CYRUS D. MEHTA & PARTNERS PLLC
US IMMIGRATION & NATIONALITY LAW

WHAT COMES NEXT: POTENTIAL RELIEF OPTIONS AFTER THE TERMINATION OF TPS

Posted on January 17, 2018 by David Isaacson

With the recent announcement that the Trump Administration will terminate Temporary Protected Status (TPS) for more than 200,000 citizens of El Salvador effective September 2019 after previously terminating TPS for Haiti, Nicaragua, and Sudan, it seems appropriate to examine alternate forms of immigration relief that may become available to those whose TPS is terminated. Of course, we may hope that Congress will provide some relief to TPS holders, but as things stand now, that appears to be an eventuality which should not be counted on at least in the short run.

One possibility for some TPS holders may be adjustment of status under INA §245. As explained in a September 2017 practice advisory from the American Immigration Council, the Courts of Appeals for the Sixth and Ninth Circuits have held that TPS constitutes an admission for purposes of eligibility for adjustment under INA §245(a). TPS holders who are immediate relatives of U.S. citizens can take advantage of this holding most simply, if they reside 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). Those who reside outside those two Circuits 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. The situation with respect to applicants for adjustment based on other family relationships or employment is more complex, as explained in the linked American Immigration Council practice advisory, but that sort of adjustment of status will be potentially available to TPS recipients under at least some limited circumstances.

Another possibility for many TPS-holders, if they are placed in removal

proceedings, might be seeking cancellation of removal for non-permanent residents under INA §240A(b). It has been reported that many TPS recipients from El Salvador have U.S. citizen children, for example: there are reported to be "nearly 200,000 US citizen children of Salvadoran parents with TPS." Many TPS holders may be able to show that one or more of their U.S. citizen children (or Lawful Permanent Resident children or U.S. citizen or Lawful Permanent Resident spouses or parents) will suffer "exceptional and extremely unusual hardship" upon removal of the parent, although this is admittedly a very high bar. If such TPS holders, with qualifying relatives who would suffer such hardship, have been continuously physically present in the United States for ten years before being placed in removal proceedings – which El Salvadoran TPS holders, for example, generally will have been, since TPS for El Salvador commenced in 2001 – then, if certain other criteria regarding good moral character and lack of disqualifying criminal convictions are met, they can seek cancellation of removal in Immigration Court under §240A(b), which would result in Lawful Permanent Resident status.

It is important to note, in this context, that time in TPS counts towards the ten-year minimum for cancellation under INA §240A(b). It is only in the distinct context of cancellation of removal for lawful permanent residents under INA §240A(a) that INA §244(e) excludes from continuous presence one's time in TPS, and there only "unless the Attorney General determines that extreme hardship exists." A footnote on the USCIS webpage reproduction of this INA section suggests that the restriction was actually meant to apply to §240A(b) cancellation, but besides being contrary to the text of the statute, this would have little practical impact even if it were true: any case in which "exceptional and extremely unusual hardship" exists for purposes of §240A(b) cancellation would presumably be a case in which extreme hardship exists for the purposes of the exception.

Admittedly, some TPS holders will presumably be unable to establish a sufficiently high level of hardship to their children—although given the atrocious violence and other country conditions in El Salvador, where the State Department has notably advised U.S. citizens not to travel, it is not clear what proportion of U.S. citizen children could relocate there without suffering exceptional and extremely unusual hardship. Even so, however, one wonders how the Trump Administration thinks the already-overburdened immigration court system is going to deal with determining which of the nearly-200,000 U.S.

citizen children involved will suffer such exceptional and extremely unusual hardship. Perhaps the answer is that they do not intend to place former TPS beneficiaries into removal proceedings. But that could give rise to the peculiar spectacle of a large population seeking to be placed into removal proceedings, where they can have the hardship to their children taken into account under the statutes enacted by Congress, while the Administration insists that the members of that population should leave, but refuses to commence the proceedings that under INA §240(a)(3) are the "sole and exclusive procedure" for compelling them to do so.

