



PRACTICE ADVISORY

Challenging a “Tier III” Terrorism Determination in Removal Proceedings

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Practice Advisory¹

I. Overview

Under the Immigration and Nationality Act (INA), any group of two or more individuals who engage in a so-called “terrorist activity,” a term that is defined broadly by the statute, is a Tier III terrorist organization.² Noncitizens who knowingly provide material support to or are members of a Tier III terrorist organization are inadmissible,³ deportable,⁴ ineligible for asylum or withholding of removal,⁵ and subject to mandatory detention.⁶

The Department of Homeland Security’s (DHS) practices with respect to Tier III terrorist organizations are inconsistent, lacking in transparency, and harmful to noncitizens seeking immigration relief. This practice advisory will address three potential ways respondents can challenge Tier III determinations in removal proceedings:⁷

- Narrowly framing the scope of 8 U.S.C. § 1182(a)(3)(B);
- Arguing that DHS did not meet its threshold burden under 8 C.F.R. §§ 1240.8, 1208.16; and
- Arguing that a group is not a Tier III organization absent evidence that its leadership authorized terrorist activity.

¹ This practice advisory was written by Khaled Alrabe with guidance and review from Sejal Zota and Dan Kesselbrenner. Questions about this advisory can be directed to Khaled Alrabe at khaled@nipnl.org.

² 8 U.S.C. § 1182(a)(3)(B)(vi)(III).

³ 8 U.S.C. § 1182(a)(3)(B)(i).

⁴ 8 U.S.C. § 1227 (a)(4)(B).

⁵ 8 U.S.C. §§ 1158(b)(2)(A)(v), 1231(b)(3)(B).

⁶ 8 U.S.C. § 1226(c)(1)(D).

⁷ More general arguments related to the material support bar or other issues connected to the terrorism related inadmissibility grounds (TRIG) are beyond the scope of this advisory.

The advisory is particularly relevant for noncitizen respondents who have supported or belong to political organizations in countries with loosely defined political parties where elections and political rallies can turn violent. The advisory also includes sixteen unpublished Board of Immigration Appeals (BIA) decisions on Tier III determinations that may be useful to respondents as discussed below.

II. Tier III Terrorist Organizations

The INA defines three types of terrorist organizations commonly referred to as Tier I, Tier II, and Tier III.⁸ Tier I and II organizations are designated as such by the Secretary of State and are listed in the Federal Register.⁹ Tier III organizations are “undesigned,” meaning they are determined on a case-by-case basis by fact-finders, such as immigration judges in removal proceedings, and are not listed in any published list.¹⁰

A Tier III terrorist organization is defined as any “group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in” a terrorist activity.¹¹ The INA explicitly defines both the terms “engage in a terrorist activity” and “terrorist activity.”¹² Thus, to qualify as a Tier III terrorist organization, the groups’ actions must fall under the enumerated activities defined by the term “engages in terrorist activity” in 8 U.S.C. § 1182(a)(3)(B)(iv). These activities include planning, soliciting funds for, or committing a terrorist activity.¹³ The term “terrorist activity” includes activities generally associated with terrorism such as hijacking, kidnapping, and assassination.¹⁴ However, “terrorist activity” also includes the use of a weapon “with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.”¹⁵

At a minimum, therefore, engaging in a terrorist activity includes merely planning to use a weapon to cause substantial damage to property. DHS have argued that political parties are terrorist organizations where some members are involved in protests that turn violent. As one member of the Board of Immigration Appeals (BIA) put it, “[t]he statutory language is breathtaking in its scope. Any group that has used a weapon for any purpose

⁸ 8 U.S.C. § 1182(a)(3)(b)(vi)(I),(II),(III).

⁹ 8 U.S.C. §§ 1182(a)(3)(b)(vi)(II), 1189.

¹⁰ 8 U.S.C. § 1182(a)(3)(b)(vi)(III).

¹¹ 8 U.S.C. § 1182(a)(3)(b)(vi)(III).

¹² 8 U.S.C. §§ 1182(a)(3)(B)(iii), 1182(a)(3)(B)(iv).

¹³ 8 U.S.C. § 1182(a)(3)(B)(iv).

¹⁴ 8 U.S.C. § 1182(a)(3)(B)(iii)(V)(b).

