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Tier III Terrorist Organizations: The Role of the Immigration Court in Making a Terrorist Determination

by Denise Bell

Under section 212(a)(3)(B)(vi)(III) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(3)(B)(vi)(III), Immigration Judges may be asked to determine whether a group of two or more individuals constitutes a terrorist organization.[1] Commonly known as Tier III terrorist organizations, these "undesignated terrorist organizations" are determined on a case-by-case basis by Immigration Judges. Because the Act employs broad language in defining an "undesignated terrorist organization," any number of groups could theoretically be determined to be a Tier III terrorist organization. Tier III determinations may seem contrary to the court's jurisdiction because they are decisions that can have foreign policy implications. However, the circuit courts and the Board of Immigration Appeals have consistently affirmed Tier III determinations, even as they acknowledge that the statutory language has a "breathtaking" scope. *See Matter of S-K-*, 23 I&N Dec. 936, 948 (BIA 2006).

This article seeks to clarify and demystify the Tier III determination process. Part I will provide background to understanding where Tier III terrorist organizations fit in the Federal government's landscape for designating terrorist organizations under the Act. Part II will focus on the process of making a Tier III determination and types of groups frequently determined to be Tier III terrorist organizations. Part III will briefly address challenges to Tier III statutory determinations, including collateral estoppel.

I. Types of Terrorist Organizations

The Act specifies three categories of "terrorist organizations." Section 212(a)(3)(B)(vi) of the Act. The first category, a Foreign Terrorist Organization ("FTO"), is designated by the Secretary of State, in consultation with the Attorney General and the Secretary of the

Treasury, in accordance with section 219 of the Act. Section 212(a)(3)(B)(vi)(I) of the Act. FTOs are also known as Tier I terrorist organizations ("Tier I") because they are delineated in subsection one of section 212(a)(3)(B)(vi) of the Act. An FTO hews closely to the popular understanding of what a terrorist organization is: a foreign group seeking to harm the United States or U.S. nationals through terrorist acts. In legal terms, an FTO is a foreign organization that is engaged in—or retains the capability and intent to engage in—terrorist activities as described in section 212(a)(3)(B) of the Act or terrorism as described in 22 U.S.C. § 2656f(d)(2), where such acts represent a threat to national security or the security of U.S. nationals. Section 219(a)(1) of the Act. Examples of FTOs are Islamic State of Iraq and the Levant ("ISIL"), Hamas, al-Qa'ida, al-Shabaab, and Boko Haram.[2] FTOs are published in the Federal Register.

The second category, an organization on the Terrorist Exclusion List ("TEL"), is designated by the Secretary of State for immigration purposes in consultation with, or upon the request of, the Attorney General or the Secretary of Homeland Security. Section 212(a)(3)(B)(vi)(II) of the Act. TEL organizations are known as Tier II ("Tier II") terrorist organizations. A TEL organization engages in the activities described in section 212(a)(3)(B)(iv)(I)–(VI) of the Act (*see* section II, *infra*). Examples of Tier II organizations include the Revolutionary United Front ("RUF") and the Lord's Resistance Army ("LRA"); a de-listed organization is the Communist Party of Nepal (Maoist) ("CPN(M)").[3] As with FTOs, TEL organizations are published in the Federal Register. Association with entities on the TEL will generally exclude an alien from entering the United States.

The third category is an "undesignated terrorist organization." Section 212(a)(3)(B)(vi)(III) of the Act. Referred to as a Tier III terrorist organization, the category of "undesignated terrorist organizations" was added to the Act by the USA PATRIOT Act ("Patriot Act") in 2001. Pub. L. No. 107–56, 115 Stat. 272. Tier III terrorist organizations are defined as "a group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in" terrorist activity as defined under the Act. Section 212(a)(3)(B)(vi)(III) of the Act. The Patriot Act authorized the retroactive application of the Tier III determination. *See Bojnoordi v. Holder*, 757 F.3d 1075, 1077 (9th Cir. 2014); *Daneshvar v. Ashcroft*, 355 F.3d 615, 627 (6th Cir. 2004).

Unlike Tier I and Tier II terrorist organizations, Tier III terrorist organizations are not subject to a formal designation process and thus do not appear in the Federal Register. They are determined by adjudicators on a case-by-case basis in connection with the review of an application for any immigration benefit. Thus, for example, Tier III determinations arise in immigration court when an Immigration Judge must assess whether the mandatory terrorism bar applies. *See* sections 208(b), 212(a)(3)(B), 237(a)(4)(B) of the Act, 8 U.S.C. §§ 1158(b), 1182(a)(3)(B), 1227(a)(4)(B). Tier III determinations are also made by asylum officers in the initial review of an asylum application; by U.S. Citizenship and Immigration Services ("USCIS") officers in reviewing immigrant visa petitions and applications for adjustment of status; and by consular officers in reviewing visa applications. *See* sections 209, 318 of the Act; *Am. Acad. of Religion v. Napolitano*, 573 F.3d 115 (2d Cir. 2009); Vol. 9, Foreign Affairs Manual §§ 301.1–2; 302.6.

Because the Tier III determination is a case-by-case assessment, Tier III terrorist organizations arise and change over time, and there is not an official list of them.[4] Nonetheless, there are examples of prior Tier III determinations, as gleaned from case law. They include, but are certainly not limited to, the Association de Secours Palestinien ("ASP") prior to its formal designation in 2003,[5] Chin National Front ("CNF"),[6] Jammu Kashmir Liberation Front ("JKLF"),[7] and the Mujahedin-e Khalq ("MEK")[8] prior to its designation in 1997.

