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THE FASCINATING CONFLUENCE OF TEMPORARY PROTECTED STATUS, REMOVAL AND EMPLOYMENT-BASED ADJUSTMENT OF STATUS

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Immigration Judge Ila C. Deiss' summary order shows how one who is granted Temporary Protected Status can adjust to permanent resident status through an I-140 petition filed by an employer.

Here are the facts based upon which IJ Deiss issued the order:

The Respondent is a native and citizen of Nepal who arrived in the United States in 2006 in F-1 student status. In 2007 he stopped going to school and began working without authorization. He affirmatively filed for asylum in 2008, but his asylum claim was not granted and he was placed in removal proceedings in the same year. An Immigration Judge denied his asylum claim in 2010 and he was granted voluntary departure. Respondent appealed to the Board of Immigration Appeals, which dismissed his appeal in 2011. Respondent then filed a Petition for Review in the 9th Circuit Court of Appeals, which was denied in 2014. His case was then remanded to the Immigration Judge and was subsequently Administratively Closed based on a grant of Temporary Protected Status. In 2015, as a result of a massive earth quake, the Attorney General designated Nepal for Temporary Protected Status. Respondent, as a citizen of Nepal, applied for and was granted TPS in the same year and continued to be a recipient of TPS registration at the time of the decision.

Respondent's employer filed an I-140 petition to the USCIS on his behalf in 2019, and in the same year, Respondent concurrently filed an I-485 adjustment of status application with the court. The legal question before IJ Deiss was whether the Respondent was eligible for adjustment of status.

Earlier, in *Ramirez v. Brown*, 852 F.3d 954 (9th Cir. 2017), the Ninth Circuit held that TPS constitutes an admission for purpose of establishing eligibility for adjustment of status under INA 245(a). A foreign national who enters the United States without inspection, which was the case in *Ramirez v. Brown*, 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 another case in the 6th Circuit with the same facts, *Flores v. USCIS*, 718 F.3d 548 (6th Cir. 2013), 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 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 § 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. Those who have entered without inspection in these two circuits

need not travel outside the US under advance parole in order to become eligible to adjust status under § 245(a). On the other hand, those not in the jurisdiction of the Sixth and Ninth Circuit who were not previously admitted will need to travel under advance parole to become eligible for adjustment of status as immediate relatives 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).

In a prior blog titled *Potential Adjustment of Status Options After the Termination of TPS*, I raised the question whether the holdings in *Ramirez* and *Flores* could apply to TPS recipients who are beneficiaries of an approved I-140 petition under the employment-based first, second, third and fourth preferences. I postulated that the "answer arguably is 'yes" under § 245(k) provided they fall under the jurisdiction of the Sixth and Ninth Circuits.

IJ Deiss' order in the San Francisco Immigration Court, which falls under the Ninth Circuit's jurisdiction, now confirms that §245(k) can rescue such persons even if they are in removal proceedings. § 245(k) exempts applicants for adjustment of status who are otherwise subject to the § 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. § 245(k) also waives the bars under §§ 245(c)(7) and (c)(8) that otherwise apply to employment-based adjustment applicants. 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, as IJ Deiss also held.

The attorney for the respondent, Emily Wilson, in arguing for 245(k) eligibility relied on a USCIS memo by Acting Associate Director, Donald Neufeld, titled *Applicability of Section 245(k) to Certain Employment Based Adjustment of Status Applications filed under Section 245(a) of the Immigration and Nationality Act*. This memo correctly interprets 245(k) by stating that "adjudicators must only examine the 180 day period from the date of the alien's last lawful admission to the United States and must not count violations that occurred before the alien's last lawful admission." In the instant case, the Respondent's last lawful

admission to the United States was his grant of TPS in 2015. Ms. Wilson went on to argue, "Under a plain reading of the regulation and USCIS' guidance on the applicability of 245(k) it is clear that only violations of 245(c)(2), (c)(7), and (c)(6) that occurred after the TPS grant are relevant in this case. Since the Respondent has no violations of 245(c)(2), (c)(7), and (c)(8) since his TPS grant on 2015 he is eligible to adjust status to lawful permanent resident under §§ 245(a) and 245(k) of the INA."

Another interesting aspect of this case is that the grant of TPS constituted another admission, thus resenting the clock, although the Respondent was previously admitted in F-1 status. In *Ramirez* and *Flores*, the adjustment applicants had entered without inspection, and conceptually, it is easier to admit someone who was previously not admitted. However, there is nothing in the reading of §244(f)(4) that should preclude someone from being admitted again, as in the instant case, even if previously admitted in a nonimmigrant status prior to the TPS grant.

There are other interesting things to ponder about. Although the Trump administration has sought to terminated TPS for Nepal, under the court ordered stipulation in *Bhattarai v. Neilsen* the TPS designation for Nepal remains in effect. I would argue that even assuming TPS for Nepal was terminated at the time IJ Deiss rendered her decision, 245(k) ought to allow a respondent in removal proceedings to adjust status. Although INA 244(f)(4) bestows lawful nonimmigrant status to a current TPS recipient, that grant of nonimmigrant status also previously admitted the TPS recipient 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 further argue that this should apply to a § 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. Finally, Ms. Wilson correctly pointed out in footnote 1 in her decision that a derivative may also benefit under § 245(k), according to the USCIS 245(k) memo, and so the Respondent's spouse who presumably is also a

TPS recipient along with her spouse is also eligible to apply for adjustment of status.

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 (although there is one outlier federal district court decision, *See Figueroa v. Rodriguez*, No. CV-16-8218 -PA, 2017 U.S. Dist. LEXIS 128120 (C.D. Cal. Aug. 10, 2017)). Hence, the beneficiary of an I-130 filed by a permanent resident on behalf of his spouse will likely not be able to adjust status if he was not in status prior to the grant of TPS. Also, one who needs to travel outside the United States in order to become eligible for adjustment of status under § 245(a) as an immediate relative, especially those outside the jurisdiction of the Sixth and Ninth Circuits, will not be able to avail of § 245(k) to adjust pursuant to an employment-based I-140 petition as § 245(k) only applies to one who has been admitted rather than paroled into the United States..

Unfortunately, the beneficial impact of a TPS grant for employment-based adjustment applicants is only applicable to those within the jurisdiction of the Sixth and Ninth Circuit. 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). A class action, filed by the American Immigration Council, is designed to replicate the *Ramirez* and *Flores* decisions in all Circuits that have not yet ruled and has been awaiting a decision from the district court judge for over a year in the Eastern District of New York. In the interim, the issue is now pending in the Third, Fifth, and Eight Circuits and the AIC has filed amicus briefs in all of them. There is a strong statutory argument that the grant of TPS constitutes an admission under § 244(f)(4), and thus allows one to adjust status both as an immediate relative and also through an employment-based I-140 petition under § 245(k). This logical and unambiguous interpretation should ultimately be adhered to by all courts.

(Hats off to Emily Wilson who was the Respondent's attorney!)