¹⁵ 8 U.S.C. § 1182(a)(3)(B)(iii)(V)(b). This provision excludes activities that were performed for mere personal monetary gain.

other than for personal monetary gain can, under this statute, be labeled a terrorist organization.”¹⁶

Tier III terrorist organizations have included the Movement for Democratic Change, the main opposition party to Robert Mugabe of Zimbabwe;¹⁷ the Free Syrian Army, a western-backed armed group opposing the Syrian government and ISIL;¹⁸ the Bangladesh Nationalist Party, the second largest political party in the one of the world’s largest democracies;¹⁹ and Nelson Mandela’s anti-apartheid African National Congress.²⁰

III. Burden of Proof

In removal proceedings, DHS bears the burden to prove deportability.²¹ There is a different burden when a noncitizen seeks relief from removal.²² In the relief context, the regulations create a shifting burden to determine whether a bar to relief applies.²³ That regulation states:

“[i]f 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.”²⁴

The Board has interpreted these regulations as burden shifting rules. In *Matter of S-K-*, the Board found that a respondent bears the burden of proof with respect to whether an organization is a terrorist organization because “the Department of Homeland Security (“DHS”) satisfied its burden of establishing that the evidence ‘indicated’ that an asylum

¹⁶ *Matter of S-K-*, 23 I&N Dec. 936, 948 (BIA 2006) (Osuna, concurring).

¹⁷ See Human Rights First, *Denial and Delay: The Impact of the Immigration Law’s ‘Terrorism Bars’ on Asylum Seekers and Refugees in the United States*, 4-5 (2009).

¹⁸ Suzanne Nossel, *The Gross Misconduct of Radwan Ziadeh’s Asylum Denial*, Foreign Policy (July 25, 2017).

¹⁹ *Uddin v. Att’y Gen. of U.S.*, 870 F.3d 282 (3d Cir. 2017).

²⁰ See Human Rights First, *Denial and Delay*, 4-5. In 2007, Congress amended the INA to permit DHS to waive the application of Tier III designations to groups in some circumstances and also created congressional exemptions for specific groups such as the African National Congress. See Consolidated Appropriations Act of 2008, Pub. L. No. 110-161, § 691(a), 121 Stat. 1844, 2364 (2007) (codified as 8 U.S.C. 1182(d)(3)(B)) and Pub. L. No. 110-257, 122 Stat. 2426 (2008). As of September 2018, DHS is exercising this discretion with respect to eleven groups. A list of these groups can be found at the USCIS webpage on Terrorism-Related Inadmissibility Grounds (TRIG) - Group-Based Exemptions, available at <https://www.uscis.gov/unassigned/terrorism-related-inadmissibility-grounds-trig-group-based-exemptions>.

²¹ 8 U.S.C. § 1229a(c)(3)(A); 8 C.F.R. § 1240.8(a).

²² 8 U.S.C. § 1229a(c)(4)(A).

²³ 8 C.F.R. § 1240.8.

²⁴ 8 C.F.R. § 1240.8.

bar applied, and under the regulation the burden of proof has shifted to the respondent to show by a preponderance of the evidence that the bar is inapplicable.”²⁵

Similarly, in the withholding of removal context, only after the evidence indicates “the applicability” of a ground for denial of withholding of removal will the burden shift to the applicant to prove otherwise by a preponderance of the evidence.²⁶

III. Challenging “Tier III” Determinations

The scope of the terrorism-related language in the INA makes challenging Tier III determinations difficult. Challenges based on the nature of a group as a freedom fighting organization or an armed resistance organization have not been successful.²⁷ Challenges arguing that the definition of terrorist activity under the statute is unconstitutionally vague have also failed.²⁸ This advisory suggests three ways respondents could challenge Tier III determinations.

A. Narrowly Framing the Scope of the Statute

While the definition of a Tier III terrorist organization is extremely broad, general assertions about violent activities by a group are not enough to label it a Tier III organization. A close reading of 8 U.S.C. § 1182(a)(3)(B)(iv) (defining “engaging in terrorist activity”) and 8 U.S.C. § 1182(a)(3)(B)(iii) (defining “terrorist activity”) reveals a labyrinthine structure that requires a thorough analysis when determining whether a group is a Tier III terrorist organization. Respondents should demand that immigration judges adhere to the specific requirements of the statute when determining whether a group is a Tier III organization.

