



CATHOLIC LEGAL IMMIGRATION NETWORK, INC.

Helping Venezuelan Clients Navigate TPS and DED:

FAQs for Legal Practitioners

On Jan. 19, 2021, former President Trump [announced](#) Deferred Enforced Departure (DED) through July 20, 2022 for certain Venezuelans residing in the United States. On March 9, 2021, the Department of Homeland Security (DHS) designated Venezuela for Temporary Protected Status (TPS) through Sept. 9, 2022. The details about the TPS registration process and work authorization, as well as how to apply for work authorization under DED, were published in a March 9, 2021 [Federal Register Notice](#). These FAQs review the eligibility requirements and benefits of TPS versus DED, the TPS application process, the DED work authorization application process, and other practical considerations for Venezuelan clients.

What is Temporary Protected Status?

TPS is an immigration status granted to eligible nationals of a designated country or persons without nationality who last habitually resided in the designated country. Under INA § 244, the Secretary of DHS in consultation with the Secretary of State is authorized to designate a foreign state for TPS based on an emergency situation, such as an ongoing armed conflict or environmental disaster, that temporarily prevents nationals who are in the United States from returning safely to the designated country. TPS beneficiaries who register by the specified date¹ are eligible to remain in the United States during the TPS designation period and receive protection from deportation. They may also apply for employment authorization and advance parole travel permission during their grant of TPS. Aside from Venezuela, the other eleven countries currently designated for TPS include Burma, El Salvador, Haiti, Honduras, Nepal, Nicaragua, Somalia, Sudan, South Sudan, Syria and Yemen.

What is Deferred Enforced Departure?

DED provides temporary protection from removal to certain individuals from a country that has been designated by the president. This discretionary authority is not based in statute but comes from the president's constitutional authority to conduct foreign relations. DED is not an immigration status but provides eligible nationals with an administrative stay of removal for a specific period of time. If

¹ U.S. Citizenship and Immigration Services (USCIS) may accept late initial registrations and re-registration applications under certain circumstances.

directed by the president, those covered by DED may request employment authorization and travel authorization. In addition to DED protection for Venezuelans, DED is also currently available for certain Liberians.²

In the context of Venezuela, how is DED different from TPS?

As explained above, TPS has a statutory basis while DED does not. Both DED and TPS are temporary and neither lead to lawful permanent resident status. However, while DED provides only an administrative stay of removal, TPS provides an immigration status. Both TPS and DED for Venezuela permit beneficiaries to apply for an employment authorization document (EAD). While a president *may* direct that travel authorization be available to foreign nationals covered by DED, this was not authorized in the Jan. 19, 2021 DED memorandum. Thus, in the context of Venezuelans, the ability to seek advance parole is one advantage of TPS over DED. Finally, TPS for Venezuela is currently designated through Sept. 9, 2022 while DED is set to expire July 20, 2022.

I. TPS

Who is eligible for TPS for Venezuela?

To be granted TPS, an applicant must be a Venezuelan national or a noncitizen with no nationality who last habitually resided in Venezuela. He or she must also prove continuous residence in the United States since March 8, 2021 and continuous physical presence in the United States since March 9, 2021. The applicant must apply within the 180-day registration period that runs from March 9, 2021 through Sept. 5, 2021, unless he or she qualifies for late initial registration. An otherwise eligible individual is disqualified if he or she:

- Has been convicted of any felony or two or more misdemeanors committed in the United States;
- Is found inadmissible as an immigrant under applicable grounds in INA § 212(a), including non-waivable criminal and security-related grounds; or
- Is subject to any of the mandatory bars to asylum, found at INA § 208(b)(2)(A).

Which inadmissibility grounds apply to TPS applicants? Which of those can be waived?

TPS applicants must demonstrate that they are admissible. However, as provided in INA § 244(c)(2), certain grounds of inadmissibility do not apply to TPS applicants, while others may be waived.

² DED protection for Liberians was reinstated on Jan. 20, 2021 and extended through June 30, 2022. See Presidential Memorandum of Jan. 20, 2021 Reinstating Deferred Enforced Departure for Liberians, available at: [federalregister.gov/documents/2021/01/25/2021-01770/reinstating-deferred-enforced-departure-for-liberians](https://www.federalregister.gov/documents/2021/01/25/2021-01770/reinstating-deferred-enforced-departure-for-liberians). Other countries and regions that have been designated previously for DED include China (1990), the Persian Gulf (1991), El Salvador (1992), Haiti (1997) and Liberia (1999).

The following grounds of inadmissibility are not applicable: public charge, 212(a)(4); the labor certification grounds, 212(a)(5)(A); unqualified physicians, 212(a)(5)(B); and documentation requirements, 212(a)(7)(A)(i).

