



# A FRAMEWORK FOR ANALYSIS

## *The Impact of Firm Resettlement and Dual Nationality on Temporary Protected Status (TPS)*

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### I. Introduction

Temporary Protected Status (TPS) has been part of U.S. immigration law for more than thirty years, enacted as part of the Immigration Act of 1990 (IMMACT 90).<sup>1</sup> The INA § 244 and accompanying regulations remain the primary authority on TPS eligibility, the extent of coverage, and the application process.<sup>2</sup>

This practice advisory will briefly provide an overview of TPS and then focus on a framework for analysis for the firm resettlement bar to eligibility. It will also discuss the impact of dual nationality on TPS applicants. This advisory will not review the details of the current countries designated for TPS.<sup>3</sup>

### II. Basics of TPS

INA § 244 allows eligible nationals of the designated country, or stateless persons who last habitually resided in that country, to apply for a temporary legal status that insulates them from removal and provides them authorization to work during the designated time period.

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<sup>1</sup> Pub. L. 101-649.

<sup>2</sup> INA § 244, 8 CFR § 244.1 - 244.9.

<sup>3</sup> The current information on countries designated for TPS and their dates for filing is found on the USCIS TPS web page, <https://www.uscis.gov/humanitarian/temporary-protected-status>.

The statute authorizes the Secretary of the Department of Homeland Security (DHS)<sup>4</sup> to designate eligible individuals of certain countries for TPS if that country has: an ongoing armed conflict that would pose a serious threat to the person safety of nationals returned there; there has been an environmental disaster such as an earthquake, flood, drought, or epidemic that substantially, but temporarily, disrupts living conditions; the foreign state is unable, temporarily, to handle the return of its nationals; and the country affected has officially requested TPS designation. Alternatively, the DHS Secretary can find that there exist temporary and extraordinary conditions that prevent the nationals of the country affected from returning in safety, as long as such designation would not be contrary to the U.S. national interest.<sup>5</sup>

Initial TPS designations can range from 6 – 18 months and may be extended by DHS.<sup>6</sup> Employment authorization should be effective throughout the period that the noncitizen has TPS.<sup>7</sup> Eligible applicants have to register during the initial registration period announced in the Federal Register, unless the individual can qualify for one of the circumstances that allow late registration.<sup>8</sup>

### III. General Eligibility Requirements

In order to qualify for TPS, applicants must meet the following requirements:

1. **Nationality** - Only nationals of countries designated for TPS, or a noncitizen with no nationality who last habitually resided in such a country, are eligible for the status.

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<sup>4</sup> At the time that the TPS statute was written, the Attorney General was named as the decision maker for TPS, because in 1990 the functions of the U.S. Immigration and Naturalization Service (INS) were organized under the Department of Justice (DOJ). Since the reorganization of the Homeland Security Act of 2003, the Secretary of DHS has taken over the oversight of the former INS functions, which now reside with the U.S. Citizenship and Immigration Services (USCIS). See DHS, *Creation of the Department of Homeland Security*, describing the impact of the Homeland Security Act of 2002, <https://www.dhs.gov/creation-department-homeland-security>.

<sup>5</sup> INA § 244(b)(1)(B) and (C).

<sup>6</sup> INA § 244(b)(2).

<sup>7</sup> INA § 244(a)(2).

<sup>8</sup> During any subsequent extension of an initial designation, late initial registration will be allowed if the applicant is a nonimmigrant or has been granted voluntary departure or any relief from removal; applicant has an application for change of status, adjustment of status, asylum, voluntary departure, or any relief from removal which is pending or subject to further review or appeal; applicant is a parolee or has a pending request for reparole; or the applicant is a spouse or child of a noncitizen currently eligible to be a TPS registrant. For these groups of applicants, except for applicants applying under the child-based exception who are not subject to time limitations, a late initial TPS application will be allowed if it is filed within 60 days of the subsequent designation of the TPS period, 8 CFR § 244.2(f).

