Adjustment Options for Temporary Protected Status Beneficiaries

Sept. 17, 2021

Temporary Protected Status (TPS) is a temporary immigration status for nationals of a country that is experiencing ongoing armed conflict, environmental disaster, or another extraordinary and temporary condition. While TPS does not provide an independent path to Lawful Permanent Resident (LPR) status, there are ways in which TPS has been able to help some beneficiaries of family-based petitions (primarily immediate relatives) become eligible for adjustment of status, even if the TPS beneficiary initially entered the United States without being "inspected and admitted or paroled." However, the Supreme Court's recent decision in *Sanchez v. Maryokas* and recent changes to U.S. Citizenship and Immigration Services (USCIS) policy have made it increasingly difficult for many TPS beneficiaries who initially entered the United States without inspection to adjust status through family-based petitions. This practice advisory reviews these recent developments as well as options for adjustment that may still be available to help certain TPS beneficiaries adjust under Immigration and Nationality Act (INA) § 245(a), even if they initially entered the United States without being inspected and admitted or paroled.[1]

Eligibility requirements for adjustment of status under 245(a).

To adjust under 245(a), an applicant must have been "inspected and admitted or paroled" upon their last entry; have an immigrant visa immediately available; and be admissible (or eligible for an inadmissibility waiver). In addition, INA § 245(c) imposes bars to adjustment that apply to any preference category beneficiary who has either worked without authorization or has failed to continuously maintain lawful immigration status since entry. Because most preference beneficiaries who are in the United States are subject to either or both bars, 245(a) adjustment is typically only available to immediate relatives who have been inspected and admitted or paroled, since immediate relatives are exempt from these bars.

> ***Example***: Rohan from Nepal first came to the United States in 2013 on a tourist visa. He overstayed and in 2015, after Nepal was designated for TPS, he applied for TPS and was approved. In 2018, he married a U.S. citizen and applied for adjustment of status. Since he was inspected and admitted as a tourist and has a visa immediately available, he is eligible to adjust under 245(a) as long as he is admissible. Furthermore, because he is an immediate relative, it does not matter that he has worked without authorization and failed to maintain lawful

[1] While this advisory focuses on family-based adjustment of status under INA § 245(a), adjustment of status may be available under INA § 245(i) for certain beneficiaries and derivative beneficiaries of an approvable-when-filed petition filed on or before April 30, 2001.

immigration status prior to being granted TPS.

The Supreme Court ruled that a grant of TPS is not an admission for 245(a) adjustment

Many TPS beneficiaries initially entered the United States without inspection, which would ordinarily bar a noncitizen from adjustment of status under 245(a). For years, however, appellate courts have held differing opinions on whether a grant of TPS itself should be considered an "inspection and admission or parole" that satisfies the 245(a) requirement. The recent Supreme Court decision in *Sanchez v. Maryokas*, resolved the circuit split by holding that a TPS recipient who first entered the United States without inspection is not considered "admitted" by virtue of being granted TPS.

Under the prior law and policy for those who resided in a state under the jurisdiction of the U.S. Court of Appeals for the Sixth Circuit, the U.S. Court of Appeals for the Eighth Circuit, and the U.S. Court of Appeals for the Ninth Circuit,[2] TPS itself was considered an "admission" for purposes of 245(a) adjustment.[3] The U.S. Court of Appeals for the Third Circuit, the U.S. Court of Appeals for the Fifth Circuit, and the U.S. Court of Appeals for the Eleventh Circuit reached the opposite conclusion.[4] In a unanimous decision issued on June 7, 2021, the Supreme Court held that the petitioner, Jose Santos Sanchez, who entered the United States unlawfully prior to obtaining TPS, was not "admitted" after he was subsequently granted TPS. His employment-based application for adjustment was denied based on USCIS's determination that he had not been admitted. The Third Circuit affirmed that interpretation and the Supreme Court agreed. The Court reasoned that "lawful status and admission are distinct concepts in immigration law, and establishing the former does not establish the latter."

Writing for the majority, Justice Kagan agreed that while the statute states that a TPS recipient who applies for permanent residency is treated as having nonimmigrant status, which the Court characterizes as "the status traditionally and generally needed to invoke the LPR process under § 245 — that provision does not aid the TPS recipient in meeting § 245's separate admission requirement." Adjustment of status requires an admission, defined under INA 101(a)(13)(A), and it was interpreted by the Court as requiring a lawful *physical* entry.

