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**MEMORANDUM BY CENTRO ROMERO in Support of the Position that Current TPS Registrants are Eligible to Adjust Status Pursuant to Section 245(a), Irrespective of a Prior Entry Without Inspection.**

Senior Special Counsel Gallagher:

**SUMMARY.**

A person currently registered under a Temporary Protected Status (TPS) designation is, for purposes of INA §§ 245 and 248, considered to be in lawful non-immigrant status and is admissible as an immigrant for the duration of the TPS registration benefits period. A current TPS Registrant with an entry without inspection (EWI) that occurred prior to the commencement of the TPS benefits period is eligible to adjust status pursuant to INA § 245(a), because the EWI has been waived and the person has been determined to be admissible as an immigrant for the duration of the TPS benefits period, so long as an immigrant visa is immediately available and Form I-485 is properly filed within the duration of the TPS benefits period.



## INTRODUCTION.

CENTRO ROMERO presents this Memorandum at the invitation of the Senior Special Counsel. Attorney Albert Mokhiber arranged and facilitated a conference call on May 9, 2008. Special Counsel Gallagher generously provided CENTRO ROMERO with an opportunity to present its case.

The Special Counsel requested the following elements:

- A record of the USCIS Decisions to Deny for CENTRO ROMERO adjustment of status cases filed in the Chicago District with the above-described circumstances [Submitted May 2008].
- A Memorandum of Law in support of CENTRO ROMERO's position that current TPS Registrants are eligible to adjust status pursuant to Section 245(a) of the Immigration and Nationality Act, irrespective of the fact that an entry without inspection has occurred at some time prior to the TPS designation [Submitted herein].
- A compendium of Congressional Support for this position [Forthcoming].
- A compendium of Immigration Bar and Organizational Contacts which have either indicated an interest in this position or which have actually filed similar arguments [Forthcoming].

CENTRO ROMERO is a not-for-profit community center recognized and accredited by the Board of Immigration Appeals, with an attorney and accredited representatives on staff.

In 2005, Accredited Representative Jose Manuel Ventura of CENTRO ROMERO first recognized and asserted the legal argument that a person currently registered under a



Temporary Protected Status (TPS) designation was in lawful non-immigrant status and admissible as an immigrant for the duration of the TPS registration benefits period. As such, the TPS registrant with a prior entry without inspection (EWI) was eligible to adjust status pursuant to INA § 245(a), so long as s/he was able to so apply within the duration of the TPS registration benefits period.

In 2005, Mr. Ventura successfully filed two such cases with the Chicago District Adjudications Office. Both persons were current under TPS, and had an EWI that had occurred prior to the TPS designation. Neither Applicant was required to pay any penalty sum. The EWI was properly disclosed in the Adjustment Application and at the interview. The Applicants were approved under INA § 245(a).

CENTRO ROMERO produced a short email broadcast to provide this information to the immigration bar and other organizations and to solicit suggestions and critique. CENTRO ROMERO is in the process of providing this compilation, which thus far numbers over 50 contacts.

CENTRO ROMERO submitted 14 more adjustment applications with the same basic factual pattern. Five more cases were approved and four were denied. At that point, CENTRO ROMERO was informed that a policy decision had been made in the Chicago District to deny any more such cases. CENTRO ROMERO discontinued filing any more cases at this point.

In summary, CENTRO ROMERO filed 16 such adjustment cases in total. 7 were approved and 4 denied prior to the Chicago District policy decision. Subsequently the 5 cases still pending were denied.

**TABLE OF AUTHORITIES CITED [NOT COMPLETE AS OF 07 02 2008].**

Note: Title 8 of the United States Code will be cited as the Immigration & Nationality Act (INA).

- INA § 101(a)(13) [definition of “admission” and “admitted”]
- INA § 101(a)(18) [definition of “immigration officer”]
- INA § 212(a) [inadmissibility grounds]
- INA §§ 235(d)(3), 287(b) [inspection authority to administer oath and examine evidence]
- INA § 244 [Temporary Protected Status]
- INA § 245 [Adjustment of Status]
- INA § 248 [Change of Status]
- Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. 102-232, 105 Stat. 1733 (January 3, 1991) [MTINA].
- 8 C.F.R. 244.
- *U.S. v. Orellana*, 405 F.3d 360, 364-5 (5th Cir. 2005).
- *Garcia-Quintero v. Gonzales*, 455 F.3d 1006 (9th Cir. 2006).
- *Ocampo-Duran v. Ashcroft*, 254 F.3d 1133, 1135 (9th Cir. 2001).
- *Hernanded v. Ashcroft*, 345 F.3d 824, 840 (9th Cir. 2003).
- *In re Rosas-Ramirez*, 22 I&N Dec. 616, Int. Dec. # 3384 (BIA 1999).
- *In re S-B-*, 24 I&N Dec. 42, Int. Dec. # 3545 (BIA 2006).
- *Matter of Escobar-Turcios*, A24-848-532 (Unpublished IJ, October 21, 1992), discussed in 69 Int. Rel. 1400 (November 2, 1992).



