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Legal Sidebar

Are Temporary Protected Status Recipients Eligible to Adjust Status?

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Certain non-U.S. nationals (aliens) who lack a permanent foothold in the United States may pursue adjustment of status and become lawful permanent residents (LPRs). To qualify, an alien must satisfy certain requirements, generally including having been "inspected and admitted or paroled" into the United States by immigration authorities. In recent years, some federal courts have addressed whether aliens who unlawfully entered the United States but later received Temporary Protected Status (TPS) are considered to be "inspected and admitted" into the United States. Reviewing courts have split on this issue. That said, even if an alien's acquisition of TPS is treated as being "inspected and admitted" into the country, that alone does not provide a pathway to adjustment of status. An alien who was unlawfully present in the United States before receiving TPS would have to meet other requirements, such as being the beneficiary of an immigrant visa petition filed by a U.S. citizen spouse. This Legal Sidebar provides a brief overview of the adjustment of status framework and TPS, before examining the conflicting jurisprudence on TPS recipients' eligibility for adjustment, the Department of Homeland Security's (DHS's) guidance regarding the adjudication of adjustment applications filed by TPS recipients, and recent legislative proposals.

Legal Background: Adjustment of Status and Temporary Protected Status

Adjustment of Status

Section 245(a) of the Immigration and Nationality Act (INA) authorizes the Secretary of Homeland Security to adjust the status of the beneficiary of an approved immigrant visa petition (e.g., an immediate relative petition filed by a U.S. citizen spouse) to that of an LPR. The adjustment of status process was created by Congress to ensure that eligible aliens who were physically present in the United States could become LPRs without having to travel and apply for immigrant visas abroad. Within DHS, U.S. Citizenship and Immigration Services (USCIS) adjudicates visa petitions and adjustment of status applications. But if an alien is placed in formal removal proceedings (e.g., because the alien is unlawfully present in the United States), an immigration judge in the Department of Justice's Executive Office for Immigration Review generally has jurisdiction over the adjustment application.

As a threshold matter, INA § 245(a) requires an applicant for adjustment to have been "inspected and admitted or paroled into the United States" by immigration authorities (but INA § 245(i) permits a small

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and decreasing category of aliens who entered the country without inspection and whose visa petitions were filed on or before April 30, 2001, to pursue adjustment). The INA defines "admitted" or "admission" as "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." Parole occurs when an alien is permitted to enter the United States temporarily for "urgent humanitarian reasons" or "significant public benefit," but parole is not an "admission" for INA purposes.

An adjustment applicant must also be eligible to receive an immigrant visa that is immediately available at the time of the application, and the applicant must be admissible to the United States for permanent residence. Additionally, INA § 245(c) bars certain classes of aliens from adjustment of status, including aliens in "unlawful immigration status" at the time of the application or those who failed "to maintain continuously a lawful status" since entering the United States. But the § 245(c) bar does not apply to "immediate relatives" (e.g., a spouse) of petitioning U.S. citizens, "special immigrants" (e.g., certain abused or abandoned juveniles), or aliens whose visa petitions were filed on or before April 30, 2001.

Temporary Protected Status (TPS)

Under INA § 244, DHS, in consultation with the State Department, may designate a country for TPS if (1) there is an armed conflict preventing the safe return of nationals from that country; (2) there has been an environmental disaster in the country that substantially disrupts living conditions in the area affected; or (3) there are "extraordinary and temporary conditions" in the country that prevent alien nationals from safely returning. An alien from a country designated for TPS may be permitted to remain and work in the United States for the period in which the TPS designation is in effect, even if the alien had entered the United States unlawfully. An alien seeking TPS must have been physically present in the United States since the date of his or her country's TPS designation, and the alien must meet certain other criteria. Those granted TPS are permitted to travel abroad and return to the United States with the prior consent of the DHS Secretary.

INA § 244(f)(4) provides that, for purposes of adjustment of status, a TPS holder "shall be considered as being in, and maintaining, lawful status as a nonimmigrant" during the period in which the alien has TPS. A nonimmigrant is an alien admitted temporarily to the United States for a specified purpose (e.g., a temporary worker). USCIS has interpreted § 244(f)(4) to mean that a TPS recipient, who would otherwise accrue unlawful status *during* the TPS period were it not for having TPS (e.g., because the period of stay authorized by his nonimmigrant visa expired), is not subject to INA § 245(c)'s bar to adjustment of status for aliens in unlawful immigration status or who failed to maintain lawful status. But according to USCIS, § 244(f)(4) does not cure any *prior* period of unlawful status that had accrued before the grant of TPS. Thus, based on USCIS's interpretation, a TPS holder who had an accrued unlawful presence in the United States before receiving TPS is subject to § 245(c)'s adjustment of status bar for failure to maintain lawful status (unless the alien falls within one of the exempted classes of individuals, including immediate relatives of U.S. citizens).

