

MEMORANDUM

FROM: Laurie Wu, Esq.
TO: Past and Present Communist Party Members
RE: Inadmissibility Exceptions based on Communist Party Membership
DATE: November 13, 2009

INTRODUCTION

Immigrant visa applicants who were or are members or affiliates of the Communist Party are inadmissible to the United States unless they fall under one of the enumerated exceptions. Under section 212(a)(3)(D) of the Immigration and Nationality Act (INA), an immigrant visa applicant who is or was a member or affiliate¹ of the Communist Party is inadmissible to the United States unless (I) the membership or affiliation is or was involuntary, under the age of 16, by operation of law, or for the purposes of obtaining the essentials of living; (II) the membership or affiliation terminated at least two years before the date of the visa application and the applicant is not a threat to the security of the United States; (III) the membership or affiliation is or was non-meaningful; or (IV) the Department of Homeland Security grants a waiver to an applicant who has the requisite family relationship² with a United States citizen or permanent residence alien for humanitarian purposes.³

¹ A affiliate is “organization which is related to, or identified with, a proscribed association or party, including any section, subsidiary, branch, or subdivision thereof, in such close association as to evidence an adherence to or a furtherance of the purposes and objectives of such association or party, or as to indicate a working alliance to bring to fruition the purposes and objectives of the proscribed association or party. An organization which gives, loans, or promises support, money, or other thing of value for any purpose to any proscribed association or party is presumed to be an *affiliate* of such association or party, but nothing contained in this paragraph shall be construed as an exclusive definition of the term *affiliate*.” 22 C.F.R. § 40.34(a)

² The requisite family relationship is that the applicant is the parent, spouse, son, daughter, brother or sister of a United States citizen or the spouse, son or daughter of an alien lawfully admitted for permanent residence. INA § 212(a)(3)(D)(iv).

³ The humanitarian purpose is to assure family unity or when it is otherwise in the public interest, if the applicant is not a treat to the security of the United States. INA § 212(a)(3)(D)(iv).

I. Involuntary Membership or Affiliation

Immigrant applicants are not inadmissible to the United States if their membership or affiliation is or was involuntary. The immigrant applicant has the burden of establishing to the satisfaction of the consular officer that the membership or affiliation is or was involuntary.⁴ Statutory immigration law and the U.S. Department of State Foreign Affairs Manual have established some circumstances that constitute involuntary membership or affiliation with the Communist Party.

First, service in the armed forces in any country, whether voluntary or not, does not constitute an applicant's membership or affiliation in itself.⁵ However, "voluntary service in a political capacity shall constitute affiliation with the political party or organization in power at the time of such service."⁶ Thus, an applicant who continues service and/or gets promoted to a higher rank in the armed forces could be serving in a political capacity and be inadmissible.⁷

Second, an applicant's membership or affiliation is involuntary if it is the result of "fraud, duress, coercion, incapacity, or error which impairs or negates the capacity for affirmative and intentional action."⁸ For example, membership or affiliation with the Communist Party is involuntary if the membership or affiliation was or is the result of police repression or coercion and/or political or economic sanctions.⁹ The applicant's "credibility is enhanced if membership or affiliation is or was nominal and without active participation in the affairs of the proscribed

⁴ INA § 212(a)(3)(D)(ii).

⁵ 22 C.F.R. § 40.34(b).

⁶ 22 C.F.R. § 40.34(c).

⁷ 9 FAM 403.64 N3.6 (Mar. 21, 2008).

⁸ 9 FAM 403.64 N6.1 (Mar. 21, 2008).

⁹ 9 FAM 403.64 N6.1 (Mar. 21, 2008).

organization, other than periodic payment of dues and/or attendance at required meetings of the organization.”¹⁰

Third, an alien’s membership or affiliation with the Communist Party under the age of 16 is considered involuntary.¹¹ However, if after reaching the age of 16 the alien continues his/her membership or affiliation with the Communist Party, then only the alien’s activities at the age of 16 and thereafter will be evaluated in determining whether the continued membership was voluntary or involuntary.¹²

Fourth, if by operation of law, an alien was or is a member of the Communist Party, then the membership or affiliation was or is involuntary.¹³ Membership or affiliation by operation of law occurs when an alien automatically and without personal acquiescence, knowledge or consent becomes a member or affiliate of the Communist Party.¹⁴

Finally, an immigrant alien’s membership or affiliation is involuntary if the purpose was to obtain the “essentials of living.”¹⁵ The “essentials of living” refer to a minimum standard of living and not merely continued survival.¹⁶ The “essentials of living” “include[,] but [are] not limited to housing, food rations, employment, medical and dental care, clothing, furnishings, transportation [] and education.”¹⁷ Specific circumstances which may qualify under the “essentials of living” exception include the following: (i) “[m]embership was a prerequisite for admission to a university or other advanced school;” (ii) “[a]lthough membership was not a prerequisite for admission to a university or advanced school, membership was necessary for the alien to continue his or her studies;” (iii) “[m]embership was necessary to obtain academic

¹⁰ 9 FAM 403.64 N6.1 (Mar. 21, 2008).