- Michael L. Aytes, Memorandum HQDOMO 70 / 23.1, *Adjustment of Status for VAWA Self-Petitioner who is Present Without Inspection* (April 11, 2008) [Inadmissibility for EWI waived for VAWA Self-Petitioners].
- Paul Virtue, Legal Opinion 91-27 *Protected Status Under Section 245, Temporary Protected Status and Eligibility for Adjustment of Status Under Section 245* (CO 245-C March 4, 1991).
- Paul Virtue, Legal Opinion 93-96 *Eligibility for Change of Status, Relationship Between Sections 244A(f)(4) and 248 of the INA* (HQ 248-P December 28, 1993).
- Dea Carpenter, Memorandum HQCOU 120 / 12.2-P, *Administrative Closure When Alien is Prima Facie Eligible for TPS or DED* (February 7, 2002).
- Johnny Williams, Memorandum, *Unlawful Presence*, HQADN 70 / 21.1.24-P (June 12, 2002).
- United States Department of Homeland Security, *FAQs on the Arrival-Departure Record (I-94 Form) & Crewman Landing Permit (I-95 Form)* (2008).

## **OUTLINE OF ARGUMENT.**

- I. The TPS Designation and TPS Registration Benefits Period.
- II. Current TPS Registrants are eligible for adjustment of status under Section 245(a), notwithstanding an EWI that occurred prior to the TPS designation.
  - a. A grant of TPS constitutes inspection and admission for purposes of Section 245(a).
    - i. In registering for TPS using Form I-821, applicants submit to inspection by an immigration officer.



- ii. A grant of TPS constitutes “admission” even where it does not coincide with “entry.”
    - 1. “Admission” is distinguishable from “entry.”
    - 2. “Admission” can occur through an administrative process.
    - 3. A grant of TPS constitutes an “admission.”
    - 4. Form I-94 is issued upon the approval of the TPS registration.
  - iii. The Congressional grant of lawful nonimmigrant status in 244(f)(4) subsumes an inspection and admission.
  - b. A grant of TPS waives prior EWI as a bar to admissibility for the duration of the TPS period.
    - i. Pursuant to the structure of section 244, the USCIS cannot grant TPS without waiving prior EWI.
    - ii. TPS status and benefits, including the waiver of a prior EWI, are limited in duration but are not limited in efficacy.
  - c. Section 245(c)(2) is inapplicable to TPS registrants for the duration of the TPS period.
- III. Public Policy.
- IV. Provisions for Motions to Reopen.
- a. Upon motion, USCIS should reopen adjustment of status applications already filed during a TPS benefits period that had been denied.
  - b. Upon motion, and subject to USCIS regulation and time limitation, one motion to reopen should be provided to any former TPS Registrant who,



but for the unavailability of this clarification, would have been able to apply for adjustment of status under Section 245(a).

V. TPS Registrants whose applications for adjustment of status were denied during the TPS Registration Benefits Period should continue to be considered current TPS Registrants upon renewal of their applications in Immigration Court, and throughout the subsequent appeals process.

VI. Conclusions.

## **ARGUMENT.**

### **I. The TPS Designation and TPS Registration Benefits Period.**

TPS is a humanitarian benefit designed to provide temporary safe haven to those persons who are not able to avail themselves to political asylum, but who would nevertheless be in significant peril or danger if they were removed by the United States Government. INA § 244(b)(1); *See generally*, 135 Cong. Rec. H. 7501 (101<sup>st</sup> Cong., October 25, 1989); Library of Congress, *CRS Report for Congress: Temporary Protected Status: Current Immigration Policy and Issues* (RS20844, January 14, 2005).

TPS is very clearly a program of temporary duration, with a commencement date and a termination date. INA §§ 244(b)(2). TPS is also very clearly a program with explicit limitations on how the *Government* can and cannot utilize it. The executive agencies cannot utilize region or nationality to extend benefits except through the TPS provisions, unless Congress “specifically” provides. INA § 244(g). Congress may not amend or limit the TPS provisions without specified rules and conditions first being met. INA § 244(h)(1)(B), (h)(2) and (h)(3). Nor may Congress utilize the TPS provisions as a



platform for a general adjustment of status provision, without specified rules and conditions first being met. INA § 244(h)(1)(A), (h)(2) and (h)(3).

The TPS designation, itself, does not lead to permanent residency, nor is this what we are arguing here. Most registrants are expected to return to their countries of origin upon the termination of the designation. *See, for e.g.* 72 Fed. Reg. 46649, 46652 (August 21, 2007) [Extension notice for El Salvador: “Once the Secretary determines that a TPS designation should be terminated, aliens who had TPS under that designation are expected to plan for their departure.”]