2. **Physical Presence** - The eligible applicant must prove that they have been continuously physically present in the United States since the effective date of the most recent designation, although brief, casual, and innocent absences are allowable.<sup>9</sup>
3. **Continuous Residence** - The applicant must show that they have been continuously residing in the United States since the date indicated in the designation, usually a few days prior to the effective date of the designation. Again, brief, casual, and innocent absences are permissible.
4. **Not Inadmissible** - TPS applicants also must be admissible, although several grounds of inadmissibility are waived by statute and regulation.<sup>10</sup> By USCIS policy, several other grounds of inadmissibility do not require a waiver for TPS: the 3/10-year bar for unlawful presence, the permanent bar for unlawful presence and reentry, the bars for presence without admission or parole and removal orders, the bar for stowaways, and the bar for student violators.<sup>11</sup> Even if no waiver is required it is important to disclose applicable inadmissibility grounds in the application materials.

Of those inadmissibility grounds that do apply, specific ones may not be waived. These nonwaivable grounds includes crimes of moral turpitude, controlled substance violations (except for a single offense of simple possession of 30 grams or less marijuana), multiple criminal convictions, and others.<sup>12</sup> In addition, the grounds related to national security and terrorism may not be waived.<sup>13</sup>

Any other inadmissibility grounds that apply under INA § 212(a) may be waived under a generous standard of humanitarian purposes, to assure family unity, or where it is in the public interest.<sup>14</sup>

<sup>9</sup> Brief, casual and innocent absences which do not interfere with TPS eligibility are those of short duration, reasonably calculated to accomplish the purpose of the absence, but not departures that are a result of an order of removal, voluntary departure or institution of removal proceedings, nor absence that were for actions contrary to law, 8 CFR § 244.1.

<sup>10</sup> See INA § 244(c)(2)(A). 8 CFR § 244.3(a) provides that these inadmissibility grounds do not apply: public charge, INA § 212(a)(4); labor certification grounds, INA § 212(a)(5)(A); unqualified physicians, INA § 212(a)(5)(B); and documentation requirements, INA § 212(a)(7)(A)(i).

<sup>11</sup> See USCIS, Forms, *I-601 Waiver of Inadmissibility, Instructions*, p. 13 <https://www.uscis.gov/sites/default/files/document/forms/i-601instr.pdf> (7/20/21) in which USCIS instructs TPS applicants not to file waivers for these grounds.

<sup>12</sup> The nonwaivable crimes bars to TPS are INA § 212(a)(2)(A); INA § 212(a)(2)(B) relating to criminals in such sections; and INA § 212(a)(2)(C) (except for the simple possession of 30 grams or less of marijuana).

<sup>13</sup> The nonwaivable security bars are INA § 212(a)(3)(A); INA § 212(a)(3)(B); INA § 212(a)(3)(C); and INA § 212(a)(3)(E).

<sup>14</sup> 8 CFR § 244.3(b)

5. **Not Subject to Mandatory Criminal Bars** - An individual is ineligible for TPS if convicted of any felony or two or more misdemeanors committed in the United States. This bar is apart from any crimes-related inadmissibility grounds raised in 212(a) and cannot be waived.<sup>15</sup> These bars are mandatory, but advocates should be careful to analyze the criminal record closely to determine if they in fact apply and also consider whether post-conviction relief could provide a path to eligibility.
6. **Not Subject to Mandatory Asylum Bars** - TPS law also incorporates the mandatory bars that apply to asylum. These bars concern crimes, persecution of others, security grounds, and the firm resettlement bar, where an applicant was firmly resettled in a third country prior to arriving in the United States.<sup>16</sup>

#### IV. Firm Resettlement – What is it and When Does it Apply?

The INA provides that a noncitizen is barred from asylum, and also from TPS, if they were firmly resettled in another country prior to arriving in the United States.<sup>17</sup> The regulations provide further detail: a noncitizen is considered firmly resettled if, prior to arrival in the United States, they entered into another country with, or while in that country received an offer of permanent resident status, citizenship, or some other type of permanent resettlement.<sup>18</sup> This definition indicates that firm resettlement requires that the applicant actually entered the third country and that the status they were offered or held there was permanent in nature. This means merely traveling through another country, living and working without any status in another country, or possessing a type of temporary or limited form of status from another country will not trigger this bar.

The sequence of events is also relevant in analyzing whether the firm resettlement bar applies. Note that in recent engagements on TPS for Haitians, USCIS stated, “the fact that an individual has received a lawful immigration status in a country other than Haiti, by itself is not disqualifying... For purposes of TPS eligibility, USCIS considers an applicant to be firmly resettled if, prior to arrival in the United States, and subsequent to the events giving rise to the TPS designation, they entered into another country with, or while in that country received, an officer of permanent residence status, citizenship, or some other type of permanent

<sup>15</sup> 8 CFR § 244.4(a).

