Important TPS Issues You Did Not Have Time to Research

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INTRODUCTION

Temporary Protective Status (TPS)[1] has been a rare bright spot in an otherwise barren immigration landscape. Since 1991, TPS has benefited thousands of foreign nationals living without documentation in the United States, bestowing on them a semblance of normalcy. TPS has not only protected families with U.S. citizen children from being torn apart by the removal of a parent, it also has provided recipients with that most coveted immigration privilege: a work permit. In most states, an employment authorization document has also made driving legally in the United States a reality for many TPS holders.

Recent decisions by the Board of Immigration Appeals (BIA) have "sweetened" the benefit by making it possible for TPS grantees not only to travel abroad without triggering the unlawful presence bar,[2] but even to adjust their status to lawful permanent residence (LPR).[3] Because most immigration practitioners do not typically devote their entire practice to the processing of TPS applications, but rather do it sporadically, it is often difficult to keep up with this area of the law. Accordingly, we have gathered the most pressing issues in TPS law that every practitioner should be aware of.

[1] INA §244, 8 USC §1254a; 8 CFR §§244 1244; 56 FR 23491 (May 22, 1991).
[2] INA §212(a)(9)(B)(i).
[3] Over the years, TPS has had other collateral benefits such as allowing Salvadoran's who registered for TPS in 1991 to adjust status under §203 of the Nicaraguan and Central American Relief Act (NACARA). *See* section 203 of the Nicaraguan Adjustment and Central American Relief Act Pub. L. No. 105-100, tit. II, 111 Stat. 2193, 2196 (1997), amended by Pub. L. No. 105-139, 111 Stat 2644 (1997).

FACING A TPS DENIAL THAT YOU KNOW TO BE ERRONEOUS? TAKE IT TO IMMIGRATION COURT!

Because appeals to the Administrative Appeals Office (AAO) are lengthy and rarely reverse TPS decisions, practitioners and their clients can forego that step and reapply for TPS before the immigration court. The BIA has held that there is no need to exhaust all administrative remedies (*e.g.*, filing with the AAO) before having the matter reviewed de novo by the court[4]. Moreover, immigration court is often a better forum to untangle complicated issues of eligibility such as physical presence and criminal convictions, and can provide the attorney the opportunity to bolster a weak application through the introduction of "credible testimony"[5] from the applicant. The desirability of the court as a forum is further augmented by the fact that in deciding a TPS application in a de novo hearing, immigration judges must consider "any material and relevant evidence, regardless of whether the evidence was previously considered in proceedings" before U.S. Citizenship and Immigration Services (USCIS).[6]

YOUR CLIENT MAY BE ONE-STEP[7] ADJUSTABLE IF HE OR SHE RESIDES IN KENTUCKY, MICHIGAN, OHIO, OR TENNESSEE

In *Flores v. USCIS,*[8] the U.S. Court of Appeals for the Sixth Circuit found that under the plain language of Immigration and Nationality Act (INA)[9] §244(f)(4), persons granted TPS who entered without inspection are eligible to adjust status through the one-step process, without leaving the United States.[10] Persons seeking to adjust status in the United States should aggressively utilize this decision to obtain adjustment of status for clients. Of additional interest is the court's scathing reprimand of the government for its opposition.[11]

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[4] *Matter of Barrientos*, 24 I&N Dec. 100 (BIA 2007) and *Matter of Ismael Lopez-Aldana*, 25 I&N Dec. 49 (BIA 2009).

[5] "We reaffirm here the principle that "the time element of an alien's residency may be shown by credible direct testimony or written declarations." *Lopez-Alvarado v. Ashcroft*, 381 F 3d.847 (9th Cir2004). See also, *Vera-Villegas v. INS*, 330 F.3d 1222, 1225 (9th Cir 2003).

[6] *Matter of Antonio Figueroa*, 25 I&N Dec. 596 (BIA 2011).

[7] One-step adjustment means filing the I-130 Immigrant Petition and I-485 Application to Adjust Status concurrently.