Notably as well, unlike FTOs, a Tier III organization need not endanger U.S. national security or U.S. nationals. *Hussain v. Mukasey*, 518 F.3d 534, 538 (7th Cir. 2008) ("It is likewise irrelevant that MQM-H [the Mohajir Qaumi Movement-Haqiqi] does not appear to harbor any hostile designs against the United States; the statute does not require that the terrorist organization be a threat to us."). In 2006, Representative Joseph Pitts introduced an amendment to limit the scope of Tier III determinations to an organization of two or more individuals engaged in terrorist activities whose activities threaten the security of U.S. nationals or U.S. national security, but the bill did not move out of the House Judiciary Committee. H.R. 5918, 109th Cong. (2006).

II. Making a Tier III Determination

An Immigration Judge is commonly called upon to make a Tier III determination when the Department of Homeland Security ("DHS") alleges that the mandatory terrorism bar applies—that is, a respondent is inadmissible under section 212(a)(3)(B) of the Act, removable under section 237(a)(4)(B), or barred from applying for relief under section 208(b).[9] These bars, known as the terrorism-related inadmissibility grounds ("TRIG"), are beyond the scope of the present article. However, the *Immigration Law Advisor* has covered their history, scope, and exemptions in a series of articles.[10]

Burden of Proof

For the mandatory terrorism bar to apply, the DHS must first demonstrate that a group is a Tier III terrorist organization. 8 C.F.R. § 1240.8(d) ("If the evidence indicates that one or more of the grounds for mandatory denial of the application for relief may apply, the alien shall have the burden of proving by a preponderance of the evidence that such grounds do not apply."); *see Viegas v. Holder*, 699 F.3d 798, 801–02 (4th Cir. 2012) (concluding that the DHS presented evidence indicating that the membership and material support bars applied before the burden shifted to the applicant to establish that the bars did not apply to him); *Matter of S-K-*, 23 I&N Dec. at 939 (explaining that the burden of proof "shifted" to the applicant to establish the inapplicability of section 208(b)(2)(A)(v) of the Act once the DHS "satisfied its burden of establishing that the evidence 'indicated' that an asylum bar applied").

When considering whether a group's actions constitute a terrorist activity, the relevant question is whether the group engaged in terrorist activity during the time that the alien was allegedly affiliated with the group. *See Bojnoordi*, 757 F.3d at 1077–78; *Alturo v. Att'y Gen.*, 716 F.3d 1310, 1313 (11th Cir. 2013); *Viegas*, 699 F.3d at 802. For purposes of the Tier III determination analysis, evidence concerning other periods of time is not determinative. The pertinent time frame for examining a group's activities is when an alien was involved with the alleged Tier III terrorist organization in some capacity. If the DHS satisfies its burden, the burden shifts to the respondent to prove "by a preponderance of the evidence that [the bar does] not apply." 8 C.F.R. § 1240.8(d); *Viegas*, 699 F.3d at 801–02; *Matter of S-K-*, 23 I&N Dec. at 939.[11]

There is no circuit court or Board case law outlining the amount, strength, or type of evidence that the DHS must produce to meet its burden under 8 C.F.R. § 1240.8(d). Because Tier III terrorist organizations are undesignated, they are not published on any government list and might not be mentioned in government reports as organizations eliciting concern. Or, if the group is mentioned, it might be noted for generalized violent activity, for example, but not be designated by any government agency as a terrorist group or have the term "terrorist" associated with it. Immigration Judges must therefore consider the probative value, relevance, and reliability of a variety of evidence in lieu of or in addition to U.S. State Department country reports or other agency reports. *See Matter of Interiano-Rosa*, 25 I&N Dec. 264, 265 (BIA 2010) ("Immigration Judges have broad discretion to conduct and control immigration proceedings and to admit and consider relevant and probative evidence."); *Matter of H-L-H- & Z-Y-Z-*, 25 I&N Dec. 209, 213 (BIA 2010) (abrogated on other grounds) (affording special weight to State Department country conditions reports as highly probative evidence); *Matter of S-K-*, 23 I&N Dec. at 948 (referencing a USCIS report to determine whether CNF engaged in terrorist activities). Because an Immigration Judge has substantial leeway when evaluating whether the evidence presented during a hearing is sufficient to "indicate" that the mandatory terrorism bar applies, much will necessarily depend on the reliability and specificity of the evidence in question.

While reports from United States government agencies are not conclusive of a Tier III designation, courts have relied on them as probative evidence of terrorist activity. *Bojnoordi*, 757 F.3d at 1077–78 (relying in part on a State Department report on FTOs in affirming that MEK was a Tier III terrorist organization); *Viegas*, 699 F.3d at 800, 802 (relying on reports from the State Department in affirming that the Front for the Liberation of the Enclave of Cabinda ("FLEC") was a Tier III terrorist organization). *But see Matter of S-K-*, 23 I&N Dec. at 939, 948 (upholding a Tier III determination even where a USCIS report on the CNF did not indicate that the organization was involved in terrorist activities). Reports from established, reputable organizations such as Amnesty International and Human Rights Watch have been deemed probative, as has information from the Memorial Institute for the Prevention of Terrorism. *See Viegas*, 699 F.3d at 800, 802; *Haile v. Holder*, 658 F.3d 1122, 1128 (9th Cir. 2011); *Hussain*, 518 F.3d at 539.