<sup>16</sup> INA § 244(c)(2)(B)(ii), 8 CFR § 244.4(b) states that an alien described in INA § 208(b)(2)(A) will not be eligible for TPS. This section of asylum law lists persecutors of others, noncitizens convicted of a particularly serious crime, persons who there are reasons to believe are a danger to the security of the United States, certain persons engaged in terrorist activity, or persons firmly resettled in another country prior to arriving in the United States.

<sup>17</sup> INA § 244(c)(2)(B)(ii), INA § 208(b)(2)(A)(vi).

<sup>18</sup> 8 CFR § 208.15(a)(1).

resettlement....”.<sup>19</sup> This indicates that the time in the third country when the permanent resettlement status was offered or held must have occurred **after** events giving rise to the TPS designation. This further narrows the category of cases where the bar is applicable.

Because TPS applicants are barred from eligibility if they are found to be firmly resettled in another country prior to arriving in the United States,<sup>20</sup> and many applicants have had lengthy, complicated journeys before their arrival, it is important to understand when USCIS can reasonably apply the bar. Firm resettlement is very fact-specific analysis and can only be evaluated on a case-by-case basis.

In the 2011 precedent decision, *Matter of A-G-G*<sup>21</sup>, the BIA developed a framework for analysis of firm resettlement for asylum that is helpful in analyzing the impact that the bar has on TPS. *Matter of A-G-G* came after federal circuit courts had developed a split in interpretation of firm resettlement. Some circuits adopted a “direct offer” approach, which focused on whether the country had offered some type of permanent residence. Other circuits adopted a “totality of the circumstances” formula which weighed the offer of permanent residence on the same level of other factors such as length of stay, family ties, receipt of privileges and benefits in the country.

*Matter of A-G-G*’s analysis should generally be adhered to because of federal court deference to administrative agency interpretation. Practitioners should also consult the pertinent caselaw from their circuit to see how certain facts resulted in findings of firm resettlement. USCIS has helpful training materials which include analysis of the federal case law in the USCIS Officer Training manual.<sup>22</sup>

USCIS has opined on firm resettlement for TPS applicants in recent public engagements as well as in written resources posted on their website.<sup>23</sup> There are also non-precedent decisions from the AAO on TPS and firm resettlement.<sup>24</sup> Although these are not binding authority that the

<sup>19</sup> See USCIS, *TPS Webinar (Haiti) Questions and Answers*, Question 25-33 (Aug. 20, 2021)

[https://www.uscis.gov/sites/default/files/document/questions-and-answers/Temporary\\_Protected\\_Status\\_TPS\\_for\\_Haiti\\_Questions\\_and\\_Answers.pdf](https://www.uscis.gov/sites/default/files/document/questions-and-answers/Temporary_Protected_Status_TPS_for_Haiti_Questions_and_Answers.pdf).

<sup>20</sup> INA § 208 (b)(1)(vi).

<sup>21</sup> 25 I&N Dec. 486,501 (BIA 2011).

<sup>22</sup> USCIS, RAO Directorate - *Officer Training, RAO Combined Training Program, Firm Resettlement, Training Module* (Dec. 20, 2019) American Immigration Lawyers Association (AILA) Doc. 19022034.

<sup>23</sup> See USCIS, *TPS Webinar (Haiti) Questions and Answers*, Question 25-33 (Aug. 20, 2021)

[https://www.uscis.gov/sites/default/files/document/questions-and-answers/Temporary\\_Protected\\_Status\\_TPS\\_for\\_Haiti\\_Questions\\_and\\_Answers.pdf](https://www.uscis.gov/sites/default/files/document/questions-and-answers/Temporary_Protected_Status_TPS_for_Haiti_Questions_and_Answers.pdf); USCIS, *Questions and Answers Designation of Syria for Temporary Protected Status* (Mar. 29, 2012) [https://www.uscis.gov/sites/default/files/document/questions-and-answers/Temporary\\_Protected\\_Status\\_TPS\\_for\\_Haiti\\_Questions\\_and\\_Answers.pdf](https://www.uscis.gov/sites/default/files/document/questions-and-answers/Temporary_Protected_Status_TPS_for_Haiti_Questions_and_Answers.pdf).