[8] *Flores v. USCIS*, No. 12-3549, slip op. at 7 (6th Cir. Jun. 4, 2013).

[9] Immigration and Nationality Act of 1952 (INA), Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 USC §§1101 *et seq*.).

[10] Note that the U.S. Court of Appeals for the Eleventh Circuit came to the opposite conclusion. *See Serrano v. USCIS*, 655 F.3d 1260 (11th Cir. 2011). To date, the authors are unaware of any appeal of either *Flores* or *Serrano.*

[11] "Policy considerations support our interpretation. Mr. Suazo seems to be the exact type of person that Congress would have in mind to allow adjustment of status from TPS beneficiary to LPR. He has been in the United States for about fifteen years. He has roots here. His wife and minor child are here. They are both United States citizens. He is of good moral character and a contributing member of society. He has waited his turn for an independent, legal, and legitimate pathway to citizenship, through the immediate relative visa application. If the statutes are interpreted as the Government argues they should be, the result would be absurd. The Government is essentially telling him that he is protected and can stay here, but that he will never be allowed to become an LPR, even for an independent basis. Under the Government's interpretation, Mr. Suazo would have to leave the United States, be readmitted, and then go through the immigration process all over again. This is simply a waste of energy, time, government resources, and will have negative effects on his family—United States citizens. We are disturbed by the Government's incessant and injudicious opposition in cases like this, where the only purpose seems to be a general policy of opposition for the sake of opposition." *Flores v. USCIS*, No. 12-3549, slip op. at 7 (6th Cir. Jun. 4, 2013).

Seeking to adjust status in this manner has been tried with some success in other jurisdictions, but has generally been met with opposition from USCIS.

GO HOME … THEN ADJUST: ADVANCE PAROLE AS YOUR CLIENT'S TICKET TO ADJUSTMENT OF STATUS

This is the "having your cake and eating it, too" option for many TPS recipients. Curing unlawful entry by entering with advance parole is not a new concept or practice.[12] Many attorneys who have dealt with immigrants on TPS already utilize this strategy, one that is recognized in *Kurzban's Immigration Law Sourcebook*.

Advance Parole was intended for humanitarian/family unity reasons and for conducting legitimate business. And it should always be used for such lawful purposes. However, it has the collateral effect of creating an arrival at a designated port of entry and that individual being granted parole. This means that, under INA §245(a), the person is adjustable so long as they are an immediate relative, something that was effectively recognized by legacy Immigration and Naturalization Service (INS) in 1992.[13] However, at that time, there was a serious drawback: once the immigrant went on his or her brief, casual, and innocent trip abroad to visit family and returned using advance parole, that departure triggered the unlawful presence bar since, in most cases, he or she had been unlawfully present in the United States prior to the granting of TPS. In those instances, the person was forced to seek a waiver that required demonstrating "extreme hardship" to a U.S. citizen spouse, which was either difficult or impossible. If the waiver application was denied, the immigrant was forced to appeal—a process that could take years—and also risked being placed into removal proceedings.

Then, in April 2012, something wonderful happened. The BIA issued a precedential decision, *Matter of Arrabally and Yerrabelly*.[14] There, the BIA held that, in contrast to how advance parole and unlawful presence had always been applied, leaving the United States on advance parole was not legally a "departure" for the purposes of the unlawful presence bar, and therefore unlawful presence was not triggered. This shook the earth, from an immigration law perspective, because the BIA essentially said that it doesn't make sense for a brief, casual, and innocent visit using advance parole to trigger the unlawful presence bar since USCIS gave it to the immigrant in the first place, recognizing that they requested travel permission for a legitimate purpose. Therefore, after April 2012, a person holding TPS, married to a U.S. citizen, and seeking adjustment as an immediate relative, could utilize Advance Parole to visit relatives, many of whom they had not seen for a decade or more. And once they return on the Advance Parole they would be adjustable—no waiver required.