²⁵ *Matter of S-K-*, 23 I&N Dec. 936, 939 (BIA 2006). *See also Budiono v. Lynch*, 837 F.3d 1042, 1048 (9th Cir. 2016) (“[I]t is clear from the text of the regulations that the record must contain at least some evidence that the bar applies before the applicant must prove otherwise.”); *Vasquez-Orellana v. Holder*, 338 F. App’x 536, 540-41 (7th Cir. 2009); *De Almeida Viegas v. Holder*, 699 F.3d 798, 801 (4th Cir. 2012) (“Viegas correctly points out that Homeland Security had to present evidence indicating that the membership bar or the material support bar applied. If Homeland Security met this evidentiary burden, however, the burden properly shifted to Viegas to prove that the INA’s bars did not apply to him.”).

²⁶ 8 C.F.R. § 1208.16.

²⁷ *See, e.g., McAllister v. Att’y Gen. of U.S.*, 444 F.3d 178 (3d Cir. 2006); *Khan v. Holder*, 584 F.3d 773, 787 (9th Cir. 2009). For a detailed overview of case law on these arguments *see* Citrin, Chaya M., *One Person’s Freedom Fighter, Duress, and the Terrorism Bar*, 10 Immigr. L. Advisor 7 (2016), available at <https://www.justice.gov/eoir/page/file/906856/download>.

²⁸ *See, e.g., Khan v. Holder*, 584 F.3d 773, 786 (9th Cir. 2009); *McAllister v. Att’y Gen. of U.S.*, 444 F.3d 178, 186 (3d Cir. 2006); *Hussain v. Mukasey*, 518 F.3d 534, 537 (7th Cir. 2008).

A group is a Tier III organization only if it “engages in a terrorist activity.”²⁹ As explained above, the statute defines “terrorist activity” and “engage in terrorist activity” separately. To “engage in a terrorist activity” is defined in § 1182(a)(3)(B)(iv) as:

- “(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...[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...[for the commission of a terrorist activity, to a terrorist, or to a terrorist organization].”

A “terrorist activity” is defined in § 1182(a)(3)(B)(iii) as any activity which is unlawful under the laws of the place where it is committed and which involves any of the following: (1) hijacking; (2) hostage taking; (3) violent attacks on heads of state and other representatives of governments and international organizations; (4) assassination; (5) the use of certain weapons such as biological weapons or nuclear weapons; (6) the use of a 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”; and (7) a threat, attempt or conspiracy to commit any of the above.³⁰

Read together, a group can primarily be said to “engage in a terrorist activity” in one of two ways. First, the group must have been “engage[d]” in a “terrorist activity”, i.e. it must have been involved in a specific “terrorist activity” as defined in §1182(a)(3)(B)(iii) in the particular ways enumerated in §1182(a)(3)(B)(iv). The group must have planned or prepared, committed under particular circumstances, gathered information for, solicited funds for, solicited any individual to engage in, or provided material support for the commission of a particular “terrorist activity” (hijacking, assassination, etc.).³¹ Second, a group could also “engage in a terrorist activity” if it solicits funds for, recruits for, or knowingly provides material support to another group that is a terrorist organization.³²

²⁹ 8 U.S.C. § 1182(a)(3)(B)(vi).

³⁰ 8 U.S.C. § 1182(a)(3)(B)(iii).

³¹ 8 U.S.C. § 1182(a)(3)(B)(iv)(I-VI).

³² 8 U.S.C. §§ 1182(a)(3)(B)(iv)(IV)(bb),(cc), 1182(a)(3)(B)(iv)(V)(bb),(cc), 1182(a)(3)(B)(iv)(VI)(cc),(dd). A group could also engage in a terrorist organization in one other way not specifically covered by this paragraph. Under § 1182(a)(3)(B)(iv)(VI)(bb), a group engages in a terrorist

Using this framework, respondents could challenge a Tier III determination in a number of ways. Respondents could argue that the activity that the group “engages” in is not a “terrorist activity” as defined in § 1182(a)(3)(B)(iii). For example, suppose a group “engaged”, through “commit[ting] under circumstances indicating an intention to cause death or serious bodily injury,”³³ in a violent attack “with intent to endanger, directly or indirectly, the safety of one or more individuals.”³⁴ While the definition of “engaged” is satisfied, the definition of “terrorist activity” is not. A terrorist activity under 8 U.S.C. § 1182(a)(3)(B)(iii)(V)(b) requires “the use of any...*weapon or dangerous device*...with intent to endanger, directly or indirectly, the safety of one or more individuals[.]”³⁵ For this group to have “engage[d] in a terrorist activity,” the immigration judge also must find that the attack involved a weapon or dangerous device.