The Court was unconvinced by the petitioner's argument that the grant of nonimmigrant status requires admission. Although the TPS statute references TPS recipients as being considered nonimmigrants for purposes of 245(a) adjustment, "the immigration law nowhere states that admission is a prerequisite of nonimmigrant status. So there is no reason to interpret the TPS provision's conferral of nonimmigrant status as including a conferral of admission." The opinion notes that "there are immigration categories in which individuals have nonimmigrant status without admission," and cites U status as one example. See INA § 101(a)(15)(U).

---

[2] States within the Sixth Circuit include Kentucky, Michigan, Ohio, and Tennessee. States within the Ninth Circuit include Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington. States within the Eighth Circuit include Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota.

[3] *Flores v. USCIS*, 718 F.3d 548 (6th Cir. 2013); *Ramirez v. Brown*, 852 F.3d 954 (9th Cir. 2017); *Velasquez v. Barr*, No. 19-1148 (8th Cir. 2020).

[4] *Sanchez v. Sec'y United States Dept. of Homeland Sec.*, 967 F.3d 242 (3rd Cir. 2020); *Rodriguez Solorzano v. Mayorkas*, No. 19-50220, 2021 (5th Cir. 2021); *Serrano v. Attorney General*, 655 F.3d 1260 (11th Cir. 2011).

The Supreme Court decision is not effective until the certified judgment is issued, which should happen approximately 32 days after the opinion was announced. Immigration advocates are urging the Biden administration to delay implementing the decision and continue to adjudicate pending applications until the Supreme Court's mandate to the lower court is issued. CLINIC has heard reports that some adjustment interviews in the Sixth, Eighth, and Ninth Circuits have been cancelled in the wake of the ruling; we will continue to monitor implementation of the decision.

> ***Example***: Sami, from El Salvador, is a TPS beneficiary residing in California. Her U.S. citizen son is about to turn 21 and plans to file an I-130 petition for her. Sami first came to the United States without being inspected and admitted or paroled. She resides in the jurisdiction of the Ninth Circuit, where her TPS grant was previously considered an admission that would make her eligible for adjustment of status under 245(a). However, after the Supreme Court's decision in *Sanchez v. Mayorkas*, she will not be considered "inspected and admitted" by virtue of her TPS grant and is not eligible for adjustment of status. Because Sami accrued more than 180 days of unlawful presence before acquiring TPS, she would not be eligible to consular process since departing for the consular interview would trigger inadmissibility under INA § 212(a)(9)(B) and her U.S. citizen son is not a qualifying relative for purposes of a waiver.

Changes to USCIS policy limit the use of authorized travel to create an "admission or parole" for 245(a) adjustment.

When Congress established TPS in 1990, the statute provided a travel benefit for TPS beneficiaries. INA § 244(f)(3) authorizes "travel abroad with the prior consent" of DHS. The former INS then issued regulations to provide the mechanism for implementing the statutory TPS travel provision: "...Permission to travel may be granted by the director pursuant to the Service's advance parole provisions."[5]

A year after the TPS statute was enacted, Congress passed the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 (MTINA), which clarified in section 304(c) that a noncitizen who is authorized "to travel abroad temporarily and who returns to the United States in accordance with such authorization... shall be inspected and admitted in the same immigration status the alien had at the time of departure" as long as the individual is not inadmissible or barred from TPS. (emphasis added).

Therefore, when TPS beneficiaries return after authorized travel — typically, with an advance parole document, as provided in the regulations — they are "inspected and admitted or paroled." Regardless of whether the return is characterized as a "parole" (per agency regulations) or an "admission" (per MTINA), it satisfies the 245(a) requirement.

[5] 8 CFR 244.15; Temporary Protected Status, 56 Fed. Reg. 23491, 23498 (May 22, 1991) (final rule); 56 Fed. Reg. 618, 622 (Jan. 7, 1991).

This was recognized by the prior version of the USCIS Policy Manual Vol. 7, Pt. B, Ch. 2, which stated[6]:

> If an alien under TPS departs the United States and is admitted or paroled upon return to a port of entry, the alien meets the inspected and admitted or inspected and paroled requirement provided the inspection and parole occurred before he or she filed an adjustment application....
>
> DHS has authority to admit rather than parole TPS beneficiaries who travel and return with TPS-related advance parole documents. For purposes of adjustment eligibility, it does not matter whether the TPS beneficiary was admitted or paroled. In either situation, once the alien is inspected at a port of entry and permitted to enter to the United States, the alien meets the inspected and admitted or inspected and paroled requirement.

