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May 17, 2021

Samantha Deshommès
Chief, Regulatory Coordination Division
Office of Policy and Strategy
U.S. Citizenship and Immigration Services
Department of Homeland Security

Re: Docket ID USCIS-2021-0004-0001, Identifying Barriers Across U.S. Citizenship and Immigration Services (USCIS) Benefits and Services; Request for Public Input

Dear Ms. Deshommès:

As members of the Temporary Protected Status and Deferred Enforced Departure Administrative Advocacy Coalition (TPS-DED AAC),¹ the ten undersigned organizations submit this comment in response to the request for public input from U.S. Citizenship and Immigration Services (USCIS), *Identifying Barriers Across U.S. Citizenship and Immigration Services (USCIS) Benefits and Services; Request for Public Input*, 86 FR 20398 (April 19, 2021) (Docket ID USCIS-2021-0004-0001).

The TPS-DED AAC is a coalition of national, state, and local non-profit organizations engaged in administrative advocacy around TPS. TPS-DED AAC members work to advocate for the extension, designation, and redesignation of TPS for all eligible countries and collaborate with community members to identify and resolve barriers to successful implementation at USCIS.

I. TEMPORARY PROTECTED STATUS (TPS) AND DEFERRED ENFORCED DEPARTURE (DED)

Temporary Protected Status (TPS) extends protection to foreign nationals in the United States from civil, political, and humanitarian crises in their home country that make it unsafe for them to return. After consultation with other government agencies, such as the State Department and USCIS, the DHS Secretary may designate a country for TPS if conditions there meet certain requirements regarding ongoing armed conflict, natural disasters, or other extraordinary and temporary conditions that temporarily prevent safe return.² TPS is temporary but renewable while conditions persist. While a grant of TPS itself does not provide a path to lawful permanent residence (LPR), TPS holders who are otherwise eligible may apply for and be granted LPR status. TPS protects holders from deportation and provides work authorization for as long as an individual has TPS.

Deferred Enforced Departure (DED), which falls under the president's authority to conduct foreign relations, is also used to protect foreign nationals in the United States from civil, political, and humanitarian crises in their home country that make it unsafe for them to return, or whose suspension of deportation serves other United States foreign policy or domestic

¹ Formerly the Temporary Status Advocacy Working Group (TPS AWG).

² *Temporary Protected Status*, U.S. Cit. & Immigr. Servs., U.S. Dep't of Homeland Sec., <https://www.uscis.gov/humanitarian/temporary-protected-status> (last updated Jan. 29, 2021).



interests. DED provides similar protections as TPS (including protection from deportation and work authorization), but DED does not require a registration process and is triggered when an individual is identified for removal.

TPS and DED provide some flexibility for USCIS regarding implementation, but USCIS often fails to use this authority to the greatest degree to minimize barriers and maximize the number of people who apply for initial and re-registration for these programs.³ We identify these barriers and solutions to minimize them below.

II. BARRIERS TO BENEFITS AND SERVICES REGARDING TPS AND DED

The processing delays and increasing backlog of TPS applications at USCIS have disrupted the functionality of the program, which affects most if not all of the barriers we list below. As of this comment, processing times for Form I-821 to apply for TPS range from three to 7.5 months and processing times for Form I-765 to apply for work authorization range from 2.5 months to one year.⁴

A. Federal Register Notice Delays and Consequences⁵

The law requires the DHS Secretary to make TPS decisions for currently designated countries at least 60 days in advance of the end of the designation period and publish these decisions in the Federal Register in a timely manner.⁶ While DED does not have the same requirements under the law, the failure to publish DED Federal Register Notices (FRNs) in a timely manner following announcements has similar consequences to TPS.

Both the previous and current administrations have routinely announced TPS and DED decisions without the accompanying FRN. Recent FRNs for TPS for Syria, DED for Venezuela, and DED for Liberia were all published over a month after their decision announcement. As of the date of this comment, no FRN has been published for the new Burma TPS designation, announced on March 12, 2021.

FRN delays tip off a domino effect of consequences for TPS holders and their families. When a decision arrives or is announced without a FRN (opening the re-registration period) the clock starts to tick on TPS holders' current TPS-related documents, which are only valid through certain expiration dates. TPS holders are then unable to obtain needed documents for work, driver's licenses, maintain access to bank accounts, student loans, etc. at no fault of their own. The Department of Justice Immigrant and Employee Rights Section lists numerous examples of TPS holders being impacted by these issues and the government resources being spent to address them.⁷ The timely publication of FRNs is critical, because late publications make vulnerable communities more likely to be taken advantage of by unscrupulous actors, including

³ 8 U.S.C. § 1254; U.S. Cit. & Immigr. Servs., U.S. Dep't of Homeland Sec., Deferred Enforced Departure, last reviewed and updated March 12, 2021, <https://www.uscis.gov/humanitarian/deferred-enforced-departure>.