As noted, an adjustment applicant must also show under INA § 245(a) that the applicant had been "inspected and admitted or paroled" into the United States. INA § 244(f)(4) is silent as to whether an alien granted TPS is considered to be "inspected and admitted" for purposes of adjustment of status. Nevertheless, immigration authorities have long taken the position that § 244(f)(4)'s reference to "lawful status" does not mean that a grant of TPS constitutes an "admission."

Jurisprudence on TPS Recipients' Eligibility for Adjustment of Status

Federal courts have split over whether aliens granted TPS are considered to be "inspected and admitted" for purposes of adjustment of status, even if they unlawfully entered the United States.

The U.S. Courts of Appeals for the Third, Fifth, and Eleventh Circuits have held that aliens granted TPS are not considered "inspected and admitted." In *Serrano v. U.S. Attorney General*, the Eleventh Circuit determined that the fact that a TPS recipient has "lawful status as a nonimmigrant" under INA § 244(f)(4) "does not change [§ 245(a)'s] threshold requirement that he is eligible for adjustment of status only if he was initially inspected and admitted or paroled" into the United States. The court also observed that immigration authorities have historically interpreted §§ 244 and 245(a) as barring adjustment of status to unlawful entrants, including TPS holders. In *Sanchez v. Wolf*, the Third Circuit similarly ruled that the grant of TPS is not a lawful "admission" because it does not involve an authorized entry. The court rejected the notion that, by having "lawful status as a nonimmigrant," a TPS recipient is necessarily "inspected and admitted." The court observed that while "admission often accompanies a grant of lawful status, it does not follow that a grant of lawful status *is* an admission." The court thus held that "Congress did not intend a grant of TPS to serve as an admission for those who entered the United States illegally." In *Solorzano v. Mayorkas*, the Fifth Circuit similarly observed that "possessing a status does not have the same legal effect as going through the process of admission," and that Congress never expressly waived § 245(a)'s admission requirement for TPS recipients.

But the Sixth, Eighth, and Ninth Circuits have reached the opposite conclusion. In *Ramirez v. Brown*, the Ninth Circuit relied on INA § 244(f)(4)'s language that TPS recipients are "considered as being in, and maintaining, lawful status as a nonimmigrant" to hold that TPS recipients may pursue adjustment of status. The court reasoned that an alien with lawful nonimmigrant status has necessarily been inspected and admitted to the United States. In *Flores v. U.S. Citizenship & Immigration Services*, the Sixth Circuit similarly construed § 244(f)(4)'s reference to "lawful status as a nonimmigrant" to mean that TPS recipients are "admitted" for adjustment of status purposes. The court believed this interpretation of § 244(f)(4) was consistent with the "statutory scheme as a whole," which gives the DHS Secretary considerable discretion to waive admissibility requirements for most TPS applicants.

And more recently, the Eighth Circuit in *Velasquez v. Barr* held that TPS recipients are considered "inspected and admitted." Like the Sixth and Ninth Circuits, the court relied on INA § 244(f)(4)'s treatment of TPS recipients as having "lawful status as a nonimmigrant," reasoning that "a nonimmigrant is by definition 'admitted' to the United States," and, therefore, "the 'admission' of a nonimmigrant necessarily means that they were also 'inspected.'" The court rejected the government's contention—relied upon by the Third Circuit in *Sanchez*—that TPS recipients who entered the United States without inspection are not "admitted" because an "admission" requires lawful entry. While recognizing that "admission" and "lawful status" are distinct concepts, the court determined that § 244(f)(4)'s reference to *"nonimmigrant"* status (in addition to "lawful" status) demonstrated Congress's intent that TPS holders were to be treated as if they were "inspected and admitted," no matter how they entered the United States.

In sum, the federal circuit courts have split evenly on whether TPS recipients who unlawfully entered the United States may pursue adjustment of status. The Supreme Court has granted a petition to review the Third Circuit's *Sanchez* decision, potentially enabling the High Court to resolve the circuit split.