Terrorist Activity under the Act

While terrorism commonly refers to the use of violence against civilians or governments for political ends, *see* 18 U.S.C. §§ 2331, 2332b; 22 U.S.C. § 2656f(d); 50 U.S.C. § 1801(c), Congress defined a Tier III terrorist organization to capture a broader range of activity. The definition of a Tier III terrorist organization found in section 212(a)(3)(B)(vi) hinges on two key phrases in sections 212(a)(3)(B)(iii) and (iv): "terrorist activity" and to "engage in terrorist activity."

"Terrorist activity" is defined as any activity that is unlawful in the country where it was committed, or would be unlawful if committed in the United States, and involves any of the following:

(I) the hijacking or sabotage of any conveyance;
(II) the seizing or detaining, and threatening to kill, injure, or continue to detain another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained;
(III) a violent attack upon an internationally protected person;
(IV) an assassination;
(V) the use of a biological or chemical agent, or nuclear device, or the use of an explosive, firearm, or other weapon or dangerous devices with the intent to endanger the safety of one or more individuals or to cause substantial damage to property; or
(VI) a threat, attempt, or conspiracy to do any of the foregoing.

Section 212(a)(3)(B)(iii)(I)–(VI).

In turn, to "engage in terrorist activity" means in either an individual capacity or as a member of an organization:[12]

(I) to commit or to incite to commit, under circumstances indicating the 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 a terrorist activity or a terrorist organization];
(V) to solicit any individual [to engage in terrorist activity or for membership in a terrorist organization]; or
(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 . . . explosives, or training [for the commission of a terrorist activity or to a terrorist or terrorist organization].

Section 212(a)(3)(B)(iv)(I)–(VI).

As the circuit courts and the Board have observed, the definitions of terrorist activity and engaging in terrorist activity encompass actions that do not fall under the common understanding of terrorism. *Hussain*, 518 F.3d at 537 ("Hussain complains that [these definitions] stretch the term 'terrorist.' They do. Terrorism as used in common speech refers to the use of violence for political ends."); *McAllister v. Att'y Gen.*, 444 F.3d 178, 187 (3d Cir. 2006) (finding that the definition of terrorist activity in the Act "encompasses more conduct than our society, and perhaps even Congress, has come to associate with traditional acts of terrorism"); *Matter of S-K-*, 23 I&N Dec. at 948 ("[Section 212(a)(3)(B)] also includes groups and organizations that are not normally thought of as 'terrorists' per se."). USCIS acknowledges that the terrorist label "may apply to individuals and activities not commonly thought to be associated with terrorism." USCIS, "Terrorism-Related Inadmissibility Grounds," www.uscis.gov/laws/terrorism-related-inadmissability-grounds/terrorism-related-inadmissibility-grounds-trig#TerroristActivity (last visited July 12, 2016). Thus, for example, "a pair of kidnappers" could be a Tier III terrorist organization, and the use of weapons to endanger the safety of persons or to cause substantial damage to property (other than for monetary gain) is considered "terrorist activity." *Hussain*, 518 F.3d at 537; *Matter of S-K-*, 23 I&N Dec. at 948–49.

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CIRCUIT COURT DECISIONS FOR JUNE 2016

by John Guendelsberger

The United States courts of appeals issued 192 decisions in June 2016 in cases appealed from the Board. The courts affirmed the Board in 172 cases and reversed or remanded in 20, for an overall reversal rate of 10.4%, compared to last month's 11.5%. There were no reversals from the First, Fourth, Eighth, and Tenth Circuits.

The chart below shows the results from each circuit for June 2016 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	% Reversed
First	3	3	0	0.0
Second	20	19	1	5.0
Third	6	5	1	16.7
Fourth	5	5	0	0.0
Fifth	14	13	1	7.1
Sixth	5	4	1	20.0
Seventh	2	1	1	50.0
Eighth	7	7	0	0.0
Ninth	127	113	14	11.0
Tenth	1	1	0	0.0
Eleventh	2	1	1	50.0
All	192	172	20	10.4

The 192 decisions included 101 direct appeals from denials of asylum, withholding or protection under the Convention Against Torture; 47 direct appeals from denials of other forms of relief from removal or from findings of removal; and 44 appeals from denials of motions to reopen or reconsider. Reversals within each group were as follows:

	Total	Affirmed	Reversed	% Reversed
Asylum	101	93	8	7.9
Other Relief	47	39	8	17.0
Motions	44	40	4	9.1

The eight reversals or remands in asylum cases involved credibility (three cases), nexus (two cases), Convention Against Torture (two cases), and corroboration.

The eight reversals or remands in the "other relief" category addressed adjustment of status (three cases), aggravated felony "theft" (two cases), a derivative K visa, a continuance to obtain counsel, and cancellation of removal.

The four motions cases involved rescission of in absentia orders of removal for lack of notice or exceptional circumstances (two cases), reopening for ineffective assistance of counsel, and reopening for changed country conditions.

The chart below shows the combined numbers for January through June 2016 arranged by circuit from highest to lowest rate of reversal.

