related Inadmiss. Grounds (TRIG)

- INA §§ 212(a)(3)(B) and 212(a)(3)(F) provide circumstances giving rise to terrorism-related inadmissibility.
- Note: Likely won't apply to Afghan Parolees, but for people already admitted to the U.S. as permanent residents, or on nonimmigrant visas, parallel ground of "deportability" can be found at INA § 237(a)(4)(B).

TRIG: INA §212(a)(3)(B)(i)(I)

- “In General... Any alien who – (I) has **engaged in terrorist activity** . . . is inadmissible.”
 - Refers to past activity only.
 - Most commonly cited ground.
- Both “terrorist activity” and “engaged in terrorist activity” are later defined in the INA.

TRIG: “Terrorist Activity”

- “[A]ny activity which is unlawful under the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the laws of the United States or any State)” + involves one of six listed activities.
 - INA § 212(a)(3)(B)(iii)
- Does **not require a conviction** but the activity must be either unlawful in the US (under either federal **or** state law) or unlawful where it occurred.

TRIG: “Terrorist Activity”

- (I) Hijacking or sabotage of any conveyance (incl. aircraft, vessel, or vehicle).
- (II) Seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a government organization) to do or abstain from doing any act as an explicit or implicit condition for release of the individual seized or detained.
- (III) A violent attack upon an internationally protected person ... or upon the liberty of such a person.

INA § 212 (a)(3)(B)(iii)(I)-(VI)

TRIG: “Terrorist Activity”

- (IV) An assassination.
- **(V) The use of any—**
 - (a) biological agent, chemical agent, or nuclear weapon or device, or
 - (b) explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain),
 - with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.
- (VI) A threat, attempt, or conspiracy to do any of the foregoing.

INA § 212 (a)(3)(B)(iii)(I)-(VI)

TRIG: “Engage in Terrorist Activity”

In an individual capacity, or as a member of an organization:

- (I) To commit or to incite to commit, under circumstances indicating an intention to cause death or serious bodily injury, a terrorist activity.
- (II) To prepare or plan a terrorist activity.
- (III) To gather information on potential targets for terrorist activity.
- (IV) to solicit funds or other things of value for –
 - (aa) terrorist activity;
 - (bb) A designated terrorist organization [Tier I or Tier II] ..or
 - (cc) [an undesignated] terrorist organization ... unless the alien can show by clear and convincing evidence that [they] did not know and should not reasonably have known that it was a terrorist organization.

TRIG: “Engage in Terrorist Activity”

In an individual capacity, or as a member of an organization (cont.):

- (V) To solicit any individual—
 - (aa) To engage in [a terrorist activity];
 - (bb) for membership in a [designated] terrorist organization; or
 - (cc) for membership in [an undesignated] terrorist organization unless [alien] can demonstrate by clear and convincing evidence that [they] did not know and should not reasonably have known, that the organization was a terrorist organization.”

INA § 212(a)(3)(B)(iv)

TRIG: “Material Support”

- (VI) To **commit an act** that the actor knows, or reasonably should know, **affords material support**, including a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological or radiological weapons), explosives or training ...
 - (aa) for the commission of a terrorist activity;
 - (bb) to any individual who the [alien] knows or reasonably should know, has committed or plans to commit a terrorist activity;
 - (cc) to a **[designated] terrorist organization ... or to a member of a [designated] organization**; or
 - (dd) to an **[undesigned] terrorist organization ... or to any member** of such an organization, **unless** the [alien] can demonstrate by **clear and convincing evidence** that [they] **did not know and should not reasonably have known** that the organization was a terrorist organization.”

TRIG: “Material Support”

■ BIA Caselaw: Matter of M-H-Z- & A-C-M-

- *Matter of M-H-Z-*, 26 I&N Dec. 757 (BIA 2016): BIA held that there is **no intrinsic duress exemption** to the material support bar.
- *Matter of A-C-M-*, 27 I&N Dec. 303 (BIA 2018): BIA held there is **no de minimis exception** to the bar.
 - The BIA found that a Salvadoran woman who had been kidnapped by the guerillas and received forced military type training and provided forced labor (cooking, cleaning, etc) was inadmissible under the TRIG.

TRIG: “Terrorist Organization”

- **Tier I: Foreign Terrorist Organizations**
 - Designated by DOS
 - Although it is not designated as an FTO by DOS, **Congress mandated that the Taliban is to be considered a Tier I terrorist organization** in the Consolidated Appropriations Act of 2008.
- **Tier II: Terrorist Exclusion List**
 - Designated by DOS
- **Tier III: Undesignated Terrorist Organizations**

TRIG: “Terrorist Organization”

● Tier III: Undesignated Terrorist Orgs (cont.)

- “. . . a group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in . . . [terrorist activity].” INA § 212 (a)(3)(b)(vii)(III).
- Defined by their activity alone, without undergoing a formal designation process.
- No need for the organization to endanger US national security. Organization could even be supported by the US and still qualify as a Tier III.
- Applies even if organization no longer exists or no longer engages in violence.
- No need even for a name.

