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POTENTIAL ADJUSTMENT OF STATUS OPTIONS AFTER THE TERMINATION OF TPS

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As President Trump restricts immigration, it is incumbent upon immigration lawyers to assist their clients with creative solutions available under law. The most recent example of Trump's attack on immigration is the cancellation of Temporary Protected Status for more than 200,000 Salvadorans. David Isaacson's What Comes Next: Potential Relief Options After the Termination of TPS comprehensively provides tips on how to represent TPS recipients whose authorization will soon expire with respect to asylum, cancellation or removal and adjustment of status.

I focus specifically on how TPS recipients can potentially adjust their status within the United States through either a family-based I-130 petition or an I-140 employment-based petition for permanent residency. A September 2017 practice advisory from the American Immigration Council points to two decisions from the Ninth and Sixth Circuit, *Ramirez v. Brown*, 852 F.3d 954 (9th Cir. 2017) and *Flores v. USCIS*, 718 F.3d 548 (6th Cir. 2013), holding that TPS constitutes an admission for purpose of establishing eligibility for adjustment of status under INA 245(a).

In both these cases, the plaintiffs previously entered the United States without inspection, and then became recipients of TPS grants and subsequently married US citizens. At issue in both those cases was whether they were eligible for adjustment of status under INA 245(a) as beneficiaries of immediate relative I-130 petitions filed by their US citizen spouses. Both the decisions answered this question in the affirmative.

A foreign national who enters the United States without inspection does not qualify for adjustment of status even if married to a US citizen since s/he does

not meet the key requirement of INA 245(a), which is to "have been inspected and admitted or paroled into the United States." However, both *Ramirez* and *Flores* held that as a matter of statutory interpretation, Congress intended TPS recipients to be considered "admitted" for purposes of INA 245(a). Thus, even if the foreign national entered without inspection, the grant of TPS constituted an admission thus rendering the TPS recipient eligible for adjustment of status. Of course, the other conditions of INA 245(a) must also be met, which is to be eligible to receive a visa and not be inadmissible as well as have a visa that is immediately available. The disqualifications to adjustment of status in INA 245(c)(2) such as working without authorization, being in unlawful status or failing to maintain lawful status since entry are not applicable to immediate relatives of US citizens, who are spouses, minor children and parents.

The courts in *Ramirez* and *Flores* relied on INA 244 (f)(4), which provides:

> (f) Benefits and Status During Period of Protected Status – During a period in which an alien is granted temporary protected status under this section-
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> (4) for purposes of adjustment of status under section 245 and change of status under section 248, the alien shall be considered as being in, and maintaining, lawful status as a nonimmigrant

Both courts read the above phrase, especially "for purposes of adjustment of status under section 245 and change of status under section 248" to be in harmony with being "admitted" for purposes of adjustment of status. As INA 244(f)(4) bestows nonimmigrant status on a TPS recipient, an alien who has obtained nonimmigrant status is deemed to be "admitted." Thus, at least in places that fall under the jurisdiction of the Sixth and Ninth Circuits, TPS recipients who have been granted nonimmigrant status under INA 244(f)(4) could potentially adjust status to permanent residence as immediate relatives of US citizens.

The next question is whether a TPS recipient can also adjust status to permanent residence if s/he is the beneficiary of an approved I-140 petition under the employment-based first, second, third and fourth preferences. The answer arguably is "yes" provided the applicant resides in a place that falls under the jurisdiction of the Sixth and Ninth Circuits. INA 245(k) will come to their rescue, which applies to the employment-based first to fourth preferences.

A TPS recipient from El Salvador who is concerned that her TPS designation will terminate on September 9, 2019 may wish to request her employ to file a labor certification on her behalf. If the labor certification is approved, after an unsuccessful test of the US labor market for her experience and skills, the employer may file an I-140 petition and potentially a concurrent I-485 adjustment of status application. The EB-2 and EB-3 priority dates for a person born in El Salvador are current in the February 2018 visa bulletin, and likely to remain current over the foreseeable future.

INA 245(k) exempts applicants for adjustment who are otherwise subject to the INA 245(c)(2) bar based on unauthorized employment or for not maintaining lawful status provided they are present in the United States pursuant to a lawful admission and subsequent to such admission have not failed to maintain lawful status or engaged in unauthorized unemployment for more than 180 days. Thus, even if the TPS recipient may have not been in lawful status prior to the grant of TPS, the grant of TPS resulted in the individual being admitted into the US. If this person files within the TPS validity period, 245(k) should allow this person to adjust to permanent residence.

I would posit that this person would be eligible under 245(k) to apply for adjustment of status within 180 days from the expiration of the TPS status. This may well be the case if there is a delay in the processing of the labor certification or if there is a retrogression in the priority date. Although INA 244(f)(4) bestows lawful nonimmigrant status to a current TPS recipient, that grant of nonimmigrant status also previously admitted her into the United States. The fact that she was once admitted through the TPS grant cannot vanish just because she is no longer a TPS recipient, and she ought to be eligible to adjust status under 245(k) so long as she has not stayed in the US greater than 180 days from the termination of TPS designation. Once a person has been admitted, the person is still considered to have been admitted for 245(a) purposes even if the period of stay under TPS expires. I would argue that this should apply to a INA 244(f)(4) implied admission as much as it does to any other kind of admission. If you are necessarily admitted because you have gone from having entered without inspection to being in nonimmigrant status, that does not cease to have been the case because your nonimmigrant status later goes away.