Certain criminal and security-related grounds cannot be waived: crimes involving moral turpitude, 212(a)(2)(A)(i)(I); controlled substance violations, except for a single offense of simple possession of 30 grams or less of marijuana, 212(a)(2)(A)(i)(II); multiple criminal convictions, 212(a)(2)(B); controlled substance trafficking, 212(a)(2)(B); danger to U.S. security, 212(a)(3)(A); terrorist activities, 212(a)(3)(B); adverse foreign policy consequences, 212(a)(3)(C); membership in totalitarian party, 212(a)(3)(D); and grounds relating to Nazi persecution, genocide, or the commission of any act of torture or extrajudicial killing, 212(a)(3)(E).

The remaining inadmissibility grounds may be waived for humanitarian purposes, to assure family unity, or when it is in the public interest.

What are the mandatory bars to asylum and why are they relevant to TPS?

INA § 244(c)(2) references the mandatory bars to asylum and incorporates them as a bar to TPS eligibility. A noncitizen who is subject to a mandatory bar to asylum, found at INA § 208(b)(2)(A), cannot qualify for TPS. These bars apply to a person who:

- ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion;
- has been convicted by a final judgment of a “particularly serious crime” (which includes an aggravated felony) that constitutes a danger to the community of the United States;
- DHS has reasons for believing has committed a serious nonpolitical crime outside the United States prior to arrival in the United States;
- DHS determines, based on reasonable grounds, is a danger to the security of the United States;
- has engaged in or incited terrorist activity, as described in 212(a)(3)(B)(i) or 237(a)(4)(B);
or
- is considered firmly resettlement in a third country prior to arriving in the United States.

What is the application process for TPS for Venezuela?

Those who are eligible for TPS should file an initial application within the 180-day registration period, which is open from March 9 to Sept. 5, 2021. Noncitizens who fail to apply during the initial registration period may be able to file a late initial application if they meet certain conditions.

Applicants should submit the following:

1. Form I-821 for each applicant, along with required fees or an I-912 fee waiver request. The filing fee for an initial TPS application is \$50. In addition, an \$85 biometrics fee is required from applicants who are 14 years of age or older.
2. Form I-765 for those who are requesting an EAD. For applicants between the ages of 14 and 65, the filing fee is \$410. This fee may also be waived. Two passport-style photos should be included. USCIS has clarified that initial TPS EAD applications should use code (a)(12).
3. Proof of identity and Venezuelan nationality (passport; birth certificate and photo ID; or national identity document with photo and/or fingerprint).
4. Proof of date of entry to U.S. (passport; I-94).
5. Proof of continuous residence since March 8, 2021 and physical presence since March 9, 2021 (employment records, rent receipts, utility bills, tax returns, school records, medical records, etc.).
6. If applicable, Form I-601 waiver of inadmissibility and supporting documentation, and
7. If applicable, certified court disposition related to any criminal arrest, charge or conviction.

What are the requirements for late initial registration?

Those who fail to apply for TPS during the initial registration period may be eligible to file a late initial registration during any extension of their country's designation. To qualify, during the initial registration period or a subsequent initial registration period the applicant must have:

- been a nonimmigrant or been granted voluntary departure status or any relief from removal;
- had an application for change of status, adjustment of status, asylum, voluntary departure, or any relief from removal which was pending or subject to further review or appeal;
- been a parolee or had a pending request for re-parole; or
- be the spouse of an individual who is currently eligible for TPS.

The application for late registration must be filed while the condition still exists or within a 60-day period immediately following the expiration or termination of the status described above. In addition, someone who during the initial registration period or a subsequent initial registration period was a child of a noncitizen currently eligible for TPS may also apply for late registration. There is no time limitation on filing if you meet this condition. "Child" refers to someone who was under 21 and unmarried at any time during an initial registration period. In all cases, the applicant seeking to register late must satisfy the other TPS eligibility requirements. See 8 CFR § 244.2(f)(2) – (g) and the [USCIS webpage on TPS](#).

What evidence can I submit to show continuous residence since March 8, 2021 and continuous physical presence since March 9, 2021?

The instructions to Form I-821 provide a list of supporting documentation that may be included to prove continuous residence and continuous physical presence. Examples include employment records, rent receipts, utility bills, school records, medical records, birth certificates of children born in the United States, dated bank transactions, insurance policies, and vehicle registration. Applicants may use any relevant documentation, particularly records created during the course of ordinary business that include the applicant's name, address, and a date.

Can a dual citizen apply for TPS as a Venezuelan national?