⁴ U.S. Cit. & Immigr. Servs., U.S. Dep't of Homeland Sec., Check Case Processing Times, accessed May 6, 2021, <https://egov.uscis.gov/processing-times/> (Select "I-821 | Application for Temporary Protected Status" and then "I-765 | Application for Employment Authorization" in the form selection box).

⁵ See Appendix for a catalogue of Federal Register Notice delays.

⁶ 8 U.S.C. § 1254b(3)(A) ("At least 60 days before end of the initial period of designation, and any extended period of designation . . . the Attorney General . . . shall determine whether the conditions for such designation under this subsection continue to be met.").

⁷ Dep't of Justice Immigrant and Employee Rights Section, Telephone Interventions, accessed May 6, 2021, <https://www.justice.gov/crt/telephone-interventions-2>.

notarios and individuals engaging in the unauthorized practice of law. Moreover, an official FRN is critical to ensure that on-the-ground enforcement officers are appropriately prioritizing cases, releasing individuals from detention, and appropriately closing out immigration-related cases.

Under the previous administration, these issues were exacerbated by the lack of outreach and education to impacted communities by DHS and USCIS, one major example being the failed implementation of the Liberian Refugee Immigration Fairness (LRIF) program and Liberian DED. A lack of meaningful outreach and engagement with the Liberian community contributed to a severe underutilization of the relief available—by the original deadline in December 2020, only 2,679 applications had been received, 362 approved, and 56 denied out of an eligible population of at least 10,000.⁸

To minimize these consequences and barriers, DHS/USCIS should publish FRNs at least 60 days in advance of the end of a TPS designation period or on the same day as a statement, press release, or social media engagement for new designations.

B. USCIS Processing Delays and Consequences

Processing and FRN delays also negatively impact the benefits that are meant to accompany TPS and DED status, particularly the ability to receive work authorization. At the time of a TPS decision, given the time it takes to process, USCIS typically issues an automatic extension of employment authorization documents (EADs) in the announcing FRN. In recent years, USCIS failed to adjudicate thousands of timely filed re-registrations prior to the expiration of that automatic extension. Congress members wrote to the administration in 2019 requesting more information on the management of the TPS program, citing estimates that 20,000 Salvadorans, 4,500 Haitians, 335 Syrians, and an unknown number of Hondurans were affected by these delays.⁹ TPS holders were unable to secure their own employment or renew licenses and identification and endured harassment from employers.¹⁰

Prior to the previous administration, in the nearly 30-year history of TPS there have only been a few noted instances in which USCIS was unable to process TPS cases in time before an automatic extension ran out.¹¹ In those cases, USCIS ensured TPS holders' work authorization would not be impacted by issuing a Federal Register Notice, which is a clear and legally sufficient solution for I-9 purposes. Form I-9 instructions direct employers to accept expired EADs when they have "been extended by regulation or a Federal Register Notice."¹²

⁸ Applications for Liberian Refugee Immigration Fairness: Fact Sheet, Congressional Research Service (December 9, 2020), <https://crsreports.congress.gov/product/pdf/R/R46487>.

⁹ Letter to Kevin McAleenan, Acting Secretary, U.S. Dep't of Homeland Sec. Kenneth T. Cuccinelli, II, Acting Director, U.S. Dep't of Homeland Sec., Regarding the administration's use of Temporary Protected Status (TPS) and issues related to the program's management (July 24, 2019), available at <https://velazquez.house.gov/media-center/press-releases/velazquez-van-hollen-want-answers-tps-immigration-program>; Letter from 70 law professors and scholars to Kirstjen Nielsen, Secretary of U.S. Department of Homeland Security, and L. Francis Cissna, Director of U.S. Citizenship and Immigration Services (Nov. 28, 2018), available at <https://cliniclegal.org/resources/letter-70-law-professors-and-scholars-uscis-and-dhs-regarding-work-permit-extensions-tps>.

¹⁰ *Id.*

¹¹ Lisa Parisio, USCIS Processing Delays and the Resulting Consequences to TPS Holders and their Families, Catholic Legal Immigration Network, Inc., (June 25, 2019), available at <https://cliniclegal.org/resources/uscis-policy-and-procedure/uscis-processing-delays-and-resulting-consequences-tps-holders>.