Conversely, even where a group is involved in a “terrorist activity” as described in § 1182(a)(3)(B)(iii), respondents could challenge whether the group “engages” in that activity under § 1182(a)(3)(B)(iv). For example, a group’s commission of the “terrorist activity” of using a weapon with the intent to cause substantial damage to property as defined in § 1182(a)(3)(B)(iii)(V)(b) does not necessarily mean that the group “engages in terrorist activity.” An immigration judge must also find that the group was involved in the terrorist activity in ways described in § 1182(a)(3)(B)(iv) such as planning the attack or committing it “under circumstances indicating an intention to cause death or serious bodily injury.”

While such arguments may not ultimately succeed given the broad nature of the statute, it is imperative that advocates ensure that DHS and immigration judges do not merely gloss over this analysis. In some cases, DHS may simply not have the necessary evidence to show that a specific “terrorist activity” occurred or that a group was involved in that activity in a particular way. Respondents should not concede that a group is a Tier III organization absent clear evidence that the group specifically “engages” in a particular “terrorist activity” or that it solicited funds for, recruited for, or knowingly provided material support to a terrorist organization.

activity if it knowingly provides material support to “any individual [that the group] knows, or reasonably should know, has committed or plans to commit a terrorist activity.”

³³ 8 U.S.C. § 1182(a)(3)(B)(iv)(I).

³⁴ 8 U.S.C. § 1182(a)(3)(B)(iii)(V)(b).

³⁵ See, e.g., *Budiono v. Lynch*, 837 F.3d 1042 (9th Cir. 2016) (holding that DHS did not meet its threshold burden that a group is a Tier III terrorist organization because it did not show that weapons were used by the group during violent protests).

B. DHS Did Not Meet its Threshold Burden

In the relief context, respondents could also argue that absent particularized evidence that shows that a group has engaged in a terrorist activity, DHS has not met its initial burden that the “evidence indicates” that an organization is a Tier III terrorist organization under 8 C.F.R. §§ 1240.8, 1208.16.

While DHS has the initial burden, it is unclear how much evidence it must present to show that the “evidence indicates” that a group is a Tier III organization. Few Courts of Appeals’ decisions have addressed the question of whether a group is a Tier III organization under the INA.³⁶

In the Ninth Circuit, DHS cannot shift the burden to the respondent without “particularized evidence” that a group is a terrorist organization.³⁷ It is not enough for DHS to present “only generalized evidence suggesting that an organization was violent.”³⁸ In *Budiono v. Lynch*, the Ninth Circuit reversed the BIA’s finding that a respondent was ineligible for withholding of removal due to his membership in a group because DHS had not met its threshold burden that the group was in fact a Tier III terrorist organization.³⁹ Evidence that some members of the group had engaged in riots in which people were killed was not sufficient to shift the burden to the respondent because it did not indicate that group members used weapons in their actions as is required under the INA.⁴⁰

In contrast, the Fourth Circuit has found that evidence that a group had “engaged in violence against the Angolan government and civilians and destroyed government property” was sufficient to shift the burden to the respondent as to whether the group is a Tier III terrorist organization.⁴¹ Beyond the Ninth and Fourth, no other circuits have addressed DHS’s initial evidentiary burden with respect to whether a group is a Tier III terrorist organization.

In the context of other bars to relief, the BIA and Courts of Appeals have also required DHS to meet a non-trivial initial burden that a bar applies. With respect to the firm resettlement bar to asylum, for example, the BIA has held in *Matter of A-G-G-* that 8

³⁶ *Uddin v. Att’y Gen. of U.S.*, 870 F.3d 282, 285 (3d Cir. 2017) (“There is relatively little guidance from Courts of Appeals as to how to determine whether an organization is a Tier III terrorist group. But, from a procedural standpoint, departmental regulations set forth a burden-shifting structure for adjudicating such cases.”).

³⁷ *Budiono v. Lynch*, 837 F.3d 1042, 1048 (9th Cir. 2016).

³⁸ *Id.*

³⁹ *Id.* at 1054.

⁴⁰ *Id.* at 1050.

⁴¹ *De Almeida Viegas v. Holder*, 699 F.3d 798, 802 (4th Cir. 2012).