Circuit	Total	Affirmed	Reversed	% Reversed
Seventh	22	16	6	27.3
Sixth	32	27	5	15.6
Ninth	617	530	87	14.1
Tenth	17	15	2	11.8
First	18	16	2	11.1
Third	50	45	5	10.0
Eleventh	31	29	2	6.5
Second	198	187	11	5.6
Fifth	83	79	4	4.8
Fourth	49	47	2	4.1
Eighth	39	38	1	2.6
All	1156	1029	127	11.0

Last year's reversal rate at this point (January through June 2015) was 14.8%, with 842 total decisions and 125 reversals or remands.

The numbers by type of case on appeal for the first 6 months of 2016 combined are indicated below.

	Total	Affirmed	Reversed	% Reversed
Asylum	631	567	64	10.1
Other Relief	267	219	48	18.0
Motions	258	243	15	5.8

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Correction: The combined statistics in the January through May table contained in the last issue (Vol. 10, No. 4) were presented in the wrong order. The corrected table is available at the end of this issue. – Editor

RECENT COURT OPINIONS

Supreme Court:

Mathis v. United States, 136 S. Ct. 2243 (2016):

The Supreme Court, in a 5-3 decision, reversed the Eighth Circuit's determination that an Iowa burglary conviction qualified as a violent felony for sentencing purposes under the Armed Career Criminal Act ("ACCA"). In doing so, the Court held that the "modified categorical approach" cannot be applied where a single element can be satisfied through different ways or means that do not require jury agreement.

Under the ACCA, a state "burglary" offense fits within the generic federal definition of the same crime only if the elements of the state statute of conviction are not broader than those contained in the generic federal definition. The Court noted that the generic federal crime requires that the location entered be "a building or other structure." However, the Iowa statute also proscribes unlawful entry into a vehicle. The Court further noted that, under Iowa law, the jury need not agree on whether the defendant entered a building or a vehicle in order to agree that the locational element was satisfied. In its decision, the Eighth Circuit had acknowledged that the Iowa statute encompassed broader conduct than included under the generic definition, but held that the record of conviction established that the defendant entered a structure. The Eighth Circuit had also concluded that it was not significant whether the nature of the structure was a specific statutory element if the sentencing court had the ability to identify the way that the element had been satisfied.

The Supreme Court disagreed with this analysis, finding that the Iowa burglary statute in question does not create separate crimes, but rather allows a single element (i.e., the type of property entered) to be satisfied in multiple ways. The Court found that the Eighth Circuit's approach would prove to be unfair to defendants since the specific manner in which the element was satisfied (i.e., a building or a vehicle) had no bearing on the outcome of the criminal case and may therefore preclude the clarification of such points in plea agreements, which could then have consequences "many years down the road by triggering a lengthy mandatory sentence." The Court noted that similar issues arise in the immigration context, where the categorical approach is also employed. For example, an alien defendant charged under a state criminal statute describing an assault committed either "intentionally, knowingly, or recklessly" might have no apparent reason to contest the prosecutor's statement that his actions were "intentional," but that such designation could have serious consequences years later in the removal context, where intentional (unlike reckless) assault qualifies as a crime involving moral turpitude.

First Circuit:

Thomas v. Lynch, No. 15-1805, 2016 WL 3606943 (1st Cir. July 5, 2016): The First Circuit denied the petition for review challenging an Immigration Judge's determination that the petitioner had not derived United States citizenship through the naturalization of his mother. As a consequence of this threshold finding, the petitioner was ordered removed based on his 2012 aggravated felony conviction for armed robbery. The First Circuit noted that the statute in effect at the time the petitioner turned 18 years old provided for derivative citizenship for a child "residing in the United States pursuant to a lawful admission for permanent residence" at the time of the parent's naturalization, or where such child "thereafter begins to reside permanently in the United States while under the age of eighteen years." Although living in the United States, the petitioner never obtained lawful permanent resident status. The petitioner argued that he "thereafter began to reside permanently" following his mother's naturalization, which occurred 3 days prior to the petitioner's 18th birthday. The petitioner challenged the Board's interpretation of the term "begins to reside permanently" to mean obtaining the status of lawful permanent resident. However, the First Circuit did not decide the issue, finding that regardless of the correct interpretation of this phrase the petitioner had not met the statute's "thereafter begins" requirement, since he neither "experienced any relevant change in status or took any relevant action" in the 3-day period between his mother's naturalization and his 18th birthday.

Fourth Circuit:

Munyakazi v. Lynch, No. 15-1735, 2016 WL 3670075 (4th Cir. July 11, 2016): The Fourth Circuit dismissed the petition for review from the denial of asylum from Rwanda. The Board upheld the Immigration Judge's conclusion that the petitioner was subject to the "persecutor bar" contained in section 208(b)(2)(A) of the Act, 8 U.S.C. § 1158(b)(2)(A), based on the finding that he had participated in the 1994 genocide against ethnic Tutsis in Rwanda. The court first concluded that the record contained sufficient evidence to "raise the

inference" that the persecutor bar applied, thus shifting the burden to the petitioner to establish by a preponderance of the evidence that it did not apply. The court upheld the determination that the petitioner was not credible in disavowing any participation in the genocide. In contrast to the petitioner's testimony, the Government presented testimony and investigative reports from DHS investigators who traveled to Rwanda to investigate the petitioner's case. The court found the evidence sufficiently reliable in light of: (1) the Government's performing its own investigation rather than relying on the assertions of the Rwandan government; (2) the efforts by DHS to keep the Rwandan government at arm's length and to lessen its ability to influence witnesses; and (3) the Immigration Judge's decision to weigh the statements of individuals interviewed in Rwanda based on their incentive to provide truthful statements. The court also found that the Immigration Judge properly doubted the claim by the petitioner (who was a college professor at the time) that he had remained at home and was unaware of the murder of nearly every Tutsi in his small village. Addressing the CAT claim, the Fourth Circuit upheld the Immigration Judge's reasoning that although conditions in Rwandan military facilities may rise to the level of torture, the conditions in civilian detention facilities do not amount to torture. Evidence in the record demonstrated that individuals accused of participating in the genocide, like the petitioner, were placed in civilian detention. Thus, the court upheld the finding that it was not likely that the petitioner would be tortured because, if he were detained, he would likely be detained in a civilian facility.