<sup>24</sup> See, e.g., *In Re: Applicant* (Identifying Information Redacted by the Agency) 2004 WL 2897475(DHS); 2004 WL 3487459 (DHS); 2004 WL 3487650 (DHS); 2007 WL 5328169 (DHS); 2020 WL 729934 (DHS).

agency must follow, they are helpful in seeing how the agency decided cases based on certain facts in the past.

### A. Exceptions to Firm Resettlement

Applicants will want to initially argue that they were not in fact firmly resettled. However, if the Government makes a finding of firm resettlement, the applicant can argue that they qualify for one of two exceptions. By regulation, if the individual can show that entry into that country was a necessary consequence of flight from persecution, that they remained only as long as necessary to make further travel arrangements and that they did not establish “significant ties” to that country, then there is an exception to the firm resettlement bar.

Another regulatory exception to firm resettlement applies if the applicant demonstrates that conditions of their stay in the third country were “substantially and consciously restricted.”<sup>25</sup> In particular, the regulation requires consideration of, “the conditions under which other residents of the country live; the type of housing, whether permanent or temporary, made available to the refugee; the types and extent of employment available to the refugee; and the extent to which the refugee received permission to hold property and to enjoy other rights and privileges, such as travel documentation that includes a right of entry or reentry, education, public relief, or naturalization, ordinarily available to others resident in the country.”<sup>26</sup> This exception can provide a path to TPS eligibility for applicants who may have spent a lengthy period in a third country but faced difficult conditions.

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<sup>25</sup> 8 CFR § 208.15. Note that the Trump administration had proposed regulations to alter the definition of firm resettlement, but those proposed changes have been enjoined. Unfortunately, government and private websites contain the enjoined language as of Nov. 2021. The full language of the firm resettlement bar in the regulations at 8 CFR § 208.15 is, “Definition of “firm resettlement.” An alien is considered to be firmly resettled if, prior to arrival in the United States, he entered into another nation with, or while in that nation received, an offer of permanent resident status, citizenship, or some other type of permanent resettlement unless he establishes: (a) That his entry into that nation was a necessary consequence of his flight from persecution, that he remained in that nation only as long as was necessary to arrange onward travel, and that he did not establish significant ties in that nation; (b) That the conditions of his residence in that nation were so substantially and consciously restricted by the authority of the country of refuge that he was not in fact resettled. In making his determination, the Asylum Officer or Immigration Judge shall consider the conditions under which other residents of the country live, the type of housing made available to the refugee, whether permanent or temporary, the types and extent of employment available to the refugee, and the extent to which the refugee received permission to hold property and to enjoy other rights and privileges, such as travel documentation including a right of entry and/or reentry, education, public relief, or naturalization, ordinarily available to others resident in the country.”

<sup>26</sup> 8 CFR § 208.15.

## V. Framework for Analysis

The BIA issued a precedent decision on firm resettlement for asylum seekers in 2011, *Matter of A-G-G*.<sup>27</sup> In their agency training materials, USCIS instructs officers to not follow case law decided prior to May 2011 that may conflict with *Matter of A-G-G*.<sup>28</sup> The BIA in *Matter of A-G-G* developed a four-step framework for analysis that is useful in analyzing the applicability of firm resettlement. While this precedent concerns asylum, it provides a framework to examine TPS and its firm resettlement bar, as well.

The four steps that adjudicators must follow to determine firm resettlement under *Matter of A-G-G* are:

1. The government has the initial burden of proof of presenting *prima facie* evidence of an offer of firm resettlement, relying on direct evidence. Indirect evidence may only be relied on if direct evidence is not available.
2. If there is *prima facie* evidence of firm resettlement, the applicant must be given the opportunity to rebut it.
3. The government must weigh the totality of the evidence to determine whether the firm resettlement has been rebutted.
4. If the government finds that there was firm resettlement, the burden shifts to the applicant to establish that an exception applies.

The framework below is based on the *Matter of A-G-G* analysis and is meant to guide practitioners through the process of preparing for and arguing against the application of the firm resettlement bar.

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<sup>27</sup> 25 I&N Dec