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US IMMIGRATION & NATIONALITY LAW

SANCHEZ V. MAYORKAS: ALTHOUGH TPS IS NOT AN ADMISSION, JUSTICE KAGAN'S OPINION LEAVES OPEN AVENUES FOR TPS RECIPIENTS TO ADJUST STATUS AS NONIMMIGRANTS

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On June 7, 2021, the Supreme Court decided *Sanchez v. Mayorkas*, holding that a grant of Temporary Protected Status (TPS) does not constitute an admission under INA § 245(a) for purposes of adjustment of status. Though overall a disappointing decision, the Court's opinion may nonetheless leave open some options for some TPS recipients who want to obtain their green cards.

Sanchez v. Mayorkas involved the plight of Jose Santos Sanchez, an El Salvadoran national who entered the United States without inspection in 1997 and was subsequently granted TPS based on a series of earthquakes in his home country. In 2014, Sanchez, together with his wife, Sonia Gonzalez, sought to adjust status after more than 20 years of residence in the United States, but the USCIS denied his application on the grounds that " grant of TPS does not cure a foreign national's entry without inspection or constitute an inspection and admission of the foreign national".

Sanchez challenged the denial, and the District Court ruled in his favor, holding that an LPR "'shall be considered as' having 'lawful status as a nonimmigrant' for purposes of applying to become an LPR". *See Santos Sanchez v. Johnson*, 2018 WL 6427894, *4 (D NJ, Dec. 7, 2018). The District Court further held that INA §244(f)(4) requires TPS holders to be treated "as though had been 'inspected and admitted.'" The Third Circuit, though, reversed, holding that "a grant of TPS does not constitute an 'admission' into the United States." *Sanchez v. Secretary U. S. Dept. of Homeland Security*, 967 F. 3d 242, 252 (2020).

The Supreme Court, in an opinion authored by Justice Kagan, held that an individual who entered the United States without inspection is not eligible to adjust status under INA §245 by virtue of being a TPS recipient. The Court drew a distinction between the concept of "admission" and one's immigration status, noting that there are several categories of individuals who have nonimmigrant status without having been admitted to the United States (alien crewmen, crime victims in U visa status, etc.).

Though unfortunate that the Court did not consider a grant to TPS to be an admission under INA § 245(a), Justice Kagan's opinion includes some interesting language that may leave open some avenues for TPS recipients to adjust status. On pages 8-9 of the opinion, the Court held that TPS recipients will be considered to have nonimmigrant status, which is needed to adjust status under §245. Thus, an individual who was admitted to the United States in lawful B-2 status for example, but fell out of status before being granted TPS might be able to adjust status, having satisfied both the "admission" and "nonimmigrant status" requirements.

Thus, it is unclear whether a grant of TPS "wipes out" a lapse in one's nonimmigrant status, no matter the duration. Justice Kagan gives the more narrow example of an individual who was out of status for a few months before receiving TPS, potentially implying that TPS ends an individual's time out of status who otherwise would have exceeded 180 days and been unable to adjust under INA § 245(k). However, a noncitizen relying on §245(k) to adjust status would not need to have received TPS, or any other nonimmigrant status, to file an employment based I-485 within 180 days of admission. On the other hand, INA §245(k) could still potentially come to the rescue if the individual is granted TPS status within 180 days of the admission but then seeks to file for adjustment of status 180 days after the admission. The grant of TPS would have put the person back in nonimmigrant status within the 180 days from the admission, even if they file an adjustment application after 180 days.

Justice Kagan's opinion can be interpreted even more broadly to support the idea that a grant of TPS "wipes out" a lapse in the nonimmigrant status and thus overrides INA §§§ 245(c)(2), (7) and (8), when the lack of a lawful status impedes an individual's ability to adjust status. Under INA §245(c)(2) an applicant for adjustment of status even if admitted (other than an immediate relative) is precluded from applying for adjustment of status if they are in unlawful status at the date of filing the application or who have failed to

maintain continuously a lawful status since entry into the US. INA § 245(k) allows one who was admitted to apply for adjustment of status under the first three employment-based preferences and the employment-based fourth preference as a religious worker if they have failed to maintain lawful status for not more than 180 days. But INA § 245(k) is inapplicable to one who is applying for adjustment of status under a family-based preference. A grant of TPS at any point in time, if Justice Kagan's opinion is interpreted broadly, should once again render an applicant eligible for adjustment of status whether they are filing an adjustment application under a family based preference or an employment-based preference even 180 days beyond the admission and the grant of TPS.

INA § 245(c)(7) similarly precludes adjustment of status to that of an immigrant under INA § 203(b) (the five employment-based preferences) for one who is not in a lawful nonimmigrant status. A grant of TPS ought to wipe out this impediment. INA § 245(c)(8) disqualifies one from adjusting status who accepted employment while unauthorized. Under the broader interpretation of Justice Kagan's opinion, the grant of TPS ought to also remove this impediment under INA § 245(c)(8) too.

While the Supreme Court nixed the ability of TPS applicants to adjust status if they were not admitted, there are still some bright spots if one carefully parses through Justice Kagan's opinion. Under the broadest interpretation of Justice Kagan's opinion, TPS applicants, if they were initially admitted, should continue to claim that they are eligible to adjust status under both the family and employment preferences by virtue of receiving nonimmigrant status.

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