AMERICAN IMMIGRATION LAWYERS ASSOCIATION

Practice Pointer

Screening TPS Beneficiaries for Other Potential Forms of Immigration Relief

By AILA's Vermont Service Center Liaison Committee[1]

Background Information

When assisting a client with renewing their Temporary Protected Status (TPS), or during the period before their TPS expires, it is important to screen your TPS clients for all possible forms of immigration relief, both affirmative and defensive. This practice pointer serves as a checklist to help AILA members flag some potential avenues of relief that may be available to clients who currently hold TPS. If your practice or organization does not handle matters in one of the potential areas of relief listed below, consider referring your client out for additional review of eligibility for relief.

In general, be sure to discuss with your client all prior entries to the U.S., including dates of entries, departures, and manner of entries. Ask about prior encounters with immigration officials, as well as any prior encounters with law enforcement. A client's immigration history, as well as his or her criminal history, may substantially impact his or her immigration options. Confirm that all the information on the TPS application from years past is accurate.

General Screening Issues

Manner of Entry: How did your client enter the United States? Was your client inspected and admitted? Did your client ever travel on an Advance Parole Document after being granted TPS? Screen for any border detentions and expedited removals.

Have immigration authorities ever apprehended your client? Was your client ever in removal proceedings? Does your client have an order of removal, a prior removal, or administratively closed removal proceedings? If your client has an *in absentia* order of removal, review for the possibility of reopening for lack of notice, extraordinary circumstances, or *sua sponte* reopening.

Has your client ever used fraudulent documents or given false information to enter the United States or gain an immigration benefit? Please note, this could give rise to inadmissibility and/or good moral character issues.

Has your client ever been arrested or convicted of a crime? Applicants with one felony or two misdemeanors are ineligible for TPS, however, certain misdemeanors may affect other forms of relief.

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Family-Based Immigration Options

Family-Based Immigration Options: Does your client have a qualifying U.S. citizen or Lawful Permanent Resident family member who has, or could, file a family-based I-130 petition on behalf of your client? Screen for eligibility for adjustment of status or consular processing with an I-601A or I-601 waiver.

- For immediate relative cases where the individual initially entered the U.S. without inspection and resides within the Sixth or Ninth Circuit, where TPS is considered an admission, your client may be eligible to adjust status in the United States. Your client will need to be in current TPS status at the time of the adjustment.[2] For cases where a TPS recipient does not reside within the 6th or 9th Circuits, assess if your client has traveled or still can travel outside the U.S. and return with an Advance Parole Document.[3]
- If your client is the beneficiary of a preference petition, consider the possibility of consular processing with an I-601A waiver (waives unlawful presence only, if the applicants can show hardship to a qualifying relative). Remember to always screen your client for all inadmissibility issues.

Did a Family Member or Employer ever file a Petition for your Client prior to April 30, 2001? Ask your client if anyone has ever filed a petition for them OR their parent or spouse on or before April 30, 2001. If so, your client may be eligible to adjust under INA section 245(i).

- For additional guidance on 245(i) eligibility, practitioners should review the March 2005 Yates Memo, available at AILA Doc. 05031468.
- Even if your client is eligible to adjust under 245(i), be sure to screen for other inadmissibility issues, as 245(i) does not pardon all grounds of inadmissibility.

Humanitarian Options

Has your client been the victim of a crime in the United States? If yes, did she or he call the police and report the crime? Did she or he assist in the investigation or prosecution of the crime? If the crime was sex-based or forced-labor-based, was there an offer of remuneration? If so, screen your client's history for potential eligibility for a U-visa [victim of a crime] or a T-visa [victim of human trafficking].

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[2] For more information, please see American Immigration Council, Court Decisions Ensure TPS Holders in Sixth and Ninth Circuits May Become Permanent Residents, Practice Advisory (September 16, 2017), *available at* https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/court_decisions_ensure_tps_holders_in_sixth_and_ninth_circuits_may_become_permanent_residents.pdf. Note that in the Ninth Circuit at least one district court has found that the beneficiary of a current preference-based petition was eligible for adjustment of status. *See Figueroa v. Rodriguez*, No. CV-16-8218- PA, 2017 U.S. Dist. LEXIS 128120 (C.D. Cal. Aug. 10, 2017).

[3] *See Matter of Arrabally Yerrabelly*, 25 I&N Dec. 771 (BIA 2012).

Has your client been subject to abuse by a spouse who is a lawful permanent resident or U.S. citizen? Please note that your client may be eligible for relief under the Violence Against Women Act (VAWA) even if divorced or if their spouse is deceased, if she or he files within two years of divorce or death.