A person who was previously admitted in a nonimmigrant status, but who then fell out of status prior to the grant of TPS, may also arguably be considered

admitted once again under 245(k) upon receiving a grant of TPS. One could argue that the TPS is the last admission for 245(k). However, the argument is probably stronger for one who entered without inspection, since traditionally only the granting of status to someone previously not admitted is a new "admission"—going out of status and back in doesn't have the same tradition of being characterized that way.

Note that 245(k) is only applicable to I-485 applications filed under the employment-based first, second, third and fourth preferences. With respect to family-based preference petitions, USCIS has taken the position that anyone who has ever failed to maintain continuously a lawful status will not be eligible for adjustment of status. Hence, the beneficiary of an I-130 filed by a permanent resident on behalf of his spouse will not be able to adjust status if he was not in status prior to the grant of TPS. The AIC practice advisory cites *Figueroa v. Rodriguez*, No. CV-16-8218 -PA, 2017 U.S. Dist. LEXIS 128120 (C.D. Cal. Aug. 10, 2017), which held to the contrary that TPS cures the prior lack of status for a family preference beneficiary, but since this is a decision from a district court it has no precedential value and should not be relied upon. Of course, if his spouse becomes a US citizen, then he qualifies as an immediate relative and also eligible to adjust status if admissible despite having not maintained status prior to the TPS grant, or even if the TPS terminates, as immediate relatives are exempt from the 245(c)(2) bar.

Those who do not reside in the Sixth and Ninth Circuit can also adjust by availing of *Matter of Arrabelly and Yerrabelly*, 25 I&N Dec. 771 (BIA 2012). Under this decision, a departure under advance parole does not trigger the 3 and 10-year unlawful presence bars pursuant to INA 212(a)(9)(B). Thus, a TPS recipient may apply for advance parole, leave the United States and be paroled back into the United States (although beware that under the Trump administration, CBP could deny entry to one with advance parole). The departure would not trigger the unlawful presence bars and the parole would be recognized for purposes of adjusting under INA 245(a) as having been "inspected and admitted or paroled." Note, though, that the entry into the United States under parole would only render one eligible for adjustment of status as an immediate relative, and not under an approved I-140 preference petition since INA 245(k) only applies to one who has been admitted rather than paroled into the United States. The parole entry would also not help a preference beneficiary under an approved I-130. Although parole could be considered a lawful status (as the INA 245(c)(7)

bar only applies to employment-based I-140s that are not subject to the 245(k) exception) for purposes of adjustment of status based on a family preference I-130, the applicant must demonstrate that s/he never previously violated lawful status. Proceeding overseas for consular processing, where filing an adjustment of status application may not be possible, may trigger the 3 and 10-year bars if the TPS recipient previously accrued unlawful presence prior to the grant of TPS. Even if the TPS recipient departs the United States pursuant to a grant of advance parole, it is not clear whether the US Consulate will recognize *Matter of Arrabelly and Yerrabelly* in situations where the person departs under advance parole but intends to return on an immigrant visa. Thus, those who plan to proceed for consular processing who have accrued the requisite unlawful presence to trigger the 3 and 10-year bars should only proceed if they can obtain a provisional waiver of the bars based on extreme hardship to a qualifying relative.

What is quite certain presently is the ability to adjust status as an immediate relative if the TPS recipient resides within the jurisdiction of the Sixth Circuit (Kentucky, Michigan, Ohio, and Tennessee) or the Ninth Circuit (California, Arizona, Nevada, Washington, Oregon, Idaho, Montana, Alaska, Hawaii, Guam and the Northern Mariana Islands). It is also important to note that the

Eleventh Circuit in *Serrano v. Unites States Attorney General*, 655 F.3d 1260 (11th Cir. 2011) held that TPS was not an admission for purposes of adjustment under INA 245(a). As David pointed out in his blog, those who reside outside those two Circuits, except in the Eleventh Circuit, might still be able to pursue adjustment of status on the same theory if they are willing to litigate in federal court following any denials. An applicant can litigate by bringing an action under the Administrative Procedure Act, 5 U.S.C. 701 in federal district court. Alternatively, if the applicant is placed in removal proceedings, s/he can argue these theories before an Immigration Judge, and if unsuccessful to the Board of Immigration Appeals and subsequently in a Court of Appeals. Further details on various litigation strategies may be provided in a subsequent blog. Even if a TPS recipient resides within the jurisdiction of the Sixth or Ninth Circuit, it is not clear whether the USCIS will accept an argument for adjustment of status through an I-140 employment-based petition under INA 245(k). This uncertainty gets exacerbated where the TPS grant has already expired and the I-485 is being filed within 180 days of its final expiration date. Hence, the TPS recipient planning to deploy an adjustment of status strategy under 245(k) must also be

prepared to litigate even if residing within the jurisdiction of the Sixth or Ninth Circuit. Under the Trump administration, when immigration benefits have suddenly been curtailed for long time TPS recipients, it may be worth adopting creating adjustment of status strategies, and if USCIS does not accept them, to consider litigating until there is success as was the case in the *Ramirez* and *Flores* decisions.

(This blog is for informational purposes only and should not be considered as a substitute for independent legal advice supplied by a lawyer familiar with a client's case.)