The provisions outlined above are designed to maintain the temporary character of the overall program, however these provisions do not purport to place limitations on the benefits extended to current TPS Registrants *during* a TPS registration benefits period. If a current TPS registrant is able to adjust or change status during the TPS benefits period, s/he may do so, and this is precisely what we are arguing here. *See, for e.g.* 72 Fed. Reg. 46649, 46652 (August 21, 2007) [Extension notice for El Salvador: “May I apply for another immigration benefit while registered for TPS? Yes. Registration for TPS does not prevent you from applying for non-immigrant status, filing for adjustment of status based on an immigrant petition, or applying for any other immigration benefit or protection...For the purposes of change of status and adjustment of status, an alien is considered as being in, and maintaining, lawful status as a nonimmigrant during the period in which the alien is granted TPS... .”]

For the duration of the TPS benefits period, but not prior to or afterward, significant status, protections and benefits are afforded to TPS registrants:

- Employment authorization, INA §§ 244(a)(1)(B).



- Protection from removal and detention, INA §§ 244(a)(1)(A), (d)(4).
- Waiver of several grounds of inadmissibility, including EWI, and a USCIS determination of admissibility as an immigrant. INA § 244(c)(1)(A) and (c)(2)(A).
- Advance parole travel and re-entry under TPS status, INA § 244(f)(3); Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. 102-232, 105 Stat. 1733 (January 3, 1991) [MTINA].
- For purposes of adjustment and change of status, TPS registrants are considered to be in and maintaining lawful nonimmigrant status. 244(d)(4); 244(f); 8 C.F.R. 244.10(e) and (f).
- Unlawful presence does not accrue during the TPS benefits period. Johnny Williams, Memorandum, *Unlawful Presence*, HQADN 70 / 21.1.24-P (June 12, 2002).
- Eligibility for certain Social Security benefits. 8 C.F.R. 103.10(a)(4)(ii).
- Persons who may benefits from a TPS designation must be notified and informed. INA § 244(a)(3); 244(b)(4).

A TPS designation commences upon announcement in the Federal Register. INA § 244(b)(1). With regard to an individual registrant, the TPS benefits period commences, after designation, upon the filing of the registrant's Forms I-821 and I-765, if the application demonstrates *prima facie* eligibility and temporary benefits are approved. The TPS benefits period includes any period in which temporary TPS benefits have been granted, so long as the registration has been ultimately approved. INA § 244(a)(4); 8



C.F.R. 244.5. *See also*, Johnny Williams, Memorandum, *Unlawful Presence*, HQADN 70 / 21.1.24-P (June 12, 2002). TPS designations may be extended periodically. INA § 244(b)(3)(C).

A TPS designation is terminated upon announcement in the Federal Register. INA § 244(b)(3)(B); 8 C.F.R. 244.19. The designation terminates 60 days prior to the termination of the TPS benefits period. INA § 244(b)(3)(B); 8 C.F.R. 244.19.

A *TPS benefits period* therefore commences upon the filing of Forms I-821 and I-765 after the designation publication in the Federal Register, if the TPS registration application is subsequently approved, and terminates 60 days after the designation termination publication in the Federal Register.

A *current TPS registrant* is a person with a TPS application filed after designation, subsequently approved, and before 61 days after designation termination, from whom TPS has not been withdrawn pursuant to INA § 244(c)(3).

The TPS benefits period is different, as a matter of law, from the time period prior to the commencement of the TPS benefits period, and from the time period after the termination of the TPS benefits period. During the TPS benefits period, and in contrast to both before and after the TPS benefits period, the TPS registrant has an actual TPS status. *See* INA § 244(f) [“During a TPS benefits period “for purposes of adjustment of status under section 1255 of this title and change of status under section 1258 of this title, the alien shall be considered as being in, and maintaining, lawful status as a nonimmigrant.”]. As well, the TPS benefits period has legal characteristics that are different than the time periods before and afterward. INA § 244(e) [TPS benefits period, regardless of how many months or years it may contain, collapses to -0- unless extreme



hardship is shown for cancellation of removal, but also does not break continuity of continuous physical presence].

Conversely, the time periods prior to and after the TPS benefits period are alike, as a matter of law, with respect to the TPS registrant's status prior to the commencement of the TPS registration benefits period. *See, e.g.* 72 Fed. Reg. 46649, 46652 (August 21, 2007) [Status reverts to whichever status was held prior to TPS period upon termination of the TPS registration benefits period]. This is true unless the TPS registrant is able to otherwise regularize his or her status at some point *during* the TPS registration benefits period. Dea Carpenter, Memorandum HQCOU 120 / 12.2-P, *Administrative Closure When Alien is Prima Facie Eligible for TPS or DED* (February 7, 2002), p. 3 [“While TPS and DED do not necessarily lead to permanent status and beneficiaries may remain subject to removal upon termination of those protections, beneficiaries may also find alternative means by which to regularize their status.”]

## **II. Current TPS Registrants are eligible for adjustment of status under Section 245(a), notwithstanding an EWI that occurred prior to the TPS designation.**

To qualify for adjustment of status under Section 245(a), an applicant:

- Must have been “inspected and admitted or paroled into the United States” or must have an approved petition for classification as a VAWA self-petitioner;
- Apply for adjustment of status;
- Be eligible to receive an immigrant visa (*see* INA § 201);
- Be admissible to the United States for permanent residence; and



- An immigrant visa must be immediately available at the time the application is filed. INA § 245(a).

