

RONALD E. LE FEVRE
Chief Counsel
PAUL K. NISHIIE
Deputy Chief Counsel
MARGARET R. CURRY
Senior Attorney
U.S. Department of Homeland Security
U.S. Immigration and Customs Enforcement
Office of the Chief Counsel
P.O. Box 26449
San Francisco, CA 94126-6449
Telephone: (415) 716-9866

UNITED STATES DEPARTMENT OF JUSTICE
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In the Matter of:

Tareq I.J. Abufayad

Respondent,

In removal proceedings

DETAINED

File No.: A 055 372 964

San Francisco, CA

**THE U.S. DEPARTMENT OF HOMELAND SECURITY'S
STATEMENT OF NEW LEGAL AUTHORITY
RELEVANT TO THE CROSS-APPEAL OF THIS MATTER**

The U.S. Department of Homeland Security, U.S. Immigration and Customs Enforcement (DHS) hereby submits its Statement of New Legal Authority, which relates to arguments set forth in its cross-appeal, filed with the Board of Immigration Appeals (BIA) on August 18, 2008. DHS submits its Statement of New Legal Authority pursuant to § 4.6(g)(1) of the BIA Practice Manual.

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DHS argued in its cross-appeal that the Immigration Judge (I.J.) correctly found there are reasonable grounds to believe that the respondent engaged in terrorist activity by providing material support to the Islamic Resistance Movement (also known as HAMAS), a designated terrorist organization, and that the respondent is likely after entry into the United States to engage in any terrorist activity. DHS cited to Yusupov v. Ashcroft, 518 F.3d 185, 200 (3rd Cir. 2008) as persuasive authority for the proposition that the “reasonable grounds for regarding” language of the statute is analogous to a reasonable person, probable cause standard. See DHS Brief at 36.

DHS specifically quoted Yusupov for the proposition that an alien is likely to engage in terrorist activity under section 212(a)(3)(B)(i)(II) of the Immigration and Nationality Act (Act), if “there is information that would permit a reasonable person to believe that the alien may pose a danger to the national security” of the United States and that the information relied upon to make such a determination need not meet admissibility standards of evidence in court proceedings and will be sufficient to satisfy reasonable grounds to believe if reliable and not “intrinsicly suspect.” Yusupov, 518 F.3d at 200.

Subsequent to DHS filing its cross-appeal, the U.S. Court of Appeals for the Ninth Circuit rendered its decision in Malkandi v. Mukasey, No. 06-73491, 2008 WL 4276912 (9th Cir. Sept. 19, 2008). The Malkandi court adopts Yusupov’s reasonable person, probable cause burden of proof for determining whether there are “reasonable grounds for regarding” an alien as “a danger to national security.” Id., at *7. Thus, the probable cause burden of proof, as argued by DHS in its appeal brief, is consistent with Malkandi. See DHS Brief at 36.

The Malkandi court further adopts Yusupov for the proposition that the alien must “‘actually’ pose a ‘serious danger’ to United States security.” Id., at *7. Thus, the evidence

must provide reasonable grounds to conclude that the alien is, rather than might be, a danger to the security of the United States. Id., at *7.

DHS argues on appeal that the I.J. correctly found that the respondent is a danger to the security of the United States because he has engaged in terrorist activity by providing material support to HAMAS.¹ See DHS Brief at 31-35. This argument is consistent with the Malkandi burden of proof because under the reasonable person, probable cause standard there are reasonable grounds to believe that the respondent's material support to a designated terrorist organization actually poses a serious danger to the security of the United States. See, e.g. Bellout v. Ashcroft, 362 F.3d 975, 978 (9th Cir. 2004) (past membership in a designated terrorist organization demonstrated applicant had engaged in terrorist activity; therefore reasonable grounds to believe applicant is danger to the security of the United States).

DHS also argues on appeal that the I.J. correctly found that the respondent is a danger to the security of the United States because the respondent is likely to engage after entry into the United States in terrorist activity. See DHS Brief at 35-40. This argument is consistent with the Malkandi burden of proof because under the reasonable person, probable cause standard, the evidence demonstrates that the respondent's prior provision of material support to HAMAS demonstrates a propensity for engaging in terrorist activity. The Malkandi burden of proof is also satisfied because the evidence demonstrates that the respondent was targeted for recruitment by HAMAS, has close connections to hard-core HAMAS leaders and activists, has close family connections to HAMAS, and that the respondent has more than just a mere

¹ The respondent is also inadmissible because he has engaged in terrorist activity by affording material support to HAMAS, a designated terrorist organization. See INA §§ 212(a)(3)(B)(i)(I); 212(a)(3)(B)(iv)(VI); see also Bellout v. Ashcroft, 363 F.3d 975, 979 (9th Cir. 2004) ("an alien is ineligible for asylum if the Attorney General decides that there are reasonable grounds for regarding the alien as a danger to the security of the United States or that the alien is inadmissible or removable for terrorist activity. Either ground will support the IJ's denial of asylum.").