¹² *Id.*

Instead of abiding by historical precedent and issuing additional FRNs to automatically extend EADs when necessary, under the previous administration USCIS began a new practice of issuing individual Extension Notices. Again, Form I-9 directs employers to accept expired EADs only when they have “been extended by regulation or a Federal Register Notice,” which has caused some employers to terminate TPS holders because they do not understand or accept the Extension Notice.¹³ We question whether this change is arbitrary and capricious under the Administrative Procedures Act, as USCIS replaced a time-tested, effective, and successful administrative practice (uniformly extending EADs for all TPS holders immediately and consistently), with one more susceptible to delays, errors, miscommunication with no explanation as to why the change was made, potentially violating 5 U.S.C. § 706(2)(A).¹⁴

Like FRN delays, the confusion surrounding individual Extension Notices also drains resources at the DOJ Immigrants and Employee Rights Section, which must field all instances of employer noncompliance surrounding the use of the individual Extension Notice.

Accordingly, we urge the administration to address ongoing processing delays so that work arounds to extend EADs are unnecessary, and in the meantime we strongly encourage the administration to discontinue the practice of individual Extension Notices and return to all automatic extensions of work authorization by Federal Register Notice.

C. Responding to Barriers Related to COVID-19

The COVID-19 pandemic has introduced additional barriers around TPS and DED for both USCIS and applicants. For individuals and families, new obstacles on top of FRN and processing delays include social distancing protocols, USCIS field office closures, and job loss and loss of income. As pandemic precautions are at least months away from fully lifting and USCIS continues to work to increase capacity and reduce the backlog, we recommend the following to ease application processes for TPS holders:

1. Make TPS decisions and publish corresponding FRNs 180 days in advance

The statute states that DHS must make a determination as to whether to extend, designate, or redesignate a country for TPS “at least” 60 days before expiration of the current grant period.¹⁵ As specified above, TPS processing currently takes a minimum of three months, or 90 days. Congress intended for a 60 day minimum, not maximum, and thus we recommend this determination be made at least 180 days before the end of a grant period to accommodate for USCIS processing delays.

2. Extend all registration periods to one year.

The statute provides that TPS registration periods be not less than 180 days.¹⁶ DHS has interpreted the 180-day requirement to only apply to an initial TPS designation not for the

¹³ Form I-9, U.S. Cit. & Immigr. Servs., U.S. Dep’t of Homeland Sec. (July 17, 2017), www.uscis.gov/i-9; Instructions Form I-9, U.S. Cit. & Immigr. Servs., U.S. Dep’t of Homeland Sec (July 17, 2017), www.uscis.gov/i-9.

¹⁴ 5 U.S.C. § 716(2)(A); See Letter from 70 law professors and scholars to USCIS and DHS regarding work permit extensions for TPS holders (December 3, 2018), <https://clinicalegal.org/resources/humanitarian-relief/letter-70-law-professors-and-scholars-uscis-and-dhs-regardin-g-work>.

¹⁵ 8 U.S.C. § 1254b(3)(A).

¹⁶ 8 U.S.C. § 1254c(1)(A)(iv).

re-registration period, which is inconsistent with the language of the statute and undermines a successful re-registration.¹⁷ The use of “not less than” also indicates that Congress envisioned the possibility of longer registration periods. Considering the current processing times of up to 7.5 months and the additional barriers to timely submission caused by the COVID-19 pandemic, 180 days is not an adequate registration period. We therefore recommend that USCIS extend both the initial and re-registration periods to one year.

D. Advance Parole

For decades, the USCIS (and formerly INS) policy was that a TPS holder who obtained advance parole and used it to travel abroad was “paroled” into the United States upon their return. This entry into the United States also constituted a “parole” within the meaning of INA 245(a). In August, 2020, USCIS abruptly reversed this position by adopting the decision of the Administrative Appeals Office in *Matter of Z-R-Z-C*.¹⁸ The new policy states that the return on an advance parole document is not a parole within the meaning of INA 245(a). Instead, USCIS finds that the person returns to the United States in the status they had at the time of their departure, precluding many TPS holders from being able to adjust to LPR status. We question whether USCIS’ current policy is arbitrary and capricious, as it constitutes a substantive rule unlawfully adopted without notice and comment under the APA, and whether it violates the Miscellaneous and Technical Immigration and Naturalization Act of 1991, the very statute that the new policy purports to rely on.¹⁹ We recommend USCIS to reverse its August 2020 memorandum, returning to the previous policy of recognizing TPS holders who leave the country on advance parole as having satisfied the “inspected and admitted or paroled” requirement upon return.