Persons who entered the United States without inspection are generally ineligible for adjustment of status, because they have not been inspected and admitted or paroled into the United States, and because their entry without inspection (EWI) makes them inadmissible for permanent residence. INA § 212(a)(6)(A)(i). *But see* INA § 212(a) [*Preface “Except as otherwise provided in this chapter, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States.” (emphasis added)*]; *and* INA § 212(a)(6)(A)(ii) [*Exception provided for VAWA Self-Petitioners*]; *and* Michael L. Aytes, Memorandum HQDOMO 70 / 23.1, *Adjustment of Status for VAWA Self-Petitioner who is Present Without Inspection* (April 11, 2008) [*Inadmissibility for EWI waived for VAWA Self-Petitioners*].

Furthermore, Section 245(c) generally disqualifies many adjustment applicants who have failed to maintain a continuous lawful status since entry into the United States. INA § 245(c).

A person currently registered under TPS is able to meet all the qualifications of INA § 245(a) notwithstanding an EWI that had occurred prior to the TPS designation.

**A. A grant of TPS constitutes inspection and admission for purposes of Section 245(a).**

The first requirement for Adjustment of Status under section 245(a) is that applicants have been “inspected and admitted or paroled into the United States.” TPS



registrants satisfy this requirement because a grant of TPS constitutes “inspection and admission.”

**1. In registering for TPS using Form I-821, applicants submit to inspection by an immigration officer.**

In registering for TPS using Form I-821, applicants submit to “inspection” by an immigration officer. The term “immigration officer,” as defined in INA 101(a)(18), is not limited to Customs and Border Patrol officers, but also encompasses those USCIS officers who examine and adjudicate Form I-821 applications for TPS.

In filing the Form I-821, TPS applicants must submit documents which prove they are a national of a country designated for TPS, their date of entry to the United States, and their United States residence. These documents may include a passport, birth certificate, I-94 arrival/departure record, pay stubs, W-2 forms, tax returns, rent receipts, utility bills, school records, hospital or medical records, and other documents requested by the USCIS officer. TPS applicants must submit a full set of biometrics, including fingerprints, photograph and signature. They must report any arrest, participation in political or non-political crimes and persecutions, espionage, terrorist activities, membership in communist or Nazi organizations, prostitution, past deportation, communicable diseases, entry as a stowaway, and other violations of eligibility standards. Each applicant must also submit a Form I-765 Application for Employment Authorization, even if they do not seek employment. The USCIS officer’s examination of all of these records constitutes an “inspection” for purposes of Section 245(a). 8 C.F.R. 244.6, 244.7, 244.9. The TPS applicant may also be required to appear for an interview. 8 C.F.R. 244.8.



**2. A grant of TPS constitutes “admission” even where it does not coincide with “entry.”**

**a. “Admission” is distinguishable from “entry.”**

An immigration officer’s approval of a Form I-821 application constitutes an “admission.” An “admission” need not coincide with the TPS registrant’s physical entry into the United States.

The term “entry” was defined in the 1994 INA as “any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntary or otherwise.” INA 101(a)(13) (1994). “Entry” refers to the physical movement of the person into the United States. “Entry” is accomplished by the alien. It may be lawful or unlawful. An entry without inspection constitutes an unlawful “entry.”

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Public Law 104-208, 110 Stat. 3009 (September 30, 1996) [“IIRIRA”] served to clarify the distinction between entry which is lawful and entry which is unlawful, by replacing the concept of “entry” with the concept of “admission.” Rather than distinguishing between aliens who have made an “entry” and those who have not made an “entry,” IIRIRA distinguishes between aliens who have been “admitted” and those who have not been “admitted.”

“Admission” is defined as the “lawful entry” of the alien into the United States after inspection and authorization by an immigration officer. INA 101(a)(13)(A). “Lawful entry” is a legal action accomplished by the immigration officer which imparts a status to the alien. “Lawful entry” may or may not coincide with the alien’s physical “entry.”



**b. “Admission” can occur through an administrative process.**

Admission can occur through an administrative process even where the alien has already been present in the United States after an entry without inspection. For example, both the Board of Immigration Appeals and the Ninth Circuit Court of Appeals have held that adjustment of status constitutes an “admission” in this context. *See, In re Rosas-Ramirez*, 22 I.&N. Dec. 616, at 623 (BIA 1999), File A92 125 313 – San Diego, Interim Decision #3384; *Ocampo-Duran v. Ashcroft*, 254 F.3d 1133, 1135 (9th Cir. 2001) [concluding that adjustment of status qualifies as a “date of admission”]. INA 101(a)(20) defines the term “lawfully admitted for permanent residence” as “the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed.” In *In re Rosas-Ramirez*, the BIA noted that this definition encompasses both admissions to permanent resident status at the border and admissions through adjustment to lawful permanent resident status under various provisions of the Act. Therefore, the BIA held that an alien who had been lawfully admitted for permanent residence through the adjustment process had accomplished an “admission,” even though she had initially entered the United States without inspection.