Is your client eligible for relief under the Nicaraguan and Central American Relief Act (NACARA)? A TPS beneficiary from El Salvador may be eligible for relief under NACARA if she or he has not been convicted of an aggravated felony and he or she can show:

- entry into the U.S. on or before September 19, 1990;
- registration for TPS; registration as a class member in the American Baptist Churches (ABC) class action[4] on or before October 31, 1991; or filing an application for asylum prior to April 1, 1990; and
- Not apprehended at the time of entry into the U.S. after December 19, 1990.

Members should also screen to determine if your client is a "qualified family member" of such a person who meets the criteria outlined above. A qualified family member is the spouse, child, unmarried son, or unmarried daughter of an individual described above who has been granted suspension of deportation or cancellation of removal. For more information on NACARA eligibility, visit the USCIS website.

Is your client afraid to return to his or her country of nationality because he or she has suffered persecution or fears suffering persecution on the basis of his or her race, religion, nationality, membership in a particular social group, or political opinion? If so, evaluate your client's eligibility for asylum, withholding of removal, and relief under the Convention Against Torture (CAT).

- Members should be careful of jurisdictional issues. If your client was previously ordered removed but did not depart, she or he may need to file a motion to reopen. If your client returned after removal, she or he should be eligible for a reasonable fear interview and withholding-only proceedings.
- Members are also advised to take note of the one-year-filing-deadline under INA section 208.4 and note that maintenance of TPS is considered an extraordinary circumstance excusing late filing under the federal regulations. However, applicants must still show changed or extraordinary circumstances for time in the United States from one year after entry (after April 1, 1997, the effective date of IIRIRA) until obtaining TPS status.
- Note that under the Convention Against Torture, an applicant need not show that she or he would be tortured 'on account of' a protected ground; however, the torture must have been inflicted by or with the acquiescence of a state actor.

[4] The *American Baptist Churches* lawsuit was a class action against the Department of Justice (DOJ) for the discrimination and treatment of asylum claims filed by El Salvadoran and Guatemalan applicants. *See American Baptist Churches v. Thornburgh*, 760 F. Supp. 796 (N.D. Cal. 1991).

Employment-Based Immigration Options

Is your client eligible for any employment-based immigration options? In general, applicants for non-immigrant and immigrant employment-based applications need to have maintained lawful status (see INA section 245(k) for employment-based adjustment of status). Evaluate if your client has a current or prospective employer willing to file a nonimmigrant visa petition, such as an H-1B (if the position is a specialty occupation and your client meets the requirements for the position) and/or permanent residence as an alien of extraordinary ability, National Interest Waiver, or sponsorship through the PERM Labor Certification application and I-140 immigrant visa petition route. This includes both professional and non-professional categories.

Client resides within the Sixth and Ninth Circuits (where the granting of TPS constitutes an "admission"):

- Whether your client initially entered with or without a visa, your client should be eligible to change to a nonimmigrant visa status or apply for adjustment of status (I-485) without leaving the United States if your client has continuously held TPS up to the date of filing and is otherwise admissible.
- For adjustment of status applicants, note that employment-based applicants must be admissible under INA section 245(k) (in addition to all other applicable admissibility grounds).[5] Therefore, it is required that the applicant either still hold TPS upon the filing of the adjustment of status application or apply for adjustment of status no later than 180 days after their TPS has expired. Members should also beware of any lapses in employment authorization subsequent to the I-485 filing.

Client resides outside of the Sixth or Ninth Circuits (where the granting of TPS does <u>not</u> constitute an "admission"):

- If your client entered with a visa and has not fallen out of status (i.e., registered for TPS prior to expiration of authorized stay) your client may be able to change to a nonimmigrant status or apply for adjustment of status (I-485) without leaving the United States.
    - Note that INA 245(k) applies to employment-based adjustment of status applicants (see above) and that TPS does *not* constitute an admission outside of the Sixth and Ninth Circuits. The 180-day clock after lawful admission under INA section 245(k) would therefore have started once the applicant initially entered the U.S. with a visa.

[5] Pursuant to INA §245(k), individuals are eligible to adjust if they: 1) are present in the United States pursuant to a lawful admission on the date of applying for adjustment; and 2) subsequent to such admission, have not—for an aggregate period of more than 180 days—failed to maintain lawful status, engaged in unauthorized employment, or otherwise violated a condition of admission. The circuit courts in *Ramirez* and *Flores* did not address directly the intersection of INA section 245(k) and TPS. As a result, practitioners should be prepared to argue that under 245(k), only the period subsequent to the TPS admission is to be considered for adjustment of status eligibility. *See Ramirez v. Brown*, 852 F.3d 954 (9th Cir. 2017); see *Flores v. USCIS*, 718 F.3d 548 (6th Cir. 2013).