The AAO confirmed this analysis in August 2012, when it issued a decision based on *Matter of Arrabally*. In the decision, the AAO considered the case of a man from El Salvador, who had departed the United States using advance parole, then tried to adjust status when he reentered. Unfortunately for him, the USCIS district office did not find extreme hardship, so they denied

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[13] Legal Opinion, Virtue, Acting G.C. (Mar. 4, 1991), *reprinted in* 68 No. 15 *Interpreter Releases* 461, 483–86.
[14] *Matter of Arrabally and Yerrabelly*, 25 I&N Dec. 771 (BIA 2012).

the waiver and denied his adjustment of status. He then appealed. The AAO sustained his appeal and granted his adjustment of status. They did so because after *Arrabally*, the waiver was no longer necessary. This supports the position that adjustment of status using advance parole can establish eligibility for adjustment of status.

IF ALL ELSE FAILS, YOUR CLIENT MAY JUST HAVE TO DO A PROVISIONAL WAIVER. GOT HARDSHIP?

This is the way that USCIS would prefer TPS recipients to obtain LPR status. It is a great improvement over the traditional means of consular processing for entry-without-inspection (EWI) recipients waiting eight to twelve months in their home country for a waiver that may or may not be granted. But it is far inferior to the above choices, as the immigrant has no tangible benefits while they wait—merely having an I-601A waiver pending doesn't confer permission to work or travel; it takes around 8 months; it is expensive; and, of course, the difficult standard of extreme hardship must be met. This is winnable in many cases, where the U.S. citizen or LPR spouse has compelling circumstances. But what happens when your TPS client marries a Spanish literature professor who is a triathlete and independently wealthy? Additionally, until recently, provisional waivers were regularly rejected for minor infractions—e.g., driving under the influence—that would not create a ground of inadmissibility. This hair trigger, plus the always fickle and subjective nature of hardship adjudication, makes provisional waivers an option for some, but a sickly last chance for most.

CERTAIN CRIMES ARE A DEAL BREAKER

If your client has been convicted of a felony, *two* or more misdemeanors, or a "particularly serious crime" that makes him or her a danger to the community,[15] he or she is ineligible for TPS.[16]

- Generally, a felony is considered a crime punishable by imprisonment for a term of more than one year (regardless of the actual term served).[17] However, if the offense is defined by the state as a misdemeanor and the sentence actually imposed is one year or less (regardless of the actual term served), the crime will be treated as a misdemeanor for the purposes of establishing TPS eligibility.[18]
- A misdemeanor is considered a crime punishable by imprisonment for a term of one year or less (regardless of the actual term serviced) or a crime treated as a misdemeanor by the state, as previously described.
- A "particularly serious crime" may be an aggravated felony or other qualifying offense, which may be assessed on a case-by-case basis.[19]
- If your client has been convicted of a crime punishable by imprisonment for a maximum term of only five days or less, he or she will remain eligible for TPS.

[15] *See* INA §244(c)(2)(B)(ii); 208(b)(2)(A)(ii).
[16] 8 CFR §244.4.
[17] 8 CFR §244.1.
[18] *Id.*
[19] *See generally Matter of N–A–M–*, 24 I&N Dec. 336 (BIA 2007).

Review your client's criminal record and confirm whether your client has actually been convicted of a crime for immigration purposes. If a final judgment is not readily available, submit a request for your client's "rap sheet" to the Federal Bureau of Investigation (FBI).

CERTAIN CRIMINAL CONDUCT MAY BE WAIVED

In order to be eligible for TPS, an applicant must be admissible, so he or she may need to file an I-601 waiver application alongside his or her application. For instance, conduct such as fraud,[20] drug abuse,[21] smuggling,[22] and prostitution[23] may be waived for "humanitarian purposes, to assure family unity, or when it is in the public interest."[24] However, other criminal conduct cannot be waived if it involves a "crime involving moral turpitude,"[25] drug trafficking[26] or a violation of any controlled substance law or regulation,[27] multiple criminal offenses "for which the aggregate sentences to confinement were 5 years or more,"[28] or certain security-related grounds.[29]