In *Garcia-Quintero v. Gonzales*, the United States Court of Appeals for the Ninth Circuit held that the induction of an alien into the Family Unity Program, 8 C.F.R. 236.10, *formerly* 8 C.F.R. 242.6, 57 Fed. Reg. 6457 (February 25, 1992) [“FUP”] constitutes an “admission,” even where the alien has already been present in the United States. 455 F.3d 1006, 1015 (9th Cir. 2006). Qualified alien spouses or unmarried



children of legalized aliens, who entered the United States before 1988 and have continuously resided in the United States since that time, can apply for the benefits of the FUP. These benefits include protection from deportation and authorization to work in the United States. An FUP beneficiary may also apply to travel outside the United States. Upon return from authorized travel, an FUP registrant is admitted in the same immigration status the alien had at the time of departure. Garcia-Quintero was a citizen of Mexico who entered the United States unlawfully in 1986, and was accepted into the FUP in 1993. The Ninth Circuit held that, based on his 1993 acceptance into the FUP, Garcia-Quintero had been “admitted in any status” for purposes of cancellation of removal. 8 U.S.C. § 1229b(a).

Similar to the FUP, a grant of TPS constitutes an “admission,” even where the TPS registrant had already been present in the United States after an entry without inspection. Like the FUP, TPS provides a temporary protection from deportation. Like FUP beneficiaries, TPS registrants receive work authorization and may receive authorization to travel abroad. Like induction into the FUP, the grant of TPS status constitutes an “admission.”

**c. A grant of TPS constitutes an “admission.”**

When TPS is granted, TPS registrants are issued a Form I-94. This form is an entry document that serves as further proof of TPS registrants’ “admission.” The approved Form I-94 proves that a non-citizen was processed and admitted in to the United States. 8 C.F.R. § 235.1(h) (2007); *see also* United States Department of Homeland Security, *FAQs on the Arrival-Departure Record (I-94 Form) & Crewman Landing Permit (I-95 Form)* (2008), [http://www.cbp.gov/xp/cgov/travel/id\\_visa/i-](http://www.cbp.gov/xp/cgov/travel/id_visa/i-)



94\_instructions/arrival\_departure\_record.xml. According to USCIS, “the Form I-94 currently serves an important purpose: Evidence of lawful entry and status after admission to the United States.” 69 Fed. Reg. 53318, 53326 (2004).

As discussed above, the INA defines “admission” as a “lawful entry...after inspection and authorization by an immigration officer.” 8 U.S.C.S. § 1101(a)(13)(A) (2007). The lawful entry in TPS cases occurs upon approval of the Form I-821, when the non-citizen becomes registered for TPS. By submitting Form I-821, the alien submits to inspection by an immigration officer. When the examining officer approves the Form I-821, “admission” is granted.

**3. The Congressional grant of lawful nonimmigrant status in 244(f)(4) subsumes an inspection and admission.**

Section 244(f)(4) provides that, for purposes of adjustment of status, a TPS registrant “shall be considered as being in, and maintaining, lawful status as a nonimmigrant.” A non-citizen is considered to be unlawfully present in the United States if the non-citizen “is present in the United States without being admitted or paroled.” INA 212(a)(9)(B)(ii). Therefore, since TPS registrants are considered as being in lawful status, they must have been “admitted.”

In *Matter of Escobar-Turcios*, Immigration Judge John M. Bryant allowed a TPS registrant to adjust his status under 245(a), notwithstanding the fact that he had initially entered the United States without inspection. Judge Bryant held that the Congressional grant of lawful nonimmigrant status in 244(f)(4) subsumes an inspection and admission. When non-citizens are granted TPS, and therefore lawful status as a nonimmigrant, they are “admitted” for purposes of adjustment of status. The Immigration Judge reasoned:



“The plain language of this section of the Act places an alien under TPS into a nonimmigrant status. The requirement that an alien be inspected and admitted into the United States is subsumed into the congressional act of grace conferring upon TPS recipients a nonimmigrant status. Unlike aliens who were afforded the privilege of extended voluntary departure, Congress has accorded to TPS aliens a nonimmigrant status.” *Matter of Escobar-Turcios*, A24-848-532 (Unpublished IJ, October 21, 1992), *discussed in* 69 Int. Rel. 1400 (November 2, 1992).

This is very clearly established with regard to INA § 248. “In most cases, of course, the alien could have acquired lawful nonimmigrant status only through inspection and admission. But the TPS statute makes it clear that an alien who has been granted TPS is, as a matter of law, in a lawful nonimmigrant status for purposes of change of status under section 248.” Paul Virtue, Legal Opinion 93-96 *Eligibility for Change of Status, Relationship Between Sections 244A(f)(4) and 248 of the INA* (HQ 248-P December 28, 1993).

We would argue, however, that the TPS statute makes it clear that an alien who has been granted TPS is, as a matter of law, in a lawful nonimmigrant status for purposes of change of status, and adjustment of status, as INA § 244(f)(4) actually and explicitly provides.