Dual nationality is not necessarily a bar to TPS if the applicant is able to prove that he or she is a national of Venezuela.³ Note that USCIS has applied *Matter of Ognibene*, 18 I&N Dec. 425 (BIA 1983) to deny TPS applications where the applicant's "operative nationality" does not belong to a country designated for TPS. In *Ognibene*, the BIA held that in the case of a dual national, the nationality claimed or established at the time of entry into the United States must be regarded, for purposes of INA § 214, as the sole or operative nationality for the duration of their stay in the United States. This issue may arise where the dual citizen claimed to be a national of a non-TPS country upon entry to the United States or when applying for a visa or other U.S. immigration benefit. USCIS should consider primary and secondary evidence of Venezuelan nationality. If your client has previously applied for an immigration benefit using their non-TPS nationality, USCIS may issue a request for evidence (RFE) or a denial. Consider including arguments that, despite having dual nationality, the applicant has no significant ties to their other country of nationality. For more on this topic, see CLINIC's [practice pointer](#) "Temporary Protected Status: Navigating Removal Proceedings, Dual Nationality, and Asylum."

Does firm resettlement in a third country make my client ineligible for TPS?

A noncitizen is ineligible for TPS if he or she was "firmly resettled in another country prior to arriving in the United States." INA § 208(b)(A)(vi). Whether a noncitizen has received an offer of firm resettlement is a complex analysis and is highly case specific.

A noncitizen is considered firmly resettled if, prior to arrival in the United States, he or she entered into another country with, or while in that country received an offer of, permanent resident status, citizenship, or some other type of permanent resettlement, unless he or she meets one of two exceptions. First, the noncitizen establishes that entry into the third country was a necessary consequence of flight from persecution, that he or she remained in that country only as long as was necessary to arrange onward travel, and he or she did not establish significant ties to that country.

³ USCIS Questions and Answers, Designation of Syria for Temporary Protected Status, March 29, 2012, available at uscis.gov/sites/default/files/document/questions-and-answers/TPS_Syria_QAs_03-29-12.pdf

Second, an exception applies if the conditions of residence in that country were so substantially and consciously restricted by the authority of that country that he or she was not in fact resettled. 8 CFR § 208.15. Restrictive conditions factors include the type of housing and employment opportunities made available, country conditions, the ability to own property, travel and access education, as well as evidence of persecution or discrimination by the government of the third country.

For more on this topic, see CLINIC's [practice pointer](#) "Temporary Protected Status: Navigating Removal Proceedings, Dual Nationality, and Asylum."

May someone with a pending asylum application apply for TPS?

Yes. An application for TPS does not affect a pending application for asylum or any other immigration benefit. It is possible to be both a pending asylum applicant and a TPS beneficiary at the same time. However, there is an important consideration for someone with TPS and an affirmative asylum application pending at the USCIS Asylum Office. Having TPS does not impact the asylum officer's ability to approve the asylum application. But, if following the interview, the asylum officer decides not to grant asylum, CFR § 208.14(c)(2) requires the officer to deny the application when the applicant is maintaining valid immigrant, nonimmigrant, or TPS at the time the application is decided. In contrast, if the applicant is without lawful status, their asylum case will be referred to an immigration judge who can review the asylum claim *de novo*.⁴ If the applicant is covered by DED when the asylum officer decides not to grant asylum, the application will be referred to the immigration judge (instead of being denied) since DED is not considered to be a status under 8 CFR § 208.14(c)(2).⁵

Depending on the individual asylum case, being denied at USCIS instead of referred to court could be beneficial or detrimental. If the client has a weak asylum case that is not likely to be granted by an immigration judge and does not have other relief available, then it may be in his or her best interest to have TPS. On the other hand, if TPS is granted and the client wants to continue to pursue asylum (or another form of relief) in front of an immigration judge, that option would be foreclosed. Those who have a strong case for asylum may decide to refrain from filing for TPS until the asylum application has been decided and later apply for TPS under the late initial registration guidelines at 8 CFR § 244.2(f)(2), assuming the TPS designation for Venezuela is extended beyond Sept. 9, 2022. The clients would need to apply for TPS during that extension period and within 60 days of their asylum denial. Once the initial TPS registration deadline of Sept. 5, 2021 has passed, if their asylum

⁴ Following an interview, an asylum officer can either approve an asylum application or determine the applicant has not demonstrated eligibility for asylum. In the latter case, the three options are for the asylum office to deny the application, refer it to an immigration judge, or dismiss it. Referral results in the asylum applicant being placed in removal proceedings where he or she may present the asylum claim again but this time to an immigration judge.