Federal Agency Guidance on Adjustment of Status for TPS Recipients

As courts have grappled over whether TPS recipients who entered the United States without inspection may pursue adjustment of status, USCIS has issued its own guidance. In *Matter of H-G-G-*, the agency's Administrative Appeals Office (AAO) ruled in 2019 that a grant of TPS is not an "admission" for adjustment of status purposes. Furthermore, the AAO held, INA § 244(f)(4)'s reference to "lawful status" is only intended to ensure that TPS holders who had entered the United States lawfully, and whose original nonimmigrant status lapsed *during* their TPS period (e.g., because their visas expired after they acquired TPS), would avoid § 245(c)'s bar to adjustment of status for those who failed to maintain lawful status. The AAO ruled that § 244(f)(4) does not confer a broad remedy for *prior* immigration violations, such as an unlawful entry or prior period of unlawful presence. The AAO thus held that the limited

lawful-status benefit conferred by § 244(f)(4) does not waive the threshold "inspected and admitted" requirement under § 245(a), *or* cure any previous unlawful status accrued before TPS for purposes of § 245(c).

Then, in 2020, the AAO ruled in *Matter of Z-R-Z-C-* that TPS recipients who initially enter the United States without inspection, but are later permitted to travel abroad and return to the United States (e.g., using an "advance parole" document), do not satisfy the "inspected and admitted or paroled" threshold for adjustment of status. The AAO reasoned that Congress through legislation has stated that returning TPS holders retain the "same immigration status" they had when they departed the United States (subject to certain exceptions), indicating they would be treated as if they had never left this country.

USCIS announced it would apply *Matter of H-G-G-* in the adjudication of adjustment applications filed by TPS holders. The agency stated it would also apply *Matter of Z-R-Z-C-*, but only to TPS holders who departed and returned to the United States *after* the August 20, 2020, date of that decision. But USCIS recognized that the Sixth and Ninth Circuits' rulings that the grant of TPS constitutes an "admission" are controlling in cases arising within those Circuits. Moreover, USCIS issued its guidance before the Eighth Circuit's more recent decision holding that TPS recipients are deemed "admitted." As a result, TPS recipients residing in the Sixth, Eighth, and Ninth Circuits can pursue adjustment of status, even if they entered the United States without inspection. But outside those circuits, TPS recipients who entered the United States without inspection are generally barred from adjustment of status because they are not considered "inspected and admitted or paroled" (unless they obtained authorization to travel abroad and return to the United States before August 20, 2020).

Additionally, as noted, *Matter of H-G-G-* ruled that, for purposes of INA § 245(c)'s adjustment of status bar for aliens who failed to maintain lawful status, § 244(f)(4)'s conferral of "lawful status" does not waive any *previous* unlawful status accrued before the grant of TPS (e.g., because of an unlawful entry or expiration of nonimmigrant status). USCIS has stated that it will apply this aspect of the AAO's decision "universally." Moreover, some reviewing courts have ruled that § 244(f)(4)'s lawful status-benefit only cures unlawful presence accrued during the TPS period, and not any prior period of unlawful status. Thus, even if a TPS holder who unlawfully entered the United States may pursue adjustment of status (e.g., because the alien resides within the Ninth Circuit and is considered "admitted"), the alien may *still be barred* from adjustment under § 245(c) for any prior unlawful presence accrued before receiving TPS. But while § 245(c) would still preclude adjustment of status for many TPS recipients who were in the United States unlawfully before acquiring TPS, that provision exempts immediate relatives of U.S. citizens, among other classes of aliens.

Legislative Developments

Some legislative proposals have been introduced in the 117th Congress that would allow TPS recipients who unlawfully entered the United States to seek adjustment of status. For instance, the U.S. Citizenship Act (S. 348, H.R. 1177) contains a provision ("The American Promise Act") that would confer LPR status on TPS recipients (or those who are otherwise eligible for TPS) who meet certain requirements. That provision would also clarify that a person granted TPS is considered to have been "inspected and admitted" for purposes of adjustment of status under INA § 245(a), and exempt TPS recipients from § 245(c)'s bars to adjustment. Relatedly, legislation has been introduced (e.g., S. 50, H.R. 161) that would add new countries to those designated for TPS (e.g., Venezuela).

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