



Q&A: Potential Implications of the Presidential Memorandum on Inadmissibility of Persons Affiliated with Antifa Based on Organized Criminal Activity¹

On January 5, 2021, Donald Trump issued a presidential memorandum entitled *Presidential Memorandum on Inadmissibility of Persons Affiliated with Antifa Based on Organized Criminal Activity* (“Memo”). Given that the Trump administration is coming to a close and the fact that this Memo will have no legal effect absent further action by the Secretary of State, we do not expect the Memo to have any immediate effect on immigration law. Nevertheless, we created this short FAQ to clarify the potential implications were the Secretary of State to take action.

What does the Memo do?

The Memo directs the Secretary of State to consult with the Attorney General and the Secretary of Homeland Security to do two things: (1) assess whether *Antifa* may be classified as a “Tier II” terrorist organization under the INA and (2) consider listing *Antifa* as an Identified Criminal Organization in the Foreign Affairs Manual.

The Memo itself has no effect on the immigration laws of the United States. It is merely requesting that federal agencies consider taking steps that could have immigration consequences on individuals who are members of or who provided material support to groups that the government identifies as *Antifa*. The Memo appears to be a purely political document given its timing fifteen days before the end of the Trump presidency and the fact that it primarily consists of a litany of alleged activities conducted by *Antifa* during demonstrations for racial justice.

What would happen if the Secretary of State lists *Antifa* as a “Tier II” terrorist organization?

The Immigration and Nationality Act (INA) defines three types of terrorist organizations commonly referred to as Tier I, Tier II, and Tier III organizations. A Tier II terrorist organization is one that is designated “by the Secretary of State in consultation with or upon the request of the Attorney General or the Secretary of Homeland Security” after finding that the organization has engaged in terrorist activities. INA § 212(a)(3)(B)(vi).

The INA defines “terrorist activity” and “engages in terrorist activity” extremely broadly. To designate a group as a Tier II terrorist organization, at a minimum the Secretary needs to find

¹ This Q&A was written by Khaled Alrabe, staff attorney at the National Immigration Project of the National Lawyers Guild. Please reach out if you have questions at khaled@niplng.org.

that the organization “prepared or planned” a “terrorist activity,” which at a minimum includes the use of any firearm or other weapon with intent to cause substantial damage to property. *See* INA §§ 212(a)(3)(B)(iv)(II) and (a)(3)(B)(iii)(V)(b).

There are serious questions about whether the Secretary of State can list *Antifa* as a terrorist organization. While the INA defines “organization” broadly to include even “groups of persons...associated together with joint action on any subject or subjects,” there is considerable debate about the [nature of *Antifa* as a cohesive group](#). Moreover, as a practical matter, it would be difficult for the current Secretary of State to go through the consultation process and publish the designation in the Federal Register before the end of the Trump administration.

Still, if it were to happen there could be serious consequences to non-citizens. Individuals who knowingly provide material support to or are members of a terrorist organization are inadmissible, deportable, ineligible for asylum or withholding of removal, and subject to mandatory detention. For example, this could mean that foreign students who engaged in protests that the US government may consider to be *Antifa*-led may be deported or have their visas denied. If the administration proceeds with listing *Antifa* as a Tier II terrorist organization, NIPNLG will provide more detailed information to help students and other non-citizens avoid these bars.

What would happen if *Antifa* is listed as an Identified Criminal Organization in the Foreign Affairs Manual?

Under the INA, non-citizens are inadmissible if a consular officer or the Attorney General have “reasonable ground to believe” that they seek to enter the US to engage in “unlawful activity.” INA § 212(a)(3)(A)(ii). An individual may be denied a visa under this inadmissibility ground if they are “active members” of a criminal organization listed in the Foreign Affairs Manual (FAM) under 9 FAM 302.5-4(B)(2)(U). The Memo asks the Secretary of State to consider listing *Antifa* under that section of the FAM. If that were to happen, non-citizens could be denied visas if a consular office has a reason to believe that they are active members of *Antifa*. Again, if the Secretary of State pursue this action, NIPNLG will provide more details to support individuals who may be affected.