¹¹ INA § 212(a)(3)(D)(ii).

¹² 22 C.F.R. § 40.34(d).

¹³ INA § 212(a)(3)(D)(ii).

¹⁴ 22 C.F.R. § 40.34(e); 9 FAM 40.34 N5.2 (Mar. 21, 2008).

¹⁵ INA § 212(a)(3)(D)(ii).

¹⁶ 9 FAM 40.34 N6.4 (Mar. 21, 2008).

¹⁷ 9 FAM 40.34 N6.4 (Mar. 21, 2008).

benefits such as scholarships, dormitory accommodations, food rations, reduced transportation fares, etc.,” and (iv) the sole purpose of the membership is to obtain, retain, change or advance in employment commensurate with one’s educational background and experience.¹⁸ Furthermore, to qualify for the “essentials of living” exception, an applicant’s membership must be nominal and the applicant must demonstrate the lack of “ideological commitment to communism.”¹⁹

II. Past Membership or Affiliation

Immigrant applicants who terminate their membership or affiliation with the Communist Party at least two years prior to their visa application are not inadmissible.²⁰ The applicant has the burden of establishing to the satisfaction of the consular officer that the membership or affiliation terminated at least two years ago.²¹ In addition to the two year requirement, the applicant must also not pose a threat the security of the United States.²² Furthermore, as long as applicants show mere termination of their membership or affiliation for the past two years, applicants are not required to demonstrate active opposition to communism.²³

If an applicant admits past membership or affiliation and asserts credibly that it has been terminated for the requisite period, then the consular officers should accept the assertion at face value.²⁴ However, if the consular officer has controverting evidence, such as classified information, or has any articulable reason to believe that the applicant has been a member or affiliate of the Communist Party in the past two years, then the consular officer will reject the applicant’s assertion.²⁵ If an applicant denies ever being part of the Communist Party and the

¹⁸ 9 FAM 40.34 N6.4-1; 9 FAM 40.34 N6.4-2 (Mar. 21, 2008).

¹⁹ 9 FAM 40.34 N6.4 (Mar. 21, 2008).

²⁰ INA § 212(a)(3)(D)(iii).

²¹ INA § 212(a)(3)(D)(iii).

²² 9 FAM 40.34 N4 (Mar. 21, 2008).

²³ 9 FAM 40.34 N4.1 (Mar. 21, 2008).

²⁴ 9 FAM 40.34 N4.2 (Mar. 21, 2008).

²⁵ 9 FAM 40.34 N4.2 (Mar. 21, 2008).

consular officer has classified information which indicates otherwise, then the applicant may elect to “plead in the alternative.”²⁶

In most cases, consular officers have the authority to adjudicate cases in which the applicant demonstrates termination of membership at least two years prior to the application.²⁷ However, in the following circumstances, consular officers must seek Security Advisory Opinions from the Department of Homeland Security before issuing visas in past membership cases: (a) applicants claim that their membership has been terminated, but the officer has information to indicate otherwise; (b) consular officer has reason to believe that applicant may be a threat to the security of the United States; and (c) applicants choose to “plead in the alternative.”²⁸ Also, consular officers must seek Security Advisory Opinions from the Department of Homeland Security in cases involving non-meaningful association with the Communist Party, as discussed below.²⁹

III. Non-meaningful Association

Immigrant visa applicants who were or are members or affiliates³⁰ of the Communist Party are inadmissible if they had or have meaningful association with the Communist Party.³¹ “Meaningful association” is not codified in the Immigration and Nationality Act, but is a judicially-created concept.³² The U.S. Supreme Court has reflected “that there is a great practical and legal difference between those who firmly attach themselves to the Communist

²⁶ 9 FAM 40.34 N4.3 (Mar. 21, 2008). When applicants “plead in the alternative,” they are denying any membership or affiliation at any time, but at the same time, they are asserting that, at a minimum, there has been no membership or affiliation within the past two years. 9 FAM 40.34 N4.3 (Mar. 21, 2008).

²⁷ 9 FAM 40.34 N4.4 (Mar. 21, 2008).

²⁸ 9 FAM 40.34 N4.4 (Mar. 21, 2008).

²⁹ 9 FAM 40.43 N7.1 (Mar. 21, 2008).