TRIG: What to Look For

- **Past membership** in **any** formal or informal armed group

- Receive any military type training from this group?
- Use a weapon as part of this group?
- Took up arms against the Taliban?
- Fought the Soviet invasion in the 1980s?

TRIG: What to Look For

- **Material support** to the Taliban or any other formal or informal armed group
 - Gave money or anything else to get through a checkpoint?
 - Paid a ransom or give anything else to secure release of a relative who was kidnapped?
 - Had any commercial transactions w/ these groups (e.g, groceries)?
 - Hosted anyone at their home who was a member of these groups (or other social interactions)?
 - Voluntary or forced work for these groups (carrying weapons, cooking, cleaning, etc.)?
 - Recruited anyone to join these groups?
 - Solicited funds for these groups?

TRIG: What to Look For

- **Currently** the spouse or child of someone who would be inadmissible under any of the terrorism bars?

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CONSEQUENCES OF TRIG FINDINGS

Consequences of TRIG

- **Ineligible for most forms of relief**
 - Refugee admission
 - Asylum, Withholding of Removal
 - Special immigrant visa
 - I-730 relative petitions for asylum and refugee derivatives
 - Adjustment of status to LPR
 - Others: Cancellation of Removal, T and U visas, TPS, 212(c) waiver, family unity
- **Still eligible:** deferral of removal under CAT, naturalization, visa petitions other than I-730s
- Deportable and subject to mandatory detention

Consequences of TRIG

- *What if the Government Raises a TRIG Issue?*
- **Practice Pointers:**
 - Make sure you understand the facts
 - Do not concede immediately!
 - Explore whether an exception applies
 - If no exception applies, explore whether your client may be eligible for an exemption

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EXCEPTIONS AND EXEMPTIONS TO TRIG FINDINGS

Exceptions: Lack of Knowledge, Tier III

- Refers to the applicant's lack of knowledge that the organization at issue carries out activities of the type that bring it within the definition of a Tier III terrorist organization
 - **Practice Pointer:** Does NOT refer to a lack of knowledge that a U.S. government entity finds that the group is a Tier III organization under the INA.
- Must demonstrate both a **subjective** (applicant personally did not know) and **objective** (a reasonable person would not have known) lack of knowledge
- High burden of proof: clear and convincing evidence
- Does not apply to receiving military type training or being a representative of an undesignated organization

Exceptions: Material Support Knowledge

- Material support knowledge element reads:
 - “to commit an act that the actor knows or reasonably should know affords material support.”
 - INA § 212(a)(3)(B)(iv)(VI).
- Applies to knowledge that the applicant’s act itself afforded material support to any organization at all, or for the commission of a terrorist activity, or to an individual who has committed or plans to commit a terrorist activity.

Exemptions

- Sec. of DOS and DHS, in consultation with AG, can authorize exemptions from TRIG. INA § 212(d)(3)(B)
- Two types of exemptions: group-based & situational
 - Currently DHS has authorized 13 group-based exemptions and 8 situation-based exemptions:
<https://www.uscis.gov/laws-and-policy/other-resources/terrorism-related-inadmissibility-grounds-trig/terrorism-related-inadmissibility-grounds-exemptions>

Exemptions

- No formal application process:
 - If the case is affirmative (at Asylum Office, not immigration court), USCIS will spontaneously consider the case for an exemption if the facts fall within a particular implemented exemption.
 - Imm. Judges are not authorized to grant TRIG exemptions.
- Whether to grant the exemption is **entirely discretionary**.
- Full list of exemptions and requirements at:
<https://www.uscis.gov/laws-and-policy/other-resources/terrorism-related-inadmissibility-grounds-trig/terrorism-related-inadmissibility-grounds-exemptions>

Exemptions: In Removal Proceedings

- 2008: DHS memo describing how it would process TRIG exemptions for those in removal.
 - DHS will consider an exemption only once the noncitizen has received an administratively final order of removal, **and** if relief was denied solely on one of the grounds for which an exemption exists.
- Memo available at:
[https://www.uscis.gov/sites/default/files/document/fact-sheets/USCIS_Process_Fact_Sheet -
_Cases_in_Removal_Proceedings.pdf](https://www.uscis.gov/sites/default/files/document/fact-sheets/USCIS_Process_Fact_Sheet_-_Cases_in_Removal_Proceedings.pdf)

Exemptions: Group-Based Exemptions

- There are numerous groups which are exempted from TRIG findings, many involving affiliations with U.S. military interests.
- Currently, **no group-based exemption** which would benefit Afghan applicants.

Exemptions: Situational Exemptions

- Material support under duress
- Solicitation under duress
- Military-type training under duress
- Voluntary medical care
- Certain limited material support
- Insignificant material support

Exemptions: General Requirements

- a) Is seeking a benefit or protection under the INA and has been determined to be otherwise eligible for the benefit or protection;
- b) Has undergone and passed all relevant background and security checks;
- c) Has fully disclosed, in all relevant applications and/or interviews with U.S. government representatives and agents, the nature and circumstances of any material support provided and any other activity or association falling within the scope of section 212(a)(3)(B) of the INA, [8 U.S.C. 1182](#)(a)(3)(B), as well as all contact with a terrorist organization and its members; and
- d) Poses no danger to the safety and security of the United States.