The Virtue Legal Opinion 93-96, however, differentiates between Section 248 and Section 245, asserting that Section 245(c) places an additional constriction upon adjustment of status, by making an earlier period of unlawful status a bar to adjustment of status. INA § 244(f) does not indicate this, however, and in any event, the TPS statute



itself has waived the earlier period of unlawful status *for the duration* of the TPS benefits period.

**C. A grant of TPS waives prior EWI as a bar to admissibility for the duration of the TPS benefits period.**

INA § 245(a)(2) requires that an applicant for adjustment of status be admissible to the United States for permanent residence. A prior EWI does not prevent a TPS registrant from meeting this admissibility requirement for the duration of the TPS benefits period. To approve a TPS application, the USCIS, acting through the immigration officer, must waive any prior EWI that was committed by the applicant. INA § 244(c)(1)(A)(iii). This waiver remains in full force and effect, but only for the duration of the TPS benefits period.

**1. Pursuant to the structure of section 244, the USCIS cannot grant TPS without waiving a prior EWI.**

To be eligible for TPS, INA 244(c)(1)(A)(iii) states that a non-citizen must be “admissible as an immigrant, except as otherwise provided under paragraph (2)(A).” INA 244(c)(2)(A) provides for waiver of certain grounds of inadmissibility. The USCIS may waive any inadmissibility provision of INA § 212(a), with the exception of provisions dealing with certain criminal offenses, drug offenses, national security and Nazi persecutions. Non-citizens with prior EWI are made inadmissible by INA 212(a)(6)(A). Because a prior EWI is grounds for inadmissibility, and admissibility is a requirement for TPS, the immigration officer can not possibly approve the TPS application of a non-citizen with a prior EWI, unless the officer waives the EWI. If the



prior EWI were not waived, then it would not be possible for the TPS registrant to be “considered as being in, and maintaining, lawful status as a nonimmigrant,” as specified in 244(f)(4).

The U.S. Court of Appeals for the Fifth Circuit employed this reasoning in *U.S. v. Orellana*, holding that a TPS registrant defendant’s prior EWI must have been waived, or else he would have been ineligible for TPS in the first place.

**2. The benefits of TPS, including the waiver of a prior EWI, are limited in duration but are not limited in efficacy.**

TPS registrants are entitled to a number of benefits. The most basic of these benefits is protection from removal to a home country that is in turmoil. INA § 244(a)(1)(A). TPS registrants may take advantage of employment authorization. INA § 244(a)(1)(B). They may travel abroad with the prior consent of the Attorney General. INA § 244(f)(3). They are granted lawful status as a nonimmigrant for the duration of the TPS registration period. INA § 244(f)(4). Waivers of several inadmissibility grounds, including EWI, may also be granted in the discretion of the USCIS. INA § 244 (c)(2)(A).

TPS status and benefits, including the waiver of a prior EWI, are limited in duration to the TPS registration period. A grant of TPS does not permanently erase past immigration violations. At the conclusion of the TPS registration period, TPS registrants who have not otherwise regularized their status will revert back to the immigration status they maintained prior to the approval of their TPS application.

For example, although TPS registrants do not accrue unlawful presence during the TPS registration period, the grant of TPS does not erase unlawful presence that accrued prior to TPS registration. A non-citizen who accrued unlawful presence prior to TPS



registration must include that time, as well as any additional unlawful presence time accrued after the TPS registration period ends, in the calculation of total unlawful presence. Similarly, EWI is waived for the duration of the TPS registration period, rendering the TPS registrant admissible as an immigrant during the TPS benefits period, but the EWI inadmissibility ground re-emerges at the conclusion of the TPS benefits period, unless the TPS registrant has otherwise regularized status during his or her window of opportunity: the TPS benefits period.

TPS registrants may avoid the re-emergence of past immigration violations by regularizing their status before the TPS registration period ends. In a February 7, 2002 Memorandum, INS Deputy General Counsel Dea Carpenter stated “While TPS and [Deferred Enforced Departure] do not necessarily lead to permanent status and beneficiaries may remain subject to removal upon termination of those protections, beneficiaries may also find alternative means by which to regularize their status.” Dea Carpenter, Administrative Closure When Alien is *Prima Facie* Eligible for TPS or DED, Memorandum for Regional Counsel, District Counsel, Sector Counsel, at 3 (Feb. 7, 2002).

While certainly limited in duration to the extent of the TPS benefits period, TPS status and benefits are not limited in efficacy. TPS registrants who affirmatively apply for some form of regularization, including adjustment or change of status, during the TPS registration period, may fully utilize their TPS status and benefits. For example, TPS registrants are considered to be in a “valid status” for purposes of applying for asylum, and to be “lawfully present in the United States” for purposes of applying for Title II Social Security benefits. *U.S. v. Orellana*, 405 F.3d at 364-5. Similarly, TPS registrants



are considered, during the TPS benefits period, to be “admissible as an immigrant” for purposes of applying for adjustment of status. The EWI is erased for purposes of otherwise regularizing status during the TPS benefits period, as an incident of TPS status and benefits, but reemerges, along with its usual legal impacts, upon termination of the TPS benefits period.