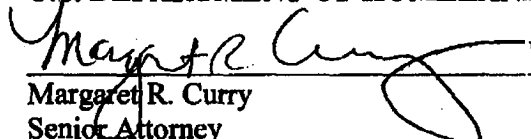
inclination toward all things HAMAS. See DHS Brief at 35-40. The evidence further demonstrates that the respondent has a general propensity for global jihad as evidenced by his meticulously and purposefully organized virtual library of jihadist materials some of which call for the destruction of the United States. Id. The foregoing clearly provides reasonable grounds to believe under the Malkandi standard that the respondent actually poses a serious danger to the security of the United States. See DHS Brief at 35-40.

Therefore, DHS respectfully requests that the BIA apply the burden of proof set forth in Malkandi and by so doing find that the record clearly establishes there are reasonable grounds for regarding the respondent as a danger to the security of the United States because he has engaged in terrorist activity by providing material support to HAMAS, and that he is likely to engage after entry into the United States in any terrorist activity. See INA §§ 212(a)(3)(B)(i)(I); 212(a)(3)(B)(i)(II); and 212(a)(3)(B)(iv)(VI).

Dated: October 2, 2008

Respectfully submitted,

U.S. DEPARTMENT OF HOMELAND SECURITY


Margaret R. Curry
Senior Attorney
U.S. Immigration and Customs Enforcement

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1 finding is clearly erroneous where although there is some evidence to support it, the reviewing
2 court on the entire evidence is left believing a mistake has been made. *United States v. United*
3 *States Gypsum Co.*, 333 U.S. 364, 395 (1948). However, the IJ's decisions in this case as to
4 Respondent's alleged inadmissibility is a mixed question of law and should be reviewed *de novo*.
5 Matter of A-H-, 23 I&N Dec. 774 (AG Dec. 2005). Similarly, eligibility for deferral under CAT is
6 a mixed, question of law and fact, and therefore the BIA should review *de novo* the IJ's
7 determination. 8 C.F.R. §1003.1(d)(3)(i) (2008).

9 VI. ARGUMENT

10 A. CONTESTED REMOVAL PORTION OF PROCEEDINGS

11
12 An applicant for admission in a removal proceeding must establish that s/he is "clearly
13 and beyond doubt entitled to be admitted and is not inadmissible under section 212." INA
14 §240(c)(2), 8 U.S.C. §1229a(c)(2), 8 C.F.R. §1240.8(b). If a consular post has issued a visa,
15 however, it is *prima facie* evidence of admissibility sufficient to shift the burden of producing
16 evidence to the DHS at a removal hearing where admissibility is questioned. Matter of Walsh &
17 Pollard, 20 I&N Dec. 60 (BIA 1988). Respondent sought admission to the United States with a
18 valid Palestinian passport and a validly issued immigrant visa. Thus the burden shifted to the
19 Government to supply "some evidence" to show that he is not admissible. Even if Government
20 satisfied this burden, which it did not, respondent can still rebut the evidence to satisfy his
21 ultimate burden that he is "not inadmissible under any provision of" the INA. INA § 291; 8
22 U.S.C. § 1361.
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1 **1. The IJ erred in finding Respondent likely to engage in terrorism because the**
2 **evidence upon which this finding was based is not reasonable, probative, or**
3 **substantive.**

4 In the context of section 212(a)(3)(B)(i)(II), the BIA has determined that the “reasonable
5 ground to believe” standard is comparable to the “probable cause” standard. Matter of U-H-, 23
6 I & N Dec. 355 (BIA). A reasonable belief may be formed if the evidence “is sufficient to
7 justify a reasonable person in the belief that the alien falls within the proscribed category.” *Id.*,
8 *citing Adams v. Baker*, 909 F.2d 643, 649 (1st Cir. 1990) In this regard, the conclusion of the
9 immigration judge must be affirmed if based on reasonable, substantial, and probative evidence.
10 Alarcon-Serrano v. I.N.S., 220 F.3d 1116, (9th Cir. 2000) The evidence presented in these
11 hearings is simply insufficient to justify a reasonable person in the belief that he has engaged in
12 terrorism or that he is likely to engage in terrorism.
13

14
15 The evidence upon which the Immigration Judge relied in finding reasonable grounds to
16 believe that Respondent is likely to engage in terrorist activity was the unreasonable, inaccurate,
17 and largely rejected testimony of FBI Special Agent Miranda and the material found on
18 Respondent’s computer and external hard drive.