Exemptions: Material Support under Duress

- Applies to support provided to designated/undesignated terrorist organizations.
- At a minimum requires that the material support was provided in response to a reasonably-perceived threat of serious harm.
- **Practice Pointer - Factors to consider:**
 - Whether the applicant reasonably could have avoided, or took steps to avoid, providing material support;
 - The severity and type of harm inflicted or threatened;
 - To whom the harm was directed (e.g., the applicant, applicant's family, applicant's community, etc.);
 - The perceived imminence of the harm threatened;
 - The perceived likelihood that the threatened harm would be inflicted; and
 - Any other relevant factor regarding the circumstances under which the applicant felt compelled to provide the material support.

Exemptions: Material Support under Duress

- Once it has been determined that the applicant provided material support under duress, the adjudicator must consider whether **the totality of the circumstances** justify the exercise of authority as a matter of discretion.
- Factors to consider must, as applicable, include:
 - The amount, type and frequency of material support provided,
 - The nature of the terrorist activities committed by the terrorist organization,
 - The applicant's awareness of those activities;
 - The length of time since material support was provided;
 - The applicant's conduct since that time;
 - And any other relevant factor.

Exemptions: Certain Limited Material Support (CLMS)

- In 2014, DHS authorized new exemptions for Certain Limited Material Support;
 - Certain routine commercial transactions;
 - Certain routine social transactions;
 - Certain humanitarian assistance; and
 - Material Support provided under substantial pressure that does not rise to the level of duress (“**sub-duress pressure**”).

Important Practice Pointer: These exemptions **ONLY** apply to undesignated terrorist organizations (Tier IIIs). This means that any CLMS provided to the Taliban is **NOT** exempted.

Exemptions: Other Duress Exemptions

- The duress exemptions below apply to both **designated** and **undesignated** terrorist groups:
 - Solicitation of funds or other items of value under duress
 - Military type training under duress

Exemptions: CLMS - Key Takeaway

- Because the CLMS exemptions **do not apply to the Taliban**, if a client thinks it “may have been the Taliban” who they paid money to versus “it absolutely was the Taliban” could be a distinction that can make or break a case.
- Given that the USCIS adjudicator may still determine that the totality of the circumstances point to the material support provisions being given to the Taliban, it is important to prepare clients to articulate the extent of their fears. If the USCIS adjudicator determines that material support was given to the Taliban, the material support under sub-duress provision will not apply so it will be imperative to show the imminent danger involved.

Exemptions: Voluntary Medical Care

- The Voluntary Medical Care exemptions is **only available for voluntary medical care provided to an undesignated terrorist organization (Tier III)**.
 1. Services provided by and in the capacity of a medical professional, such as physician, nurse, dentist, psychiatrist or other mental health care provider, emergency room technician, ambulance technician, medical lab technician, or other medical-related occupation; and
 2. Related assistance by non-medical professionals providing, for example, emergency first aid services to persons who have engaged in terrorist activity.

Exemptions: What to Look For

- **Practice Pointers:**

- If you have identified potential issues with material support in Afghanistan, **do not assume the material support was provided to the Taliban**. There are many armed groups in Afghanistan, some small and disorganized, who take advantage of chaotic situations and may demand money, labor, or other things of value.
- Clients should be prepared to answer questions involving the degree of fear of imminent harm and why they felt that way.
- The adjudicator will likely not reveal if they have come to the conclusion that the material support was provided to the Taliban or not, and so in case preparation **do not assume any CLMS exemptions will apply** even if the material support does not appear to clearly have been provided to the Taliban and not a Tier III.

Lack of USCIS Guidance on TRIG for Afghans

- Generally, adjudicators will be given a list of questions they must cover for populations where COI indicates there is a significant presence of terrorist groups. This is especially true in the RAIO context, and may involve very specific questions about checkpoints, transportation during flight, etc.
- As of today, there is **no group-based exemption** for Afghans fleeing following US withdrawal OR for Afghans who aided the U.S. military.

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HYPOTHETICALS AND CASE EXAMPLES

Hypothetical: Ahmed

- Growing up, Ahmed and his family were constantly visited by the Taliban at their home during the Fall of 2006 to Summer of 2007 timeframe demanding food and shelter, that they were forced to provide.
- In August 2021 Ahmed and his sister were able to be evacuated from Kabul but had to give money and goods in order to get through several checkpoints.

Hypothetical: Rahman

- Rahman entered the United States in 1996 and was granted asylum protection in 1997.
- During his teenage years he was involved with the Afghan Mujahideen.
- Rahman has filed his I485 application to adjust his status to a Lawful Permanent Resident, but each time USCIS has denied his application under INA 212(a)(3)(B)(vi)(III).

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Q&A

Questions?

probono@hias.org