Some TPS holders may also be eligible for asylum under INA §208. Asylum is typically thought of as a form of relief available to those who fear persecution on a protected ground in their home countries, and some citizens of El Salvador and the other countries whose TPS is being terminated may indeed meet that description. However, while a fear of future persecution is the archetypical case for asylum, it is not the only one, under the governing regulations. As the BIA explained in *Matter of L-S-*, 25 I&N Dec. 705 (BIA 2012), pursuant to 8 C.F.R. § 1208.13(b)(1)(iii)(B), asylum can be granted to one who has suffered persecution in the past and "has established that there is a reasonable possibility that he or she may suffer other serious harm upon removal to that country."

> While "other serious harm" must equal the severity of persecution, it may be wholly unrelated to the past harm. Moreover, pursuant to the regulation, the asylum applicant need only establish a "reasonable possibility" of such "other serious harm"; a showing of "compelling reasons" is not required under this provision. We also emphasize that *no nexus* between the "other serious harm" and an asylum ground protected under the Act need be shown.

Matter of L-S-, 25 I&N Dec. at 714. The BIA further explained that "adjudicators considering "other serious harm" should be cognizant of conditions in the applicant's country of return and should pay particular attention to major problems that large segments of the population face or conditions that might not significantly harm others but that could severely affect the applicant." *Id.* This may be particularly relevant to TPS recipients from countries like El Salvador which do, as discussed above, have major problems faced by large segments of the population, such as widespread violence.

It is important to note that this other-serious-harm asylum requires that an applicant have previously suffered qualifying past persecution on a protected ground. The full definition of such past persecution is beyond the scope of this blog, but it is a difficult threshold to meet. The Second Circuit has explained in *Baba v. Holder* that to constitute persecution "conduct must rise above mere harassment" and that persecution includes "threats to life or freedom" and also extends to "non-life-threatening violence and physical abuse." The Second Circuit has also, as explained in *Baba* with a quotation of *Guan Shan Liao v. U.S. Dept. of Justice*, "found that persecution may also take the form of non-physical harm, such as 'the deliberate imposition of a substantial economic disadvantage.'" As for the protected grounds, there are many subtleties, but the basic statutory requirement under INA 208(b)(1)(B)(i) (largely restating INA §101(a)(42)(A) with some added stringency per the REAL ID Act of 2005) is that "the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant."

However, such qualifying past persecution could have taken place many years ago, under very different political conditions than are now present. Moreover, the Court of Appeals for the Second Circuit has recognized that under some circumstances, children may suffer qualifying past persecution from actions primarily directed at other family or community members. In *Jorge-Tzoc v. Gonzales*, 435 F.3d 146 (2d Cir. 2006), the Second Circuit explained that massacres in a child's persecuted ethnic Mayan community could constitute persecution of the child even if not directed at the child specifically:

> Jorge-Tzoc was a child at the time of the massacres and thus necessarily dependent on both his family and his community. He also offered substantial evidence of a pervasive campaign carried out by the army against Mayans in the area in which he lived. The CEH documented two 1982 army killings of persons named Tzoc in Jorge-Tzoc's village. Further, while the family remained in their village, Jorge-Tzoc's mother was afraid to go out of their home to obtain needed groceries, and Jorge-Tzoc viewed the bullet-ridden body of his cousin lying on the ground. The army's campaign, according to Jorge-Tzoc's testimony, resulted in his relocation, along with many family members to one room in Quiche where they struggled to survive. In addition, Jorge-Tzoc's father lost his land and his animals as a result of the move. This combination of circumstances could

> well constitute persecution to a small child totally dependent on his family and community.

The Court of Appeals for the First and Ninth Circuits have similarly concluded that persecution of a child's family can constitute persecution of that child, in *Ordonez-Quino v. Holder* and *Hernandez-Ortiz v. Gonzales*. The Second Circuit narrowed *Jorge-Tzoc* somewhat in *Jiang v. Gonzales*, requiring that the persecuted child "share – or imputed to share – the characteristic that motivated the persecution." (There is also additional discussion in *Jiang*, arguably nonbinding dicta, regarding how such persecution would "presumably" require that the child, as in *Jorge-Tzoc*, "was also within the zone of risk when the family member was harmed, and suffered some continuing hardship after the incident.") Nonetheless, there may be TPS recipients who would have a reasonable past-persecution claim based on events that occurred many years ago when they were children, which could then ground an application for asylum based on the reasonable possibility of other serious harm due to current country conditions.

