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US IMMIGRATION & NATIONALITY LAW

HELPING AFGHANS AND UKRAINIANS PROGRESS FROM PAROLE TO TEMPORARY PROTECTED STATUS TO PERMANENT RESIDENCE

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By Cyrus Mehta and Kaitlyn Box*

In light of the recent crises in Afghanistan and Ukraine, Temporary Protected Status (TPS) has been at the forefront of discussions around how the United States can assist individuals who are fleeing these two countries. On March 3, 2022, Ukraine was designated for TPS for an 18 month period. On March 16, 2022, the Department of Homeland Security also announced the designation of Afghanistan for TPS for a period of 18 months.

Generally, TPS provides a temporary immigration status to nationals of countries fraught with armed conflict or other disasters. In order to be eligible for TPS, an individual must be a national of a country designated for TPS, have been continuously present in the U.S. since the date of the designation, have continuously resided in the U.S. since a date specified by the Secretary of Homeland Security, and not be inadmissible to the United States. In the case of Ukraine, the requirement that applicants must have continuously resided in the United States since April 11, 2022 will render many Ukrainian nationals ineligible for TPS, as many individuals fleeing the war would not have arrived in the United States by that date. Individuals who are granted TPS receive a stay of deportation and temporary authorization to work in the United States.

The Uniting for Ukraine program that would allow Ukrainians to enter the US under humanitarian parole was announced on April 21, 2022. Thus, those who will get paroled into the US under Uniting for Ukraine will not be eligible for TPS. However, several thousand Ukrainians who came to Mexico after the Russian invasion in February 20, 2022 and got paroled into the US from the

Southern border prior to April 11, 2022 will be eligible for TPS.

On the other hand, Afghans have been applying for humanitarian parole prior to and after the US withdrew from Afghanistan on August 30, 2021. A recent New York Times report states that of the 43,000 humanitarian parole applications received by USCIS since July 2021, the agency has processed less than 2,000. Of those processed applications, 1,500 were denied and 170 were approved as of February 11, 2022. While the humanitarian parole program for Afghans has been a disappointment, those who have been paroled into the US already prior to March 16, 2022 can apply for TPS.

Though it provides an important temporary form of relief for some nationals of countries experiencing a crisis, TPS is, by its very nature, temporary and does not provide foreign nationals with a pathway to permanent residence or citizenship in the United States. Thus, one must look for other alternatives for individuals who wish to seek permanent residence in the United States. Foreign nationals who have a U.S. citizen or lawful permanent resident relative may be able to file a family-based adjustment of status application, but some family preference categories are extremely backlogged. Skilled TPS recipients who can find a U.S. employer to sponsor them may instead be eligible to file an employment-based adjustment of status application. There are no backlogs for most TPS-designated countries, and spouses and minor children of the primary applicant may also file adjustment of status applications. In addition, foreign nationals of extraordinary ability in the sciences, arts, education, business, or athletics may be eligible for an employment-based, first-preference visa, which does not require employer sponsorship or a Labor Certification.

However, complications arise when a TPS recipient who entered the U.S. without inspection wishes to apply for permanent residence. Pursuant to INA § 245(a), an individual must have been inspected and admitted or paroled into the United States in order to be eligible to apply for adjustment of status. A foreign national who was inspected and paroled into the United States would be eligible for adjustment of status, but an individual who entered without inspection would not. In a previous blog, we analyzed the Supreme Court's decision in *Sanchez v. Mayorkas*, which holds that a grant of Temporary Protected Status (TPS) does not constitute an admission under INA § 245(a) for purposes of adjustment of status. However, the decision seems to leave open whether a grant of TPS could "cure" a short lapse in the status of an individual who was inspected and admitted to the U.S., but later fell out of status. In her

opinion, Justice Kagan gives the example of an individual who was out of status for a few months before receiving TPS, potentially implying that receiving TPS ends an individual's time out of status, if this duration would otherwise have exceeded 180 days and rendered the individual unable to adjust under INA § 245(k). Additionally, the decision could imply that a grant of TPS could qualify as a "lawful nonimmigrant status", which could assist individuals who would otherwise have been ineligible to file and adjustment of status application under INA § 245(c)(7).

While TPS is no doubt an important tool for aiding individuals who have fled Ukraine or Afghanistan, not all nationals of these countries will be eligible and a grant of TPS does not provide a path to permanent residence in the U.S. Thus, some TPS recipients, or individuals from TPS-designated countries who are ineligible, may be able to utilize employment-based immigrant visa petitions as a path to permanent residence. Thus, one who was initially paroled into the US and then was granted TPS would be able to apply for adjustment of status if he or she became the beneficiary of an employment based I-140 petition after an employer obtained labor certification. The parole would fulfill the requirement under INA 245(a) that the applicant have been inspected and admitted or paroled into the US. The subsequent grant of TPS would then confer "lawful nonimmigrant status" to that applicant and thus render him or her eligible for adjustment of status under INA §245(c)(7). However, TPS recipients who entered without inspection will be ineligible to apply for adjustment of status. For individuals who were inspected and admitted to the U.S., though, but later had a lapse in status, a grant of TPS could render them again eligible for permanent residence.

There will be large numbers who will enter the US on humanitarian parole under Uniting for Ukraine but will not be eligible to receive TPS as they would have entered the US well after the cut off date of April 11, 2022. If a parolee is sponsored by an employer through labor certification, he or she will not be eligible for adjustment of status as parole is not considered a lawful nonimmigrant status under INA § 245(c)(7). This person will have to process at a US Consulate overseas after the I-140 petition is approved. Fortunately, Ukrainian nationals can have their cases processed at the US Consulate in Frankfurt rather than in Kiev. On the other hand, a parolee would still be able to adjust status under 245(a) as an immediate relative. Similarly, a parolee who becomes the beneficiary of an I-130 petition under a family preference category

will also be able to adjust status as the requirement to be in "lawful nonimmigrant status" under 245(c)(7) only applies to beneficiaries of employment-based petitions and not family-based petitions. Indeed, one in parole status would be considered to be in a lawful status under 8 CFR 245.1 (d)(1)(v) for purposes of adjusting status under a family-based petition but not an employment-based petition.

There are pathways for people who have been paroled to become permanent residents, and even more pathways for those who have subsequently received TPS. Given the low unemployment rate and shortage of workers in the US, employers should look to not just be hiring Ukrainians and Afghans as parolees or in TPS status, but must also endeavor to sponsor people with parole and TPS for permanent residence through a labor certification, an I-140 petition and the filing of an I-485 adjustment of status application. Those who may not be eligible for adjustment of status because they are parolees can still proceed to a US Consulate for an immigrant visa following the approval of the I-140 petition.

The sponsoring of workers based on their true worth skills would allow them to pursue better jobs and careers. Presently, people on TPS or parole may have employment authorization, but many are in jobs that may not match their skills. How many times has one been driven by a taxi driver who was a doctor or engineer in their own country or received groceries from a delivery person who may have previously been an accountant? An employer who commits to hiring and then sponsoring a foreign national worker on parole or TPS based on their real skills creates a win-win situation for both.

(This blog is for informational purposes and should not be viewed as a substitute for legal advice).

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