Fifth Circuit:

Gomez-Perez v. Lynch, No. 14-60808; 2016 WL 3709757 (5th Cir. July 11, 2016): The Fifth Circuit granted the petition for review of the Board's order finding the petitioner ineligible for cancellation of removal under section 240A(b) of the Act, 8 U.S.C. § 1229b(b). The Fifth Circuit noted that an assault under Tex. Penal Code Ann. § 22.01(a)(1) can be committed by mere reckless conduct and thus does not categorically qualify as a crime involving moral turpitude, which requires a more culpable mental state. The petitioner was charged with misdemeanor assault under § 22.01(a)(1), which states that "[a] person commits an offense if the person intentionally, knowingly, or recklessly causes bodily injury to another [person]." It was not disputed that the Texas statute is overly broad because it covers both intentional and unintentional acts, and both the Immigration Judge and the Board found the statute to be divisible. However, the Fifth Circuit concluded that the Texas statute is not divisible because "intentional, knowing, and reckless" were simply equivalent means of satisfying the intent element and that jury agreement on the culpable mens rea was not required. Thus, the Fifth Circuit concluded that a statute like Texas's assault offense that merely offers alternative means of committing an offense does not allow the application of the modified categorical approach. The Fifth Circuit applied the Supreme Court's decision in *Mathis v. United States* to clarify that courts must only consider the elements of a crime that would have to be found by a jury—as opposed to alternate factual means by which a crime could be committed—to determine whether a prior conviction meets a federal statute's classification of prior offenses.

Ninth Circuit:

Lkhagvasuren v. Lynch, No. 13-71778, 2016 WL 3745524 (9th Cir. July 13, 2016): The Ninth Circuit dismissed the petition for review of the Board's denial of an asylum application. The petitioner alleged that he suffered persecution at the hands of agents of an alcoholic-beverage company that the Mongolian government was unable or unwilling to control. The petitioner asserted that such persecution was on account of a political opinion, in the form of his "whistleblowing" actions aimed at exposing the company's corrupt business practices. The Ninth Circuit adopted the three-pronged test from the Board's precedent decision in *Matter of N-M-*, 25 I&N Dec. 526 (BIA 2011), to determine whether retaliation for whistleblowing should be deemed persecution on account of a political opinion for asylum purposes. The Ninth Circuit found that substantial evidence supported the Board's conclusion that the petitioner did not present sufficient evidence to establish that the alleged persecutors "were motivated by [the petitioner's] anticorruption beliefs or that the corruption was even connected to government actors." The Ninth Circuit concluded that the petitioner did not establish that his whistleblowing activities constituted a political opinion "or that he was persecuted by or at the acquiescence of government officials."

BIA PRECEDENT DECISIONS

In *Matter of M-J-K-*, 26 I&N Dec. 773 (BIA 2016), the Board held that an Immigration Judge has the discretion to select and implement safeguards for proceedings involving an alien whose competency is at issue and that the adequacy of those safeguards will be reviewed de novo.

When the respondent exhibited indicia of incompetence, the Immigration Judge ordered a psychiatric evaluation and changed the venue of the proceedings to a mental health docket. After the respondent refused to attend several hearings, the Immigration Judge concluded that he did not appear competent despite the safeguards instituted and that those safeguards were insufficient to ensure fairness in the proceedings. The Immigration Judge further concluded that representation by counsel and administrative closure would not be sufficient because the evidence indicated that the respondent would not cooperate with counsel, and that administrative closure was not appropriate absent evidence concerning the restoration of competency. The Immigration Judge terminated proceedings without prejudice.

The Board found it appropriate to remand for consideration of additional safeguards. While questions of competency involve fact-finding, the Board concluded that the ultimate discretionary determination as to which safeguards to employ involves discretion, which is reviewed de novo. When an Immigration Judge deems an alien to be incompetent, the inquiry proceeds to an analysis of whether sufficient relevant evidence can be obtained, through means other than the respondent's testimony, to allow meaningful challenges to removability and claims for relief to be presented. While the Immigration Judge in this case had a psychiatrist's report opining that appointment of counsel would be ineffective as a safeguard, the Board concluded that the Immigration Judge should have explored other means of advancing proceedings. The Board observed that counsel was available to the respondent in the form of a Qualified Representative who might be able to interact with the respondent; to communicate with family, caregivers, or witnesses; to present legal arguments regarding the respondent's removability and opportunities for relief; and to provide evidence such as background reports or country conditions. The Board determined that remand was appropriate so that the Immigration Judge could consider implementing additional safeguards. It also suggested that the Immigration Judge reconsider whether administrative closure could be appropriate while other safeguards are explored.

In *Matter of Gomez-Beltran*, 26 I&N Dec. 765 (BIA 2016), the Board determined that an alien cannot establish good moral character as defined in section 101(f)(6) of the Act, 8 U.S.C. § 1101(f)(6), if he or she gives false sworn testimony before an Immigration Judge with the intent to obtain an immigration benefit during the time frame for which good moral character is required.