C.F.R. § 1240.8 requires that the government provide “prima facie evidence” indicating that a bar applies before the burden shifts to the respondent.⁴² As the Board explained in that case, “in order to make a prima facie showing that an offer of firm resettlement exists, the DHS should first secure and produce direct evidence of governmental documents indicating an alien’s ability to stay in a country indefinitely.”⁴³ Similarly, in the context of the persecutor bar, which is also governed by 8 C.F.R. § 1240.8, three circuits have held that the bar requires more than an inference and can only be triggered by evidence that a respondent actually engaged in persecution.⁴⁴

In 2017, the BIA adopted a less exacting interpretation of DHS’s threshold burden under 8 C.F.R. § 1240.8(d) in *Matter of M-B-C-*. The Board held that the burden shifts to a respondent under the regulation “where the record contains some evidence from which a reasonable factfinder could conclude that one or more grounds for mandatory denial of the application may apply.”⁴⁵ *Matter of M-B-C-*, however, neither explicitly overrules nor references *Matter of A-G-G-* despite its conflicting holding.⁴⁶

Most recently, in *Matter of Negusie*, the BIA again noted that the government must offer sufficient prima facie evidence before the burden shifts to the respondent in the context of 8 C.F.R. § 1240.8.⁴⁷

As highlighted above, the BIA’s cases interpreting 8 C.F.R. § 1240.8 lack consistency. The BIA should not apply regulations differently depending on whether the bar to relief

⁴² See *Matter of A-G-G-*, 25 I&N Dec. 486, 501 (BIA 2011). See also *Hanna v. Holder*, 740 F.3d 379 (6th Cir. 2014).

⁴³ *Matter of A-G-G-*, 25 I&N Dec. at 501.

⁴⁴ *Xu Sheng Gao v. Att’y Gen. of U.S.*, 500 F.3d 93, 101 (2d Cir. 2007)(finding that evidence that the Chinese government engaged in persecution “is insufficient on its own to trigger the persecutor bar without evidence indicating that [petitioner, who was previously a Chinese government employee,] *actually* assisted in an identified act of persecution”)(emphasis in original); *Singh v. Gonzales*, 417 F.3d 736, 740 (7th Cir. 2005) (“[S]imply being a member of a local Punjabi police department during the pertinent period of persecution is not enough to trigger the statutory prohibitions on asylum and withholding of removal...the record must reveal that the alien *actually* assisted or otherwise participated in the persecution of another.”) (emphasis in original); *Diaz-Zanatta v. Holder*, 558 F.3d 450, 455 (6th Cir. 2009).

⁴⁵ *Matter of M-B-C-*, 27 I&N Dec. 31, 37 (BIA 2017) (“We hold that where the record contains some evidence from which a reasonable factfinder could conclude that one or more grounds for mandatory denial of the application may apply, the alien bears the burden under 8 C.F.R. § 1240.8(d).”).

⁴⁶ Arguably, *Matter of M-B-C-* has no bearing on DHS’s threshold burden in the context of withholding of removal under 8 C.F.R. § 1208.16, which uses a different standard. Under 8 C.F.R. § 1240.8, the burden shifts to the respondent “[i]f the evidence indicates” that a bar to relief “*may* apply.” In the withholding context, however, the burden shifts “[i]f the evidence indicates the *applicability*” of a bar to withholding.⁴⁶ The decision in *Matter of M-B-C-* relied on the “*may* apply” language to determine DHS’s threshold burden under 8 C.F.R. § 1240.8.

⁴⁷ *Matter of Negusie*, 27 I&N Dec. 347, 366 (BIA 2018) (citing to *Matter of A-H-*, 23 I&N Dec. 774, 786 (A.G. 2005)).

involves an aggravated felony, Tier III ineligibility or firm resettlement.⁴⁸ Respondents should argue in the context of Tier III determinations that DHS has not met its threshold burden absent particularized evidence that a group engaged in terrorist activities.

C. Direct Authorization Requirement

Respondents should also consider arguing that a group cannot be a Tier III terrorist organization even if its members engaged in a “terrorist activity” without a finding that the leadership of the organization authorized such activities. A number of courts of appeals have endorsed this position as well as the BIA in multiple unpublished decisions.