By granting TPS, USCIS has already made the determination that the non-citizen is “admissible as an immigrant.” INA § 244(c)(1)(iii). There is no language in INA § 244(c) which limits this determination. Other limitations in INA § 244 do not apply to TPS beneficiaries. INA § 244(g) *prevents the USCIS* from protecting deportable non-citizens based on their nationality by any means other than TPS. INA § 244(h) *prevents Congress* from enacting special adjustment legislation based upon nationality. These sections do *not* limit the status or benefits given to TPS registrants and do *not* limit the registrants’ use of their TPS status or benefits. The determination of admissibility as an immigrant—and the necessary waiver of any prior EWI—extends to a TPS registrant’s application to adjust status pursuant to INA § 245(a).

TPS is a humanitarian benefit, intended to protect TPS registrants from being sent back to dangerous conditions in their home countries. The 9th Circuit has stated that the general rule of construction is “when the legislature enacts an ameliorative rule designed to forestall harsh results, the rule will be interpreted and applied in an ameliorative fashion...This is particularly so in the immigration context, where doubts are to be resolved in the favor of the alien.” *Hernandez v. Ashcroft*, 345 F.3d 824, 840 (9th Cir. 2003). TPS benefits are meant to remain in effect for the entire TPS registration period,



and registrants should be able to take full advantage of them for the duration of that time period.

In *U.S. v. Orellana*, the U.S. Court of Appeals for the Fifth Circuit held that a TPS registrant (employed with authorization as a security guard) with a prior EWI was not unlawfully in the United States, and therefore did not violate a law that criminalized the possession of firearms by unlawful immigrants. 405 F.3d at 371. The Court based its finding on the fact that TPS gave the defendant not just protection from removal, but also authorization to seek employment, and the ability to apply for adjustment of status as if he were in lawful non-immigrant status. *Id.* at 366. The Court noted that the defendant's prior EWI must have been waived, or else he would have been ineligible for TPS. *Id.* at n8. Such a waiver was put to use in *Matter of Escobar-Turcios*, where a TPS registrant with prior EWI was allowed to adjust status under INA § 245(a). A24-848-532 (IJ Oct 21, 1992), *discussed in* 69 I.R. 1400 (1992).

**D. Section 245(c)(2) is inapplicable to TPS registrants for the duration of the TPS benefits period.**

Non-citizens who are in unlawful status or who have failed to continuously maintain lawful status are generally barred from adjustment of status by section 245(c)(2). However, section 244(f)(4), in granting lawful nonimmigrant status, makes section 245(c)(2) inapplicable to TPS registrants.

“An alien who is in an unlawful status or who has failed continuously to maintain lawful status is ordinarily ineligible for adjustment of status. [INA] 245(c)(2), .... Because of section 244(f)(4), however, section 245(c)(2) will not apply to a [person]



granted TPS, but only for the period during which the alien is in TPS.” Paul Virtue, Legal Opinion 91-27 *Protected Status Under Section 245, Temporary Protected Status and Eligibility for Adjustment of Status Under Section 245* (CO 245-C March 4, 1991).

## II. Public Policy.

It is contrary to public policy to notify the public with apparently clear language that tends to lead to a conclusion contrary to what the administrative agency claims had been intended.

In this case there is clear language contained in the statute, INA § 244(f)(4): “During a period in which an alien is granted temporary protected status under this section – for purposes of adjustment of status under section 1255 of this title and change of status under section 1258 of this title, the alien shall be considered as being in, and maintaining, lawful status as a nonimmigrant.”

The regulation, 8 C.F.R. 244.10(f)(2)(iv), restates this benefit with essentially the same language and no elaboration: “For the purposes of adjustment of status under section 245 of the Act and change of status under section 248 of the Act, the alien is considered as being in, and maintaining, lawful status as a nonimmigrant while the alien maintains Temporary Protected Status.”

Typical Federal Register Notices regarding TPS programs also restate the same language with essentially no alteration. “For the purposes of change of status and adjustment of status, an alien is considered as being in, and maintaining, lawful status as a nonimmigrant during the period in which the alien is granted TPS.” 72. Fed. Reg.



46649, 46652 (August 21, 2007); *see also, e.g.* 71 Fed. Reg. 34637, 34640 (June 15, 2006); 70 Fed. Reg. 1450, 1453 (January 7, 2005).

The Form I-821 Approval Notice, which contains Form I-94, also restates this same language: “While you are under Temporary Protected Status, you: ... (3) will be considered as being in, and maintaining, lawful status as a nonimmigrant for purposes of adjustment of status under section 245 of the Act and for change of status under section 248 of the Act.”