THE PERSECUTOR BAR MAY APPLY

TPS is barred for an individual who has "ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion."[30] The persecutor bar can be applied in an overly broad manner, and may arise in the context of prior military service in the noncitizen's home country, the applicant's assistance to a group involved in human rights abuses, or even in cases where the applicant was coerced into action. If your client has provided assistance to groups abroad in *any* form, even by way of humanitarian means, the adjudicator may inquire as to whether the persecutor bar applies. Many applicants will be required to provide an addendum explaining the circumstances of their military service or activities, as the application for TPS (Form I-821) asks several questions regarding participation in military and other groups. Your client must be carefully prepared to address such questions, if applicable.

THE FIRM RESETTLEMENT BAR MAY APPLY

Applicants who have dual nationality or have spent significant time in other countries, aside from their TPS-qualifying home country, may also need to demonstrate that they were not *firmly resettled* in those countries prior to arriving in the United States.[31] The adjudicator will assess whether the firm-resettlement bar applies on a case-by-case basis. Your client should be prepared

[20] *See* INA §212(a)(6)(C).
[21] *See* INA §212(a)(1)(A)(iv).
[22] *See* INA §212(a)(6)(E).
[23] *See* INA §212(a)(2)(D).
[24] INA §244(c)(2)(A)(ii).
[25] *See* INA §212(a)(2)(A)(i)(I).
[26] *See* INA §212(a)(2)(C).
[27] *See* INA §212(a)(2)(A)(i)(II).
[28] *See* INA §212(a)(2)(B).
[29] *See* INA §212(a)(3)(A), (3)(B), (3)(C), and (3).
[30] *See* INA §244(c)(2)(B)(ii); 208(b)(2)(A)(ii).
[31] *See* INA §244(c)(2)(B)(ii); 208(b)(2)(A)(ii).

to provide evidence relevant to the firm resettlement issue, such as how they obtained citizenship from the other country, the nature of their family and other ties to the other country, and the duration of their residence or visits, if any, in or to the other country.

WHAT KIND OF STATUS IS TPS STATUS

As a general rule, an individual maintaining TPS status is considered to be in lawful nonimmigrant status.[32] This is further confirmed by the ever-present I-94 card attached to the I-791 Notice of Approval grantees receive when approved. Presumably, given this logic, anyone maintaining lawful TPS (nonimmigrant status) should be eligible to change his or her status to another status, such as H-1B…right?! Well, not quite. There appears to be some conflicting legal principles at play. While it is true that an individual in valid TPS (nonimmigrant) status is eligible to extend or change nonimmigrant classification,[33] it is also true that someone who has failed to maintain status prior to making the application to change or extend (as most TPS holder undoubtedly have) cannot change or extend such status. The procedure for attempting to change status from TPS to some other nonimmigrant status is also unclear. It is worth remembering that while the application to change status from TPS might be denied, the TPS status conferred by the grant will still remain intact.

CONCLUSION

"¡A falta de pan…galletas!" ("No bread?.... Crackers then!") ~Salvadoran Saying

In an immigration landscape sorely devoid of benefits, TPS has become, for those eligible, the "cracker" of choice. While TPS is not a permanent status, it is a nonimmigrant status that confers significant benefits—the protection against removal to a troubled country—for those who hold it.[34] Despite its limitations, it has allowed millions of undocumented immigrants the opportunity to live, work and travel outside the United States. Given the importance of this short-term immigration benefit, practitioner's bear the responsibility of not only screening the case appropriately to ensure eligibility, but also recognizing that it can be a key component to obtaining permanent immigration status in the United States for their clients. Finally, the application process must be understood to include not only USCIS, but also the immigration court, which can often be the ideal forum to score a victory for your TPS client.

[32] *U.S. v. Orellana*, 405 F.3rd 360, 364–65 n.21 (5th Cir 2005).
[33] *See* 8 CFR §244.10 (f)(iv); INA 244(f)(iv).
[34] INA §244 (a)(1)(A).