- If your client was not in status prior to receiving TPS, she or he would need to consular process for either a nonimmigrant visa or for an immigrant visa (unless grandfathered by INA section 245(i).
- If your client accrued 180 days or less of unlawful presence prior to the registration of the initial TPS application and your client has continued to hold TPS without interruption, your client may be eligible to consular process for a nonimmigrant visa petition and/or an immigrant visa (based on an employment-based permanent residence sponsorship) without being subject to the unlawful presence bar.
- Unlawful presence begins to accrue at 18 years of age. Therefore, a client who registered for TPS prior to reaching 18 years and has consistently held TPS should be able to consular process without triggering the unlawful presence bar.
- If your client has over 180 days of unlawful presence, assess if your client may be eligible to consular process with a waiver for a temporary visa (under INA section 212(d)(3)) and/or for an immigrant visa (under INA section 212(a)(9)(B)(v)). If your client has a qualifying relative (i.e. LPR parent, your client may be eligible to consular process with an I-601A waiver).

Relief in Removal Proceedings

If your client does not have affirmative relief or is in removal proceedings, consider options for relief in removal prior to the end of the TPS.

Does your client have U.S. Citizen or Lawful Permanent Resident family members who would suffer hardship if she or he were removed?

- Screen for eligibility for non-LPR cancellation of removal, including continuous physical presence for at least 10 years, and any good moral character issues. Note that any prior issuance of a Notice to Appear (NTA) and certain criminal convictions will cut-off your client's physical presence for purposes of accumulating 10-years of physical presence.
- If there are particularly compelling circumstances, but your client still does not qualify for an Application for Cancellation of Removal (or is not in removal proceedings), screen for the possibility of prosecutorial discretion, stay of removal, and deferred action.

Check List of Potential Post-TPS Relief

Individuals WITH Removal Orders:

- ☐ Motion to Reopen
  - *Automatic Stay of Removal:*
  - -Lack of Notice
  - *Request Stay of Removal:*
  - -Within 90/180-day deadline
  - -Changed Circumstances (Asylum/Withholding/CAT)
  - -Extraordinary Circumstances (Ineffective Assistance of Counsel, etc.)
  - - *Sua sponte* due to compelling equities (*Matter of Avetisya*, 25 I&N Dec. 688 (BIA 2012))
- ☐ Eligible for U visa (request continuances or admin. closure under *Matter of Avetisyan*)
- ☐ Eligible for T visa (request continuances or admin. closure under *Matter of Avetisyan*)
- ☐ Post-Order Deferred Action - compelling humanitarian circumstances (file with ICE, ERO)

Individuals ACTIVELY IN Removal Proceedings

- ☐ Asylum/Withholding/CAT
- ☐ Non-LPR Cancellation of Removal
- ☐ Adjustment of Status (see above situations)
- ☐ NACARA
- ☐ Request for Prosecutorial Discretion (to ICE OCC, or to IJ under *Matter of Avetisyan*)
- ☐ Eligible for U visa (request continuances or admin. closure under *Matter of Avetisyan*)
- ☐ Eligible for T visa (request continuances or admin. closure under *Matter of Avetisyan*)

Individuals NOT in Removal Proceedings, or WITHOUT Removal Orders:

- ☐ Adjustment of Status through U.S. Citizen Immediate Relative
  - -Client entered with a visa
  - -Client did not enter lawfully, but re-entered on Advance Parole
  - -Client did not enter lawfully, has maintained TPS, and resides in the 9thCircuit's jurisdiction
  - -Client did not enter lawfully enter the U.S. but is eligible for 245(i)
- ☐ Adjustment of Status through employment-based petition
  - -Client lives in 6th or 9th Circuits, where TPS = admission
  - -Client lives outside 6th or 9th Circuits, but can consular process without triggering unlawful presence bar (or can participate in potential impact litigation)
- ☐Eligible for nonimmigrant visa such as H-1B or O-1
- ☐Consular Processing of Immigrant Visa w/ I-601A Provisional Waiver
- ☐ Eligible for NACARA, and was never in removal proceedings
- ☐ Eligible for U visa
- ☐ Eligible for T visa
- ☐ Eligible to affirmatively file for Asylum/Withholding/CAT
- ☐ Deferred Action - compelling humanitarian circumstances (file with USCIS Director)