⁵ See USCIS Adjudicator's Field Manual, Chapter 38.2, available at: uscis.gov/sites/default/files/document/policy-manual-afm/afm38-external.pdf.

application is denied more than 60 days before an extension of TPS for Venezuela is announced, they would not be eligible for late initial registration.⁶

Note that TPS status will “stop the clock” on the requirement to file for asylum within one year of arriving in the United States if the one-year clock has not already expired. See 8 CFR § 208.4(a)(5)(iv).

Can a client currently in valid nonimmigrant status apply for TPS?

Yes. A Venezuelan in valid nonimmigrant status may apply for and be granted TPS. However, to continue to maintain nonimmigrant status while simultaneously holding TPS, the person must remain eligible for both statuses. USCIS has advised that “[I]t is up to the individual to know and understand the requirements of all statuses he/she holds or is seeking to obtain and/or maintain.”⁷ One important consideration is the impact of a decision to work using a TPS-based EAD. It is important to consider whether that employment would violate the terms of the person’s underlying nonimmigrant status, such as a B-2 visitor or F-1 student, for example, who faces limitations on employment. Those who would like to maintain their nonimmigrant status could either file the Form I-821 but not request an EAD, or they could request the EAD but refrain from using it to work.

Under INA § 244(f)(4), a TPS beneficiary is considered to be “in and maintaining lawful nonimmigrant status” while they hold valid TPS. Thus, a nonimmigrant who obtains TPS and ends up losing their underlying nonimmigrant status may be able to revert to nonimmigrant status in advance of their TPS expiring or terminating. For example, an F-1 student who obtains TPS and subsequently loses F-1 may be able to switch back into F-1 or even change into R-1 or H-1B or some other employment-based nonimmigrant status as long as the Form I-539 or I-129 is filed while he or she remains in valid TPS status.

Can obtaining TPS help my client qualify to adjust to lawful permanent resident status?

A TPS grant does not independently put someone on a path to lawful permanent residence. However, TPS may help beneficiaries of immediate relative petitions and others become eligible to adjust status under INA § 245(a), even when they initially entered the United States without being inspected and admitted or paroled. More information is available in CLINIC’s [Practice Advisory on Adjustment Options for TPS Beneficiaries](#).

⁶ USCIS Questions and Answers: Designation of Syria for Temporary Protected Status, March 29, 2012, available at: uscis.gov/sites/default/files/document/questions-and-answers/TPS_Syria_QAs_03-29-12.pdf.

⁷ USCIS FAQs on Statelessness and the Ability to Work for Joint F-1/TPS, Sept. 3, 2015 AILA Doc. No. 15090306, available at: aila.org/infonet/uscis-faq-joint-f-1-tps-status-and-statelessness

II. DED

How do I determine whether my client is eligible for DED for Venezuela?

A noncitizen is covered by DED if he or she is a Venezuelan national, or someone without nationality who last habitually resided in Venezuela, who was present in the United States as of January 20, 2021. However, an otherwise eligible individual is disqualified if he or she:

- Has voluntarily returned to Venezuela or their country of last habitual residence outside the United States;
- Has not continuously resided in the United States since Jan. 20, 2021;
- Is inadmissible under INA § 212(a)(3) or removable under INA § 237(a)(4) (the security and related grounds of inadmissibility and deportability);
- Has been convicted of any felony or two or more misdemeanors committed in the United States, or meets the criteria set forth in INA § 208(b)(2)(A) (statutory bars to asylum that apply to a noncitizen who: has persecuted others; has been convicted of a particularly serious crime; has committed a serious nonpolitical crime outside the United States; is a danger to the security of the United States; has engaged in terrorist activity; or was firmly resettled in another country prior to arriving in the United States);
- Was deported, excluded or removed before Jan. 20, 2021;
- Is subject to extradition;
- Is someone whose presence in the United States the Secretary of DHS has determined is not in the interest of the United States or presents a danger to public safety; or
- Is someone whose presence in the United States the Secretary of State has reasonable grounds to believe would have potentially serious adverse foreign policy consequences for the United States.

What is the application process for DED?

There is no application form required to obtain DED coverage. However, if someone covered by DED for Venezuela wants to obtain a DED-based EAD, he or she should file a Form I-765 in eligibility category (a)(11), along with evidence of identity and nationality. This could include documents such as a passport; a birth certificate accompanied by photo identification; or a national identity document bearing a photo and/or fingerprint. An eligible applicant without nationality should submit evidence of having last habitually resided in Venezuela.