Two circuits have understood the INA language defining Tier III terrorist organizations to mean that a few group members’ activities cannot implicate the entire group. The Seventh Circuit found that 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.”⁴⁹ Similarly, in *Uddin v. Att’y Gen. of U.S.*, the Third Circuit has held that “unless the agency finds that party leaders authorized terrorist activity committed by its members, an entity...cannot be deemed a Tier III terrorist organization.”⁵⁰ No other circuits have addressed this argument.

In *Uddin*, the Third Circuit rejected the BIA’s finding that the Bangladesh Nationalist Party (BNP) is a Tier III terrorist organization because the BIA failed to consider whether the organization’s leadership authorized its members to engage in “terrorist activities.” First, the court noted that Congress chose to define a Tier III organization as a “group...which engages in” terrorist activities rather than a group whose *members* engage in terrorist activities.⁵¹ Such language, the court found, suggests a requirement of “concerted actions” by a group and “a rule that there must be evidence of authorization.”⁵² Second, the court also relied on multiple unpublished BIA decisions which found that the BNP cannot be a Tier III terrorist organization without an

⁴⁸ Respondents could challenge the standard established by *Matter of M-B-C-* since the BIA departed from a prior rule without addressing the prima facie standard under *Matter of A-G-G-*. See *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (“An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books.”). See also *Rust v. Sullivan*, 500 U.S. 173 (1991).

⁴⁹ *Hussain v. Mukasey*, 518 F.3d 534, 538 (7th Cir. 2008). See also *Khan v. Holder*, 766 F.3d 689, 699 (7th Cir. 2014) (“An entire organization does not automatically become a terrorist organization just because some members of the group commit terrorist acts. The question is one of authorization.”).

⁵⁰ *Uddin v. Att’y Gen. of U.S.*, 870 F.3d 282, 284 (3d Cir. 2017).

⁵¹ *Id.* at 290.

⁵² *Id.*

immigration judge’s finding that the group’s leadership authorized terrorist activities.⁵³ Finally, the court found that leadership authorization is required by “common sense notions” because “[i]f a single member of the Democratic or Republican Party committed a terrorist act, we would not impute terrorist status to the entire group, absent some showing that party leadership authorized the act.”⁵⁴

Authorization of terrorist activities by leadership need not be explicit. In *Hussain v. Mukasey*, the Seventh Circuit held that a Pakistani political party is a Tier III terrorist organization absent explicit authorization by leadership because “an inference that [violence by members] was authorized is inescapable” where the party leadership did not criticize or make efforts to curb armed violence by its members.⁵⁵ The Third Circuit found that group leadership authorizes terrorist activities “may be reasonably inferred from among other things, the fact that most of an organization’s members commit terrorist activity or from a failure of a group’s leadership to condemn or curtail its members’ terrorist acts.”⁵⁶

Respondents should consider arguing that the Board itself has adopted the same view as the Third and Seventh Circuits in its own decisions. In at least sixteen unpublished cases the BIA has explicitly adopted the position that a group cannot be a Tier III terrorist organization under the statute without evidence that the group’s leadership authorized, ratified, or otherwise approved or condoned terrorist activity committed by its members.⁵⁷ Although unpublished decisions are non-binding, immigration judges and the Board cannot ignore or decline to follow them without providing any explanation.⁵⁸ All sixteen unpublished decisions are appended to this advisory.

IV. Conclusion

Where possible, we urge practitioners to challenge DHS Tier III terrorism determinations in removal proceedings. If you are representing a client facing a Tier III issue, please contact Khaled Alrabe at khaled@nipnlg.org.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Hussain*, 518 F.3d at 539 (7th Cir. 2008).

⁵⁶ *Uddin*, 870 F.3d at 292 (quoting unpublished BIA decision).

⁵⁷ See Appendix. Special thanks to Visuvanathan Rudrakumaran who provided these cases to NIPNLG. All the cases address the Bangladesh Nationalist Party (BNP)

⁵⁸ See *Perez-Vargas v. Gonzales*, 478 F.3d 191, 193 n.3 (4th Cir. 2007) (“[C]ourts typically look askance at an agency’s unexplained deviation from a prior decision, even when the prior decision is unpublished.”); *Davila-Bardales v. INS*, 27 F.3d 1, 5-6 (1st Cir. 1994) (“[W]e see no earthly reason why the mere fact of nonpublication should permit an agency to take a view of the law in one case that is flatly contrary to the view it set out in earlier (yet contemporary) cases, without explaining why it is doing so.”).