In recent years, USCIS adjudicators began to apply a different reading of the law which conflicted with the USCIS Policy Manual. Then, on Aug. 20, 2020, USCIS issued a Policy Memorandum adopting the Administrative Appeals Office (AAO) decision in Matter of Z-R-Z-C-, Adopted Decision 2020-02 (AAO Aug. 20, 2020). Through adopting *Matter of Z-R-Z-C-*, USCIS issued a new interpretation of the legal effect of TPS beneficiaries traveling and returning to the United States with DHS authorization. USCIS now takes the position that TPS beneficiaries who travel abroad and return using a DHS-issued travel document under INA § 244(f)(3) will not satisfy the "inspected and admitted or paroled" eligibility requirement for adjusting status under 245(a). This USCIS policy is legally questionable and may be the subject of future litigation.

USCIS cites MTINA to assert that TPS beneficiaries returning from authorized travel are returning with the immigration status of a "TPS beneficiary who entered without inspection," or a "TPS beneficiary in removal proceedings." The latter interpretation has also allowed USCIS adjudicators to deny adjustment applications for TPS beneficiaries, on the basis that USCIS does not have jurisdiction over such applications. The issue of TPS beneficiaries with prior removal orders who subsequently travel is discussed further below.

In recognition that the *Matter of Z-R-Z-C-* holding is a departure from its past practice and policy on the legal effect of TPS beneficiaries traveling abroad and returning pursuant to TPS travel authorization, USCIS has clarified that it will apply *Matter of Z-R-Z-C-* prospectively to TPS beneficiaries who traveled and returned to the United States with a DHS-issued travel document after Aug. 20, 2020.

Furthermore, USCIS states that it will not apply this adopted decision to TPS beneficiaries who have already adjusted status to lawful permanent residence or who have a pending application for adjustment of status based on TPS-based, DHS authorized travel prior to Aug. 20, 2020.

> Example: Luis, from Honduras, came to the United States EWI in 1997 and has had TPS since April 1999. He is now married to a U.S. citizen and hopes to become an LPR through his spouse. In 2019, Luis received advance parole to travel to Canada. He returned to the United States and was allowed to enter based on his advance parole document. Since it took place prior to Aug. 20, 2020, his return with DHS authorization means that he has been

[6] Last accessed Sept. 18. 2020.

inspected and admitted or paroled and therefore would be eligible to adjust status under 245(a) as an immediate relative.

Under *Matter of Z-R-Z-C*, if Luis had returned with DHS authorization after Aug. 20, 2020, USCIS would not view his return as an admission or parole and he would remain ineligible to adjust status under 245(a).

Under current USCIS policy, adjustment of status is virtually impossible for those with prior removal orders.

Under past practice, departing the United States to travel abroad with a DHS-issued travel document was usually viewed as executing a prior removal order. INA § 101(g) states that any noncitizen who is "ordered deported or removed…who has left the United States, shall be considered to have been ordered or removed in pursuance of law…" Language in the instructions for the I-131 Application for Travel Document, as well as language on the I-512 advance parole travel document warn that travel, even with advance permission, executes a removal order that has not been reopened and administratively closed or terminated. As a result, upon return to the United States, USCIS, not the Executive Office for Immigration Review (EOIR), would have jurisdiction over a subsequent application for adjustment of status.

Through a Dec. 20, 2019 Policy Alert, USCIS announced a new policy which states that travel with an advance parole document does not execute a removal order. Under this policy, the individual returns in "the exact same immigration status and circumstances" they were in when they departed. "Such travel does not result in the execution of any outstanding removal order to which a TPS beneficiary may be subject. TPS beneficiaries who had outstanding, unexecuted final removal orders at the time of departure, remain TPS beneficiaries who continue to have outstanding, unexecuted final removal orders upon lawful return."[7]

Therefore, USCIS's current view is that only EOIR has jurisdiction over any adjustment of status application that the returning TPS beneficiary may file. He or she would not be able to adjust before USCIS unless an immigration judge first reopened and terminated the removal order.

The process for reopening a removal order is complex and subject to time bars as well as the immigration judge's discretion,[8] which makes it very difficult for TPS beneficiaries to overcome a prior removal order. The result is that many beneficiaries are left with no forum where they can seek adjustment of status despite being statutorily eligible. Consular processing remains an option for some, however it is more costly, involves traveling abroad for an uncertain period of time, and carries the risk of prolonged separation from loved ones if the applicant is unable to overcome an inadmissibility finding. The limited operations of many consulates during the pandemic has brought

[7] USCIS Policy Alert, Effect of Travel Abroad by Temporary Protected Status Beneficiaries with Final Orders of Removal, PA-2019-12 (Dec. 20, 2019).

[8] In general, an individual who has been ordered removed may file one motion to reopen within 90 days of the date of entry of a final administrative order. See INA § 240(c)(7)(A), (c)(7)(C)(i). The BIA and IJs have *sua sponte* authority to reopen or reconsider their own decisions "at any time," without regard to the time and number limitations, however this is generally only granted in "exceptional situations." See 8 CFR §§ 1003.2(a), 1003.23(b)(1).

the issuance of immigrant visas to a virtual standstill while TPS remains under threat.