## **II. Upon motion by the non-citizen, USCIS should reopen adjustment of status applications that were denied to TPS registrants in the past.**

This corrected interpretation, that a current TPS registrant is able to adjust status pursuant to INA § 245(a) during the TPS benefits period irrespective of an EWI that had occurred prior to the TPS benefits period, would be sufficient grounds to accept and approve, without a filing fee, a motion to reopen the adjustment of status applications of applicants who were previously denied adjustment of status based solely on a finding of inadmissibility due to the prior EWI. *Cf.* Michael Aytes, Memorandum, *Adjustment of Status for VAWA Self-Petitioner who is Present Without Inspection* (April 11, 2008) [Changed interpretation of Section 245(a) a sufficient basis for allowing VAWA self-petitioners to file motion to reopen adjustment applications which were denied solely on the basis of inadmissibility under section 212(a)(6)(A) of the INA.]

Further, would-be-applicants who were compelled not to seek adjustment of status during the TPS benefits period because of the prevailing interpretation that their applications would be denied because of the earlier EWI, should now be allowed to file



for adjustment of status even if the TPS period has terminated. Since their applications for adjustment of status would otherwise have been favorable under the corrected interpretation, they should not now be barred entirely from adjustment of status merely because the prevailing interpretation blocked them from applying during their TPS benefits period.

**III. TPS registrants whose applications for adjustment of status are denied should be treated as TPS registrants upon renewal in immigration court, and throughout the subsequent appeals process.**

Where TPS registrants have applied for, and been denied, adjustment of status during the TPS registration period, they should be treated as if they are still in TPS upon renewal of the adjustment application in front of an immigration judge, as well as in subsequent appeals to the BIA and to federal court. During the TPS benefits period, TPS registrants who may not otherwise be eligible for adjustment of status may become eligible because of the waiver of EWI, or of some other condition that would otherwise bar them from adjusting status. TPS registrants can take advantage of these benefits by applying for adjustment of status during the TPS registration period.

But if their adjustment of status application is denied, TPS registrants cannot appeal the USCIS decision to deny the adjustment of status application. No appeals may be taken of a USCIS decision to deny an application for adjustment of status, but applicants may renew the adjustment application at a later date in removal proceedings before an immigration judge. TPS registrants who are denied adjustment of status would therefore be able to renew their adjustment application in removal proceedings. Removal



proceedings will not be brought, however, until the conclusion of the TPS registration period. At this point the TPS benefits, which may have made them eligible during the TPS registration period, will have terminated.

Under this system, a TPS registrant who is erroneously denied adjustment of status may have no remedy. Therefore, non-citizens who were denied adjustment of status during their TPS registration period should be treated as if they were still TPS registrants for purposes of the renewal of their adjustment application during removal proceedings. Where an original adjustment of status application was filed while the applicant was in TPS status, it should be treated as if the applicant is still in TPS status upon renewal in front of an Immigration Judge, as well as on subsequent appeal to the BIA and to federal district court.

The BIA applied a similar rule in *In re S-B-*. 24 I&N Dec. 42, Int. Dec. # 3545 (BIA 2006). In that case, the BIA held that the REAL ID Act should not apply to an asylum application renewed in Immigration Court, where the application was originally filed before the Act took effect. The REAL ID Act of 2005, Div. B of Pub. L. No. 109-13, 119 Stat. 231 (enacted May 11, 2005) amended section 208(b)(1) of the Immigration and Nationality Act, 8 U.S.C. 1158(b)(1) (2000), by adding a paragraph that specifies the factors to be considered in making a credibility determination. REAL ID Act, 101(a)(3), 119 Stat. at 303 (to be codified at section 208(b)(1)(B)(iii) of the Act, 8 U.S.C. 1158(b)(1)(B)(iii). The Act applies to applications for asylum, withholding, or other relief from removal made on or after the date of its enactment. REAL ID Act 101(h)(2), 119 Stat. at 305. Where an asylum applicant filed his asylum application prior to the effective date of the REAL ID Act, but renewed his application in removal proceedings



before an Immigration Judge subsequent to that date, the BIA held that the provisions of the Act did not apply to credibility determinations made in adjudicating his application.

Likewise, renewed adjustment of status applications should be evaluated under the law as it must have been applied at the time the applicant had originally filed. In these cases, applicants had originally filed their adjustment of status applications during a TPS benefits period. The renewed adjustment applications should be adjudicated in proceedings as if the TPS benefits period was operative.

**THEREFORE:**

For current TPS registrants and for the duration of the TPS benefits period:

- The approval of the TPS application constitutes an inspection and admission.
- The prior EWI is necessarily waived upon approval.
- Admissibility as an immigrant is established upon approval.
- INA § 245(c) is not applicable.
- A lawful nonimmigrant status is maintained.
- Eligibility for adjustment of status pursuant to INA § 245(a) is established upon properly filing for adjustment if a visa is currently available.
- An opportunity for a motion to reopen is appropriate under the changed or corrected interpretation of law.
- A renewed adjustment of status application impacted by this changed or corrected interpretation shall be adjudicated in proceedings and throughout the appeals process as if the TPS benefits period is operative.



Thank you for taking this under your consideration.

Respectfully submitted,

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