19
20 *a. The expert testimony of Special Agent Miranda was not reasonable, substantial, or*
21 *probative evidence of Respondent’s likelihood to engage in terrorism in the United*
States.

22 FBI Special Agent Robert Miranda reviewed the evidence in this case and testified
23 telephonically as to the significance of what the government alleged to be Respondent’s
24 associations with terrorism as well as his likeliness to engage in terrorism. His opinion that
25 Respondent is likely to engage in terrorism has no reasonable ground and is not based in facts.
26 One of the factors he utilized in reaching his opinion was that Respondent is a male from Gaza.
27 Another factor was that Respondent is educated, which would be attractive to Hamas. However,
28

1 at the time he was in Gaza, he was not yet educated and even now, only possesses a bachelors
2 degree in computer science that he admits is not up to U.S. standards.

3 The factor that he dwelled on the most, however, is Respondent's brief cohabitation with
4 the Student Council leaders at Bir Zeit University, which Agent Miranda found to be evidence
5 that Respondent was part of a terrorist cell. This theory was dismissed out of hand by the
6 Immigration Judge. Not finding the Agent's testimony probative that Respondent was engaged in
7 testimony in the past, past acts being easier to prove than what the future holds, the Immigration
8 Judge should have also rejected as unreasonable the rest of this Agent's testimony as to what
9 Respondent is likely to do in the future. For these reasons, Agent Miranda's testimony cannot be
10 considered reasonable, substantial, or probative evidence of Respondent's being likely to engage
11 in terrorism.
12

13
14 Respondent's alleged computer expertise, as designated by the Immigration Judge who
15 appears to believe that Agent Miranda so designated Respondent is based solely on a reference to
16 Respondent's undergraduate major, is cited more than once in the Immigration Judge's
17 decision as a reason that Respondent would be attractive to Hamas as a candidate. The very brief
18 discussion of Respondent's degree does not include any reference to Respondent being any type
19 of expert, just that he holds a degree in the area of computers (Tr. at 255) Indeed, it is likely that
20 without this clearly erroneous finding of fact, the Immigration Judge, who was clearly on the
21 fence as to whether or not the Government met its burden on this issue, would not have found
22 that that Respondent is likely to engage in terrorism, as it is clear that he did not find that the
23 material on Respondent's laptop alone, which is the only other evidence upon which he relied in
24 his decision, enough to cross "from possibility to probability." (IJ Dec. at 14.) The Immigration
25 Judge stated that "Mere possession of highly inflammatory pro-terrorist information *along with*
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1 transcript of the entire conference.

2 Q. Was Mr. Abu Baker at that conference?

3 A. Yes, he was.

4 Q. Okay. And are you familiar with something that is
5 sometimes referred to as the Hamas Archives?

6 A. Yes. During the Philadelphia Conference, there was a
7 reference made by one of the attendees that it was necessary to
8 maintain an archive because -- basically to summarize what he
9 was saying. You know, in the past, they, they meaning Hamas,
10 had taken some serious hits, if you will, by Israeli security,
11 and that it was necessary to keep an archive so that the
12 movement didn't have to start at ground zero every time they had
13 set backs, if you will, security set backs.

14 Q. Well, and was that actually described at the -- by
15 participants at the Philadelphia Conference?

16 A. That's correct.

17 Q. Okay. Now, getting back to you -- sir, your earlier
18 stream of testimony, you were talking about some of the evidence
19 that was induced by the FBI against the Holy Land Foundation?

20 A. Yes. There was years of intercepted audio calls, and
21 I think -- just on the Holy Land -- on the, on the primary finds
22 that we had on the Holy Land Foundation, Shukri Abu Baker,
23 Mohammed El-Mezain, we had approximately five years of non-stop
24 intercepted audio. There were other FISA's as well. Most were
25 search warrants. Their were search warrants of -- conducted at

1 the Holy Land Foundation, not just here in, in the Dallas area
2 where they were headquartered, but at various satellite offices
3 across the country. There was a very important search warrant
4 done of an individual -- it's in the Eastern United states. His
5 name is Ismail Elbarrasse, and his documentation was -- is very
6 significant to understanding Hamas' operations here in the U.S.

7 Q. Could you spell that name for the record, please?

8 A. Yes. First name, I S M A I L, last name,
9 E L B A R R A S S E.

10 Q. Thank you. And go ahead.

11 A. There was also a, a search of an individual named --
12 location, residence I should say, named Abda Helim Ashgar.
13 Ashgar was another Hamas individual who the, the FBI did a
14 covert search of his residence in '93, and that covert search,
15 actually pre-dated FISA, so that was actually authorized by the
16 Attorney General. And there's, of course, been evidence
17 obtained from -- by MLAT Treaty, MLAT request through the
18 government of Israel.