³⁰ Communist Party membership is not present if an alien establishes that he or she joined an affiliate or subdivision of the Communist Party when the alien had no knowledge of the Communist Party’s relationship with the affiliate or subdivision. Matter of C-, 6 I&N Dec. 20 (Mar. 14, 1955).

³¹ 9 FAM 40.34 N1 (Mar. 21, 2008).

³² 9 FAM 40.34 N4.5 (Mar. 21, 2008).

Party being aware of all of the aims and purposes attributed to it, and those who temporarily join the Party, knowing nothing of its international relationships and believing it to be a group solely trying to remedy unsatisfactory social or economic conditions, carry out trade-union objectives, eliminate racial discrimination, combat unemployment, or alleviate distress and poverty.”³³

In Rowoldt v. Perfetto, the U.S. Supreme Court coined the term “meaningful association.”³⁴ The Rowoldt Court held that an alien’s connection with the Communist Party must constitute a meaningful association and that Communist Party membership is not present when the dominating impulse to the affiliation is “wholly devoid of any ‘political’ implications.”³⁵ In Rowoldt, the alien secured employment at a Communist book store, an official outlet for Communist literature, as a salesman through his membership in the Communist Party, but had an “unilluminating understanding of, and beliefs about, the principles of communism.”³⁶ Therefore, the Court held that the alien lack any meaningful association with the Communist Party.³⁷

Furthermore, the U.S. Supreme Court in Gastelum-Quinones v. Kennedy held that Communist Party membership is not present if the alien was not aware of its nature as a political organization during the association with the Communist Party, and the even participation in the Communist Party’s activities would not constitute membership unless the participation substantially supports the inference of awareness of the political aspects of the organization.³⁸ In Gastelum-Qunones, the alien paid membership dues and attended about fifteen (15) meetings of the Communist Party.³⁹ The alien remained silent when the Government offered proof that he

³³ Gastelum-Qunones v. Kennedy, 374 U.S. 469, 473 (1963).

³⁴ 355, U.S. 115, 120 (1957).

³⁵ Id.

³⁶ Id. at 118.

³⁷ Id. at 120-21.

³⁸ 374 U.S. 469, 476-77 (1963).

³⁹ Id. at 470, 474.

paid dues and attended some meetings.⁴⁰ The Supreme Court concluded that it cannot make a mere inference that an alien is aware of the political aspects of the Communist Party based on the alien's silence, but instead, needs probative evidence of "meaningful association."⁴¹

To evaluate an applicant's association with the Communist Party, consular officers at the applicant's interview will usually issue a section 221(g) refusal letter and request further documents. *See Exhibit A.* The applicant will be asked to provide a written statement from current and past employers verifying that the applicant does not belong to the Communist Party and the applicant will be asked to provide a written statement answering the following: "a.) [n]ame of the Communist or other totalitarian party to which he/she belong or belonged; b.) [r]eason for joining; c.) [d]ates of membership; d.) [a]ny offices held; e.) [w]hy he/she remained a member; f.) [a]ny education or standard of living benefits gained by membership; g.) [d]egree to which he/she accepts(ed) the structure, goals, methods, and practices of the party; [and] h.) [i]f he/she terminated the association, the date of termination and reasons for terminating. *See Exhibit A.*

IV. Inadmissibility Waiver

If an applicant does not qualify under any of the exceptions under INA § 212(a)(3)(D) or did or does have a "meaningful association" with the Communist Party, the applicant may be eligible for a waiver under INA § 212(a)(3)(D)(iv). To qualify for the inadmissibility waiver, the immigrant applicant must be the "parent, spouse, son, daughter, brother, or sister of a citizen of the United States or a spouse, son, or daughter of an alien lawfully admitted for permanent residence for humanitarian purposes, to assure family unity, or when it is otherwise in the public

⁴⁰ *Id.* at 479.

⁴¹ *Id.*

interest if the immigrant is not a threat to the security of the United States.”⁴² If the applicant qualifies for a waiver, then the consular officer shall inform the applicant on the procedures for applying to the Department of Homeland Security for the waiver.⁴³ Consular officers cannot issue the alien a visa unless they receive notification from the Department of Homeland Security that it has approved the alien’s waiver application.⁴⁴

CONCLUSION

In conclusion, unless immigrant visa applicants who were or are members or affiliates of the Communist Party qualify under an exception, they are inadmissible to the United States. Visa applicants should evaluate the facts of their own case and present facts to the consular office to show that their membership was either involuntary, terminated at least two years ago and/or non-meaningful. As a last resort, immigrant visa applicants can apply for a humanitarian waiver with the Department of Homeland Security if they the requisite family relationship with a United States citizen or permanent residence alien.

⁴² INA § 212(a)(3)(D)(iv).

⁴³ 22 C.F.R. § 40.34(g).

⁴⁴ Id.