During his removal hearing, the respondent denied under oath having sustained a series of criminal convictions until he was reminded by his attorney and confronted by the Department of Homeland Security ("DHS") with the details of the convictions. Noting that "testimony" in section 101(f)(6) of the Act is limited to oral statements made under oath, the Board agreed with the Immigration Judge that the respondent's failure to truthfully disclose his criminal record until confronted by the DHS constituted false testimony. Further, the Board determined that the respondent had not voluntarily and timely recanted his false testimony. The Board reasoned that the respondent's explanation that he "did not know" why he did not disclose his criminal history created a strong inference of a subjective intent to mislead the Immigration Judge in considering his statutory and discretionary eligibility for cancellation of removal.

Instructing that a case-by-case assessment is required to determine whether the evidence is sufficient to establish that an alien gave false testimony as contemplated by section 101(f)(6) of the Act, the Board agreed with the Immigration Judge that the respondent actively sought to mislead the court and thus was precluded from establishing good moral character. The Board concluded that the respondent was statutorily ineligible for cancellation of removal and for voluntary departure and that he did not merit such relief in the exercise of discretion.

Tier III Terrorist Organizations:
continued

Common Traits of Tier III Terrorist Organizations

While there is little case law to guide adjudicators in determining whether a group fits the Tier III criteria, groups found to be Tier III organizations have in general participated in political violence. For example, they have articulated a goal or mission of violent overthrow of the government, have been armed militias opposing a government, or have been actively involved in bombings, attacks, assassinations, and kidnappings for that purpose. *See, e.g.*, *Bojnoordi*, 757 F.3d at 1077–78 (affirming that the MEK was a Tier III terrorist organization where it staged terrorist attacks inside Iran killing U.S. military

personnel and civilians working on defense projects); *Viegas*, 699 F.3d at 801–02 (affirming that the FLEC was a Tier III terrorist organization where its "factions engaged in violence against the Angolan government and civilians and destroyed government property"); *Haile*, 658 F.3d at 1127–28 (affirming that the Eritrean Liberation Front was a Tier III terrorist organization where the record included evidence of kidnappings, hijackings of aircraft, shootings, and car bombings in the group's efforts to overthrow the government); *Khan v. Holder*, 584 F.3d 773, 785 (9th Cir. 2009) (affirming that the JKLF was a Tier III terrorist organization where it conducted attacks against the Indian military, including killings, bombings, and attacks on convoys, as well as the kidnapping of the daughter of the Indian Home Minister); *Hussain*, 518 F.3d at 538–39 (affirming that MQM-H was a Tier III terrorist organization where it primarily targeted a rival political group, as well as ethnic militant groups and government forces); *Daneshvar*, 355 F.3d at 619–20, 627 (affirming that the MEK was a Tier III terrorist organization where it used violence to promote its aims); *Matter of S-K-*, 23 I&N Dec. at 941–42 (affirming that the CNF was a Tier III terrorist organization where it used firearms and explosives in fighting the military). However, terroristic acts under the Act are not necessarily political in scope. *See Hussain*, 518 F.3d at 538 ("So it is irrelevant that MQM-H seems not to have a political agenda, but rather to be engaged in a kind of jurisdictional dispute with MQM-A over which group shall represent Pakistan's Mohajirs.").

There is some debate whether authorization by a group's leadership to "engage in terrorist activity" is necessary to make a Tier III determination. The Seventh Circuit has noted an ambiguity in the meaning of "engages in" in section 212(a)(3)(B)(vi)(III):

> [A]n ambiguity may seem to lurk in the definition of a terrorist organization as an organization that "engages in" a specified activity. What if an organization contained people who resorted to violence without the organization's sanction; would the organization be "engaged in" that violence? That is a question about authorization. If an activity is not authorized, ratified, or otherwise approved or condoned by the organization, then the organization is not the actor.

Id. (citing *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 930–32 (1982)). Thus, an "organization is not a terrorist organization just because one of its members commits an act of armed violence without direct or indirect authorization, even if his objective was to advance the organization's goals." *Id.* However, in *Hussain*, the Seventh Circuit found that although its party leadership did not expressly authorize members' armed violence, the organization's failure to criticize or stop the violence led to an "inescapable" inference that it authorized the violence. *Id.* at 539; *cf. Khan*, 766 F.3d at 699 ("An entire organization does not automatically become a terrorist organization just because some members of the group commit terrorist acts."). In contrast, the Fourth Circuit dismissed a plaintiff's argument that the FLEC should not be considered a Tier III terrorist organization because it was composed of many factions when the record indicated that many of the factions engaged in violence and Angolans "rarely distinguished between FLEC factions." *Viegas*, 699 F.3d at 802; *see also Mugomoke v. Hazuda*, No. 13–cv–00984–KJM–KJN, 2014 WL 4472743, at *11 (E.D. Cal. Sept. 11, 2014) (dismissing a plaintiff's argument that alleged violent activity committed by some members of the Rwandan Patriotic Front and Rwandan Patriotic Army should not be attributed to those organizations as a whole).