E. E-Verify

Despite being authorized to work, TPS workers are disproportionately flagged by E-Verify as ineligible to work, costing them valuable income. According to analysis of USCIS data by the CATO Institute, nine percent of E-Verify queries for TPS holders that are legally allowed to work were incorrectly flagged as ineligible compared to roughly two percent overall.²⁰ Only 20 percent of those TPS individuals were eventually allowed to work.²¹ We ask that USCIS take immediate steps to minimize this major barrier to this vulnerable population in achieving work, stability, and security. TPS holders are flagged by the E-Verify system over four times as often with a 48 percent higher chance to be erroneously flagged than rates nationwide.²² TPS holders need a separate customer service mechanism to address the volume of issues surrounding work permits, and we recommend USCIS begin by creating a specific helpline and email inbox for queries related to work permits for TPS holders.

F. Stakeholder Engagement and Transparency

¹⁷ *Id.* (“...to the extent and in a manner which the Attorney General establishes, the alien registers for the temporary protected status under this section during a registration period of not less than 180 days.”)

¹⁸ USCIS Adopts AAO Decision on TPS and Authorized Travel, U.S. Cit. & Immigr. Servs., U.S. Dep’t of Homeland Sec. (Aug. 31, 2020), <https://www.uscis.gov/news/news-releases/uscis-adopts-ao-decision-on-tps-and-authorized-travel>.

¹⁹ 8 U.S.C. § 1101.

²⁰ Alex Nowrasteh, E-Verify Errors Plague Workers with Temporary Protected Status, CATO Institute (April 30, 2020), <https://www.cato.org/blog/e-verify-errors-plague-workers-temporary-protected-status>.

²¹ *Id.*

²² *Id.*

One major barrier to the utilization of available benefits and services is a lack of information and consistent communication between stakeholders and USCIS. As USCIS continues to troubleshoot the above barriers for TPS and DED holders, we recommend the following practices to ensure much needed communication and transparency with those who are most affected by these issues:

1. *Regular data releases*

- a. We ask that USCIS release TPS and DED-specific data at least quarterly, if not more frequently, on the Immigration and Citizenship Data page on the USCIS website.²³ The last TPS-specific data was published in November 2018, and there is no option to search for DED-specific information on the page. This data should include the number of current TPS and DED holders as well as receipts, approvals, denials, and pending adjudications for the most recent re-registration period.

2. *Regular stakeholder meetings*

- a. Hold at least one stakeholder call or webinar within one week of the publication of a TPS or DED implementing FRN.
- b. Establish at least quarterly meetings including relevant officials at DHS (including CRCL), USCIS, the CIS Ombudsman's office, DOJ Immigrant and Employee Rights section, and stakeholders to share information and address systemic issues related to TPS and DED implementation.
- c. If, in extenuating circumstances, a TPS or DED implementing FRN is delayed, ensure USCIS immediately engages in a robust, culturally competent outreach plan in order to combat notario fraud and those engaged in the unauthorized practice of immigration law from preying on vulnerable communities.

G. Initial Designation and Redesignation for TPS

The previous administration failed to even consider the use of initial designations and redesignations, resulting in four years' worth of accrual of countries and peoples who are eligible for TPS. On March 5, 314 state, local, and national immigrant, labor, faith, civil rights, and legal organizations wrote to the administration requesting that DHS, in consultation with the U.S. Department of State and USCIS, designate or redesignate the following countries for TPS: the Bahamas, Cameroon, El Salvador, Guatemala, Guinea, Haiti, Honduras, Hong Kong, Lebanon, Mauritania, Nepal, Nicaragua, Sierra Leone, Somalia, South Sudan, Sudan, Venezuela (recently designated), and Yemen.²⁴ We would like to reiterate this request.

III. CONCLUSION

We thank you for engagement on this matter and look forward to working with you to minimize these barriers going forward for a healthier, functional TPS program. Please contact Jose

²³ Immigration and Citizenship Data, U.S. Cit. & Immigr. Servs., U.S. Dep't of Homeland Sec. (accessed April 29, 2021), <https://www.uscis.gov/tools/reports-and-studies/immigration-and-citizenship-data>.

²⁴ Letter to Joseph R. Biden, President, and Alejandro Mayorkas, Secretary, U.S. Dep't of Homeland Sec., Request to Designate and Redesignate 18 Countries for Temporary Protected Status and Protect 2.3 Million Immigrants (March 5, 2021), available at <https://clinicalegal.org/resources/humanitarian-relief/temporary-protected-status-and-deferred-enforced-departure/314>.



Magaña-Salgado, Campaign Coordinator for the TPS-DED AAC at jose@masadc.com with any questions.

Sincerely,

Catholic Legal Immigration Network, Inc.
Central American Resource Center - DC
Families Rights Network
FANM In Action
Lutheran Immigration and Refugee Service
The Mauritanian Network for Human Rights in the US
New York Immigration Coalition
Service Employees International Union (SEIU)
UndocuBlack Network
World Relief