Another issue in regard to a possible asylum application by a TPS recipient would be the one-year filing deadline of INA §208(a)(2)(B). Ordinarily, one who wishes to apply for asylum must do so within a year of their last arrival in the United States. However, INA §208(a)(2)(D) exempts from the one-year deadline cases in which an applicant can establish "extraordinary circumstances relating to the delay in filing the application within the period", and the regulations at 8 C.F.R. §208.4(a)(5)(iv) clarify that such extraordinary circumstances may include maintenance of TPS or other lawful status "until a reasonable period before the filing of the asylum application". As a recent AILA practice pointer has noted, this may not solve the one-year problem for those who were present in the United States for more than a year between the time the one-year deadline was created in 1997 and the onset of their TPS. However, the TPS exception it does mean that some TPS beneficiaries will not have a problem with the one-year deadline even if the events giving rise to an asylum claim occurred long ago.

Moreover, changed circumstances "materially affecting the applicant's eligibility for asylum" can also excuse late filing under INA §208(a)(2)(D) and 8 C.F.R. §208.4(a)(4)(i) as long as the applicant files within a reasonable time given those changed circumstances. Where a claim is based on a combination of past persecution and a reasonable possibility of other serious harm in the future, there would be a strong argument that a change in circumstances materially

affecting the other-serious-harm prong of eligibility would qualify under this exception even if the past persecution remained constant. Thus, some TPS recipients who had suffered past persecution might be able to excuse an otherwise untimely asylum claim based on changed circumstances relating to the other serious harm they would suffer if returned to their home country.

In cases where a reasonable asylum claim could be made under one of these various theories, it could also have the incidental effect of solving the problem discussed above of TPS recipients being left in limbo by a refusal to place them in removal proceedings. By regulation, pursuant to 8 C.F.R. §208.14(c)(1), where an affirmatively-filed asylum application is not granted and the applicant is considered to be inadmissible or deportable, the application will generally be referred into removal proceedings, where the applicant can renew the asylum application and also apply for other available relief (such as, if applicable, cancellation of removal for non-permanent residents). Such placement in removal proceedings is of course a dangerous outcome, but for some people it may be preferred to indefinite limbo.

Another defense against removal that might be available to TPS beneficiaries placed in removal proceedings would be to challenge, in federal court, the de-designation of their countries for TPS. This is difficult outside the context of removal proceedings, because INA §244(b)(5)(A) states that "There is no judicial review of any determination of the Attorney General with respect to the designation, or termination or extension of a designation, of a foreign state under this subsection." There may be some argument that this jurisdictional bar should be interpreted to exclude bona fide constitutional claims as discussed in *Calcano-Martinez v. INS*, 533 U.S. 348 (2001) in the context of a different jurisdictional bar, although this is not completely clear. Once TPS becomes at issue in a removal order, however, the scope for federal court review would be broader, because a petition for judicial review of that order would fall under the protection of INA §242(a)(2)(D), which states that

> Nothing in . . . any other provision of this Act (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

INA §242(a)(2)(D), 8 U.S.C. §1252(a)(2)(D) (referring to "this chapter" rather than

"this Act"). Under this provision, a former TPS holder who was ordered removed ought to be able to challenge the de-designation of their country of nationality as legally inappropriate—perhaps, for example, on the basis that the de-designation, albeit nominally accomplished by DHS, had been inappropriately influenced by the views of the Chief Executive regarding people from "shithole countries."

All of these potential courses of action are complex and fraught with risk, and TPS holders would be well advised to consult a qualified immigration attorney before proceeding with any of them. It is important to know, however, that the termination of TPS may not equate to the termination of all ability to remain lawfully in the United States.