III. Challenges to Tier III Determinations

The Act does not provide an exception for armed resistance as found under international law. Thus, there is no exception for freedom fighters, liberation movements, or armed resistance groups and guerillas. As the circuit courts and the Board have reasoned, Congress included exceptions elsewhere in the Act for serious nonpolitical offenses and for aliens who persecuted others, but it did not provide an exception in section 212(a)(3)(B) of the Act for justifiable force, indicating that the omission was intentional. *See, e.g.*, *Khan*, 584 F.3d at 785–86; *Matter of S-K-*, 23 I&N Dec. at 941. A forthcoming article in the *Immigration Law Advisor* will further explore the freedom fighter defense and, concomitantly, how the executive branch and Congress have implemented group-based exceptions to the terrorism bar based on this country's national-security and foreign-policy interests.

Constitutional challenges to the Tier III statutory authority have also failed. Courts have not found the provisions to be unconstitutionally vague or overly broad. *Khan*, 584 F.3d at 786 (finding that while the definition

of "terrorist activity" is broad, it is not unconstitutionally vague); *Hussain*, 518 F.3d at 537 (finding that while the definitions of a Tier III terrorist organization and "terrorist activity" are broad, they are not unconstitutionally vague); *McAllister*, 444 F.3d at 186–87 (finding that the definition of "terrorist activity" is neither unconstitutionally overbroad nor vague).

However, challenges on collateral estoppel grounds have had some success. When an alien seeks an immigration benefit, there may be an assessment of whether the alien was at some time associated with a group meeting the criteria of a Tier III terrorist organization. Thus, for example, an asylee who applies for adjustment of status or a lawful permanent resident who seeks to naturalize may have his or her application held in abeyance because it is determined that he or she was affiliated with a Tier III terrorist organization in some capacity.[13] *See* sections 208, 209, and 318 of the Act. This new review of an alien's file has raised collateral estoppel claims.

Generally, the Supreme Court has affirmed that issue preclusion applies in an administrative setting. "When an administrative agency is acting in a judicial capacity and resolved disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose." *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 422 (1966). The Fifth and Ninth Circuits have found that the doctrine of collateral estoppel applies to adjudications under the Act. *Amrollah v. Napolitano*, 710 F.3d 568, 571 (5th Cir. 2013) ("A final decision by an immigration judge has a preclusive effect on future litigation and agency decisions."); *Belayneh v. INS*, 213 F.3d 488, 492 (9th Cir. 2000) (holding that "[i]ssue preclusion applies to immigration proceedings.").

The Fifth Circuit has found that USCIS could not make an independent Tier III determination for an asylee seeking adjustment of status because the issue was actually litigated at the asylum stage. *Amrollah*, 710 F.3d at 571–73. More specifically, the Fifth Circuit found in *Amrollah* that USCIS was collaterally estopped from concluding that an alien had provided support to a terrorist organization because the Immigration Judge's prior ruling that the alien was admissible when he was granted asylum necessarily included a finding that the alien did not provide support to an individual or organization that engaged in terrorist activities. *Id.* District courts in California have similarly found that USCIS was estopped from denying adjustment of status to asylees based on its Tier III findings. *Khan v. Johnson*, No. 2:14-CV-06288-CAS(CWx), 2016 WL 429672, at *8, 12–16 (C.D. Cal. Feb. 1, 2016) (finding that "neither the plain language of sections 1158 and 1159, nor the statutory framework of [the Act], indicates a congressional intent to bar the application of collateral estoppel" where the person's involvement in terrorist activity was actually litigated and decided by an Immigration Judge before he filed an application for adjustment of status with USCIS); *Aldarwich v. Hazuda*, No. SA CV 15-0755-DOC (RNBx), 2016 WL 1089173, at *10, 16 (C.D. Cal. Mar. 18, 2016); *Islam v. U.S. Dep't of Homeland Sec.*, 136 F. Supp. 3d 1088, 1093–94 (N.D. Cal. 2015); *see also Sile v. Napolitano*, No. 09 C 5053, 2010 WL 1912645, at *4 (N.D. Ill. May 12, 2010) (finding that USCIS was collaterally estopped from classifying an asylee as ineligible for adjustment of status on the basis of resettlement).

However, in a case arising in the Eastern District of California, the district court found that the doctrine of collateral estoppel did not apply to USCIS's adjudication of adjustment of status applications. *Mugomoke*, 2014 WL 4472743, at *7–9. It concluded that applying the doctrine of collateral estoppel was inapt because "Congress reasonably intended an asylee who may eventually qualify for U.S. citizenship to be evaluated as to that person's eligibility twice, at separate and independent stages." *Id.* at *7. The court reasoned that "[t]o apply the doctrine and hold USCIS collaterally estopped from evaluating an asylee's eligibility at the time he seeks permanent residency would contravene the legislated process." *Id.* Notably, unlike *Amrollah* and the other California district court cases discussed, *Mugomoke* concerned a petitioner granted asylum through an affirmative application before an asylum officer, not a defensive application before an Immigration Judge. Therefore, the court found that even if the doctrine of collateral estoppel applied, the plaintiff failed to show that his asylum office interview was adjudicative and adversarial in nature and thus he did not satisfy the doctrine's requirements. *Id.* at *9.

Conclusion

A Tier III finding is a complex and intensively fact-specific inquiry into whether the actions under question constitute terrorist activities. The DHS bears the initial burden to establish that the group at issue is a Tier III terrorist organization. However, little case law exists to guide adjudicators in making this determination.

