U.S. Citizenship and Immigration Services

Fact Sheet

Oct. 23, 2008

Department of Homeland Security Implements Exemption Authority for Certain Terrorist-Related Inadmissibility Grounds for Cases with Administratively Final Orders of Removal

Under section 212(d)(3)(B)(i) of the Immigration and Nationality Act (INA), the Secretary of Homeland Security may conclude in his sole unreviewable discretion to not apply certain of the terrorist-related grounds of inadmissibility at section 212(a)(3)(B) of the INA. As of Sept. 8, 2008, the Department of Homeland Security (DHS) began implementation of the Secretary's exercise of his exemption authority for certain terrorist-related inadmissibility grounds under section 212(d)(3)(B)(i) of the INA for cases issued administratively final orders of removal by the Department of Justice (DOJ), Executive Office for Immigration Review (EOIR).

The implementation currently covers detained cases with an administratively final order of removal and non-detained cases with an administratively final order of removal that was issued on or after Sept. 8, 2008.

DHS will consider a case for an exemption only after an order of removal is administratively final. An order of removal is generally considered an administratively final order when either a decision by the Board of Immigration Appeals (BIA) affirms an order of removal or the period in which the individual is permitted to seek review of such order by the BIA has expired, whichever date is earlier. By adjudicating the exemption at this stage, all parties will have a chance to litigate the merits of the case up through the BIA, and DHS will be able to focus its resources on cases where the possible exemption is the only issue remaining in the individual's case. The 212(d)(3)(B)(i) exemption will be considered even if the individual files a Petition For Review with a Federal Circuit Court of Appeals.

For individuals who are **not** in U.S. Immigration and Customs Enforcement (ICE) custody (non-detained) and for whom their administratively final order of removal was issued on or after Sept. 8, 2008, the ICE Office of the Chief Counsel handling the case will forward the case to U.S. Citizenship and Immigration Services (USCIS) for exemption consideration if relief or protection was denied **solely** on the basis of one of the grounds of inadmissibility for which exemption authority has been exercised by the Secretary. These individuals and their last attorneys of record will receive in the mail a *Notice of Referral* indicating that their case has been referred to USCIS for consideration of an available exemption to the terrorist-related inadmissibility provisions of the INA. An individual who receives such a notice does not need to take additional steps or contact ICE to initiate the process. However, it is imperative that the individual keep his/her address up to date with USCIS by filing the Form AR-11, *Change of Address*. Also, individuals are reminded that they must continue to comply with ongoing security check requirements. Thus, they may receive notices to update their fingerprints and biometrics during this process at their address on record with USCIS.

If an eligible individual is in ICE custody (detained) upon the issuance of an administratively final order of removal, the ICE Office of the Chief Counsel handling the case will serve the *Notice of Referral* on the individual in coordination with the ICE Office of Detention and Removal Operations (DRO). The individual will also be provided with a Form I-246, *Application for Stay of Deportation or Removal*. The *Notice of Referral* will explain to detained individuals that they must file the attached Form I-246 if they wish to have USCIS consider their eligibility for the 212(d)(3)(B)(i) exemption. In order to be considered for an exemption, the individual who is otherwise eligible for consideration must file the stay of removal request with DRO within seven (7) days of service of the letter. If that individual requests a stay of removal, his or her case will be forwarded to USCIS for consideration of the exemption authority.

USCIS will give priority to certain cases, including those where individuals are detained. The USCIS determination on the exemption is final and within the sole discretion of the Secretary of Homeland Security. Individuals cannot appeal the decision to EOIR. USCIS will directly notify the individual and the appropriate ICE Office of the Chief Counsel of its determination. If USCIS finds that the case merits an exemption, the ICE Office of the Chief Counsel will then forward to the individual a request to join in a *Joint Motion to Reopen* before EOIR. This request will include a template of the *Joint Motion to Reopen*. The individual or, if represented, his/her counsel should sign the motion and return it to the ICE Office of the Chief Counsel. The appropriate Form EOIR-33 (IC or BIA) (Change of Address) with the individual's address information should be forwarded with the motion. If the individual is represented, a Form EOIR-28 (Entry of Appearance – Immigration Court) or Form EOIR-27 (Entry of Appearance – BIA) should be forwarded as well. Upon receipt, ICE will file the *Joint Motion to Reopen* with EOIR, attaching USCIS' grant of the exemption. For *pro se* individuals, if ICE has not received anything from the individual after two weeks, ICE will file an independent Motion to Reopen with a Summary of the Alien's Claim.

Information regarding the implementation of the exemption authority for cases of individuals who are not detained and received an administratively final order of removal before Sept. 8, 2008, will be forthcoming.