The applicant must also provide evidence of presence and continuous residence as of Jan. 20, 2021, including copies of any of the following: passport; Form I-94, Arrival-Departure Record; employment records; rent receipts, utility bills, receipts, or letters showing dates when the applicant received service; passport entries; bank books with dated transactions; Selective Service card; attestations by churches, unions, or other organizations of the applicant's residence; affidavits;

money order receipts for money sent in or out of the United States; birth certificates of children born in the United States; correspondence between the applicant and others; or Social Security card.

Applicants should document eligibility as thoroughly as possible. Those who fail to demonstrate DED eligibility should expect to receive a request for additional evidence.

The application must be accompanied by the Form I-765 filing fee or a Form I-912 Request for Fee Waiver. If USCIS needs biometrics to produce the EAD, it will schedule an appointment for the applicant at a local Application Support Center. More details about filing are available on the USCIS website at: uscis.gov/humanitarian/deferred-enforced-departure/ded-granted-country-venezuela.

How are the eligibility criteria for TPS and DED different, and how should I advise a Venezuelan client who is eligible for both?

In addition to the benefits of TPS over DED discussed above, practitioners must consider differences in eligibility criteria. The below chart summarizes the eligibility requirements.

	DED	TPS
Nationality	Venezuelan or stateless w/ habitual residence in VZ	Venezuelan national or stateless w/ habitual residence in VZ
Physical presence	Present on Jan. 20, 2021	CPP since March 9, 2021
Continuous Residence	CR since Jan. 20, 2021	CR since March 8, 2021
Travel	Cannot have voluntarily returned to VZ or country of last habitual residence	Brief, casual, innocent absence does not disrupt CPP or CR
Inadmissibility grounds	Do not apply except INA §212(a)(3)	Most grounds apply but can be waived (with some exceptions)
Mandatory asylum bars (firm resettlement, etc.)	Apply	Apply

Criminal bars	Felony or 2 or more misdemeanors	Felony or 2 or more misdemeanors
Deported/excluded/removed	Cannot have been before Jan. 20, 2021	N/A
Subject to extradition	Cannot be	N/A
US interest, foreign policy, public safety implications	Apply	N/A

In the Federal Register Notice, USCIS encourages those who believe they are eligible for TPS to file during the initial registration period, even if they are also covered by DED, in the event they cannot qualify for TPS late initial filing under 8 CFR § 244.2(f)(2) after DED has expired.

Does someone with TPS or DED accrue unlawful presence?

No. Someone covered by DED is considered to be in a period of authorized stay beginning on Jan. 19, 2020 for as long as the DED designation for Venezuelans is in effect. A TPS beneficiary is considered to be in lawful nonimmigrant status for the duration of the TPS grant and does not accrue unlawful presence for purposes of INA §§ 212(a)(9)(B) and (C)(i)(1). The period of authorized stay begins on the date the TPS application is filed, provided it is ultimately approved, and continues until TPS status is terminated. However, a grant of TPS does not erase any unlawful presence accrued before TPS was approved.⁸

What if my client is in removal proceedings?

For a detailed discussion of these issues, please see CLINIC’s [practice pointer](#) “Temporary Protected Status: Navigating Removal Proceedings, Dual Nationality, and Asylum.”

Where is the legal guidance for DED and TPS?

March 9, 2021 Federal Register Notice — [govinfo.gov/content/pkg/FR-2021-03-09/pdf/2021-04951.pdf](https://www.govinfo.gov/content/pkg/FR-2021-03-09/pdf/2021-04951.pdf)

⁸ See USCIS Adjudicator’s Field Manual, Chapter 40.9.2.

TPS

INA § 244 — uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1254a&num=0&edition=prelim

8 CFR § 244 — [law.cornell.edu/cfr/text/8/part-244](https://www.law.cornell.edu/cfr/text/8/part-244)

8 CFR § 1244 — [law.cornell.edu/cfr/text/8/part-1244](https://www.law.cornell.edu/cfr/text/8/part-1244)

USCIS website — uscis.gov/humanitarian/temporary-protected-status/temporary-protected-status-designated-country-venezuela and uscis.gov/i-821

DED

Presidential Memorandum of Jan. 19, 2021 Designating Deferred Enforced Departure for Certain Venezuelans, available at: [federalregister.gov/documents/2021/01/25/2021-01718/deferred-enforced-departure-for-certain-venezuelans](https://www.federalregister.gov/documents/2021/01/25/2021-01718/deferred-enforced-departure-for-certain-venezuelans)

USCIS *Adjudicator's Field Manual*, Chapter 38.2, as incorporated into the USCIS Policy Manual, available at: uscis.gov/sites/default/files/document/policy-manual-afm/afm38-external.pdf

USCIS website — uscis.gov/humanitarian/deferred-enforced-departure/ded-granted-country-venezuela