19 Q. Okay. Could you just describe what a MLAT is?

20 A. Sure. Mutual Legal Assistance Treaty. Some, some
21 nations have treaties essentially to be able to exchange legal
22 information, court documents, et cetera. And so, MLAT is just
23 the abbreviation for that treaty that, that exists.

24 Q. Okay. So there was evidence that was obtained from
25 foreign governments that went to the Holy Land case?

1 A. Yes. There's been several governments that we've had
2 discussions with, not just the Israelis. Quite a few. And, of
3 course, there's been numerous interviews of people both in the
4 United States and overseas.

5 Q. Okay. And did you personally conduct any of those
6 interviews?

7 A. Yes, I have.

8 Q. And interviews of whom? Not --

9 A. I've interviewed, I've interviewed known Hamas
10 leaders, convicted Hamas terrorists in prison for murder,
11 suspected Hamas members. I've interviewed as well security
12 officials for various governments who are knowledgeable about
13 Hamas.

14 Q. Okay. And as far as the results, just for the record,
15 you said that there was a covert search on Mr. Ashgar's,
16 Ashgar's residence?

17 A. Yes.

18 Q. Did you personally review the results of that search?

19 A. Yes. I reviewed the, the results of the Ashgar
20 search. I've reviewed the thousands and thousands of documents
21 that came from the Holy Land search. Plus, I made, I made the
22 major search as well. The -- there was a search warrant of
23 (indiscernible) as well, and that resulted in numerous Hamas
24 related documents.

25 Q. Okay. And let's -- we'll talk about that in just a

1 material support to terrorist activity. Now, the material
2 support provisions that we use include safe houses,
3 transportation, communication, funds, transfer of funds, et
4 cetera.

5 A. Yes, sir.

6 Q. That's pretty similar to the criminal definition.
7 Correct?

8 A. Yes.

9 Q. Okay. Now, the provision of material support under
10 the Immigration law can be either for the commission of
11 terrorist activity or to people the actor knows or reasonably
12 should know has committed or plans to commit a terrorist
13 activity. Okay? Now, we use -- there are three kinds of
14 terrorist organizations under the Immigration and Nationality
15 Act, and you probably know that Hamas has been designated as a
16 terrorist activity. Is that correct?

17 A. Yes, we have been.

18 Q. Okay. Now, prior to its designation, Hamas, the
19 Government would argue, is -- was a -- was also a terrorist
20 activity -- a terrorist organization that was not designated.
21 In other words, it, it engaged in terrorist activities, but was
22 just a group of two or more people.

23 A. Yes.

24 Q. Follow that?

25 A. Yes, I do.

1 Q. Okay. Now, given that that's the definition of
2 terrorist activity, and I think you're probably already familiar
3 with that, right?

4 A. Yes.

5 Q. Okay. In your opinion are there reasonable grounds to
6 believe that Mr. Abufayad will engage in terrorist -- is likely
7 to engage in terrorist activity in the United States?

8 A. Yes.

9 Q. Okay. And what is the basis of that opinion?

10 A. I believe given his, his connections, and I'm speaking
11 very broadly at this point, his connections and his past
12 activities as well as what I believe to be his interest in
13 matters relating to Jihad that he would afford material support
14 to individuals connected to terrorist groups if given the
15 opportunity.

16 Q. And there are reasonable grounds to believe that in
17 your opinion?

18 A. Yes, there are.

19 Q. Okay. Now, you know that ICE agents interviewed
20 Mr. Abufayad on -- over a period of, I think it was three days,
21 right?

22 A. Yes.

23 Q. Okay. And my office sent you videotapes of those
24 interviews. Is that correct?

25 A. That's correct.

1 Q. And you personally reviewed those videotapes?

2 A. Yes, I did.

3 Q. Okay. Those were translated in English. Correct?

4 A. Yes, there was a translation, a simultaneous phone
5 translation captured on the video.

6 Q. Okay. And did those interview videotapes form part of
7 the basis of your opinion?

8 A. Yes, they did.

9 Q. Okay. Now, you were also sent certain videotapes of
10 materials that were -- or, I'm sorry, a computer disk of
11 materials that were found on his computer?

12 A. That's correct.

13 Q. Okay. And I believe you also reviewed a report by an
14 individual named Rita Katts (phonetic sp.). Is that correct?

15 A. That's correct.

16 MR. NISHIIE TO JUDGE

17 And, Your Honor, I'm going to just give you a copy of that
18 report.

19 MR. NISHIIE TO SPECIAL AGENT MIRANDA

20 Q. Who is Rita Katts?

21 A. Rita Katts is a -- first of all, she's the, the author
22 of a, a book on terrorism. I think it's entitled Anonymous. I
23 have a copy somewhere. She also was a part of an investigative,
24 part of an investigative journalist team that was headed at the
25 time by an individual named Steven Emerson, who is himself a