CLINIC and partners are challenging this policy before the United States District Court for the District of Columbia on behalf of organizational plaintiff CARECEN and seven individual TPS beneficiaries from El Salvador and Haiti who qualify as immediate relatives.

> **Example**: Rachelle from Haiti was ordered removed in 2008 but never departed. In 2011, she obtained TPS. After obtaining an advance parole document, she traveled to Haiti in 2013 to visit her father who was seriously ill. She is now married to a U.S. citizen and wants to adjust status. How would you advise her?
>
> Rachelle's return with DHS authorization was prior to Aug. 20, 2020, and would be viewed as an admission or parole for purposes of 245(a) adjustment.
>
> However, under the current USCIS guidance,[9] USCIS will reject jurisdiction over any adjustment of status application, taking the position that jurisdiction lies with the immigration court. Because of strict time bars to reopening removal proceedings, it would be extremely difficult for Rachelle to reopen her immigration court proceedings so that she could apply to adjust before the immigration judge.

Practice Tips

1. Because *Z-R-Z-C-*'s holding is prospective only, USCIS should still consider TPS beneficiaries who traveled and returned with an advance parole document prior to Aug. 20, 2020, to be "admitted or paroled" for purposes of 245(a) adjustment of status. Those who have become permanent residents based on an advance parole "admission or parole" prior to Aug. 20, 2020, are not at risk of losing their status due to the policy change.

   None of these policy changes have any impact on the statutory travel benefit afforded to TPS beneficiaries. They may continue to apply for USCIS consent to travel abroad by filing Form I- 131 to request an advance parole travel document. Because of *Z-R-Z-C-*, however, USCIS will not consider their lawful return as creating an "admission or parole" for 245(a) eligibility. TPS beneficiaries who are considering applying for advance permission to travel abroad should consider the following: In order to travel and be permitted to return, a person must remain in valid TPS upon seeking reentry. The possibility that DHS will be allowed to implement the termination of TPS designations for several countries still looms.[10] There are also lengthy processing times for advance parole requests. USCIS estimates current processing

[9] USCIS Policy Manual Vol. 7, Pt. A., Ch. 3.

[10] Due to pending litigation challenging six TPS terminations, TPS and work authorization for qualifying TPS beneficiaries from El Salvador, Haiti, Honduras, Nepal, Nicaragua, and Sudan has been automatically extended through Dec. 31, 2022. See Sept. 10, 2021 Federal Register Notice, available at: federalregister.gov/documents/2021/09/10/2021-19617/continuation-of-documentation-for-beneficiaries-of-temporary-protected-status-designations-for-el. May 22, 2021, the Department of Homeland Secretary announced a re-designation of TPS for Haiti for 18 months through Feb. 3, 2023. See: uscis.gov/humanitarian/temporary-protected-status.

times for advance parole applications are between 2.5 to 8 months, depending on the Service Center.

2. After the Supreme Court's decision in *Sanchez v. Mayorkas*, USCIS will no longer consider TPS beneficiaries residing in the Sixth, Eighth or Ninth Circuits who initially entered without inspection to be "admitted" for purposes of 245(a) based solely on their grant of TPS. USCIS has yet to clarify whether it will continue to adjudicate pending adjustment applications that were filed before June 7, 2021 based on prior USCIS policy and the law of the relevant circuit. Stay up to date on developments related to the implementation of the decision to learn how USCIS will handle adjustment applications that were pending on the date the decision was issued. CLINIC does not believe that LPRs who already adjusted under the prior law in the Sixth, Eighth or Ninth Circuits are at risk of having their LPR status rescinded based on the recent decision, but DHS has not issued any guidance or clarification on this issue.

   Remember that the *Sanchez* decision does not impact the ability of TPS beneficiaries who entered with inspection to adjust under 245(a) as long as they are not barred under 245(c). Also, don't forget to screen clients who did enter without inspection or preference relatives barred from adjusting under 245(c) to see whether they qualify to adjust status under INA 245(i).

3. Despite the strict time bars that apply, some clients with prior removal orders who have traveled with advance parole prior to Aug. 20, 2020, may wish to file a motion to reopen removal proceedings with the immigration court in order to seek a forum through which to adjust status. Practitioners should consult CLINIC's resources on motions to reopen, and CLINIC affiliates may seek assistance through our "Ask the Experts" service. Continue to follow developments in the CARECEN litigation, in which the plaintiffs have asked the court to vacate and set aside the December 2019 policy as unlawful.