In general, groups engaged in political violence have been determined to be Tier III terrorist organizations. Nonetheless, the Tier III criteria covers a broad swath of activity that goes beyond the common understanding of terrorism and could be applied to any number of groups, so long as the group at issue is composed of "two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in" terrorist activity as defined under the Act.

The Tier III category appears to be functioning as intended. The circuit courts and the Board have upheld Tier III determinations, and Congress has acted to exclude groups from the Tier III umbrella, rather than amending the statutory language. The mere fact that the United States government has not designated a group as a terrorist organization is not necessarily evidence that the group is not involved in terrorist activity. In creating the Tier III category, Congress seemingly wanted to capture activity that does not render an organization an FTO or qualify it for the TEL list. While Immigration Judges may be wary of making Tier III determinations, the circuit courts and Congress have supported their authority to do so, even where there are foreign policy implications.

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1. This article grew out of a two-part workshop on Tier III terrorist organizations presented at the New York City Immigration Court in May and June 2015 with Attorney Advisors Robyn Brown and Alison Hollenbeck. The author would like to thank them for encouraging her to write this article and generously sharing their knowledge of the topic.

2. A list of FTOs is available at http://www.state.gov/j/ct/list/.

3. The TEL is available at http://www.state.gov/j/ct/rls/other/des/123086.htm.

4. However, a district court has suggested that USCIS might have a list of Tier III terrorist organizations. *See Ahmed v. Scharfen*, No. C 08-1680 MHP, 2009 WL 55939, at *7 (N.D. Cal. Jan. 7, 2009). On September 1, 2011, the Heartland Alliance National Immigrant Justice Center ("NIJC") submitted a Freedom of Information Act ("FOIA") request for the Tier III list mentioned in *Ahmed* and any other documents related to lists of Tier III terrorist organizations. Letter from Anthony T. Eliseuson, SNR Denton US LLP, to Department of Homeland Security (Sept. 1, 2011), *available at* http://immigrantjustice.org/sites/immigrantjustice.org/files/FOIA%20letter%20-%20September%201%202011.pdf. The FOIA request was denied. Letter from Timothy A. O'Connell, Attorney Advisor, United States Coast Guard, Department of Homeland Security, to Anthony T. Eliseuson, SNR Denton US LLP (May 30, 2012), *available at* https://archive.org/stream/535046-iln-1-2012cv09692-complaint-attachment-10#page/n1/mode/2up.

5. *Am. Acad. of Religion*, 573 F.3d at 117.

6. *Matter of S-K-*, 23 I&N Dec. at 941.

7. *Khan v. Holder*, 584 F.3d 773, 785 (9th Cir. 2009).

8. *Daneshvar*, 355 F.3d at 627; *see also Rajabi v. Att'y Gen.*, 553 F. App'x 251, 256 (3d Cir. 2014). The MEK was de-listed as a Tier I terrorist organization in 2012. *See Rajabi*, 553 F. App'x at 253, n.5.

9. Prior to the amendment of section 212(a)(3)(B) pursuant to the REAL ID Act, Pub. L. No. 109–13, 119 Stat. 231 (2005), an alien was deportable on terrorism-related grounds only if he had engaged or was currently engaged in terrorist activity. Section 237(a)(4)(B) of the Act. Membership in or association with a terrorist organization, the endorsement or espousal of terrorist activity, or being the spouse or child of an alien who was inadmissible to the United States on terror-related grounds were not grounds for removal, even where such grounds made an alien seeking to enter the United States inadmissible.

10. Patricia Allen, "Let's Talk 'TRIG': Litigation in the Federal Courts on the Terrorism-related Inadmissibility Grounds," *Immigration Law Advisor*, Vol. 7, No. 9 (Nov.–Dec. 2013); Lisa Yu, "Differentiating the Material Support and Persecutor Bars in Asylum Claims," *Immigration Law Advisor*, Vol. 3, No. 2 (Feb. 2009); Lisa Yu, "New Developments on the Terrorism-Related Inadmissibility Ground Exemptions," *Immigration Law Advisor*, Vol. 2, No. 12 (Dec. 2008); Linda Alberty, "Affording Material Support to a Terrorist Organization—A Look at the Discretionary Exemption to Inadmissibility for Aliens Caught Between a Rock and a Hard Place," *Immigration Law Advisor*, Vol. 2, No. 4 (Apr. 2008).

11. For further discussion regarding the alien's burden under TRIG, *see supra* note 10.

12. To engage in terrorist activity does not require that a person be acting as a member of a terrorist organization. *McAllister v. Att'y Gen.*, 444 F.3d 178, 187 (3d Cir. 2006) (affirming that a person "must be acting either individually or as a member of an organization – but not necessarily as a member of a terrorist organization.").

13. For further discussion of the collateral estoppel issue, *see* Allen, *supra* note 10.

Correction:

As noted on page 5, the previous edition of the *Immigration Law Advisor* contained an error in presenting the year-to-date reversal rates by circuit. The corrected chart below shows the combined numbers for January through May 2016 arranged by circuit from highest to lowest rate of reversal.

Circuit	Total	Affirmed	Reversed	% Reversed
Seventh	20	15	5	25.0
Ninth	490	417	73	14.9
Sixth	27	23	4	14.8
First	15	13	2	13.3
Tenth	16	14	2	12.5
Third	44	40	4	9.1
Second	178	168	10	5.6
Fourth	44	42	2	4.5
Fifth	69	66	3	4.3
Eleventh	29	28	1	3.4
Eighth	32	31	1	3.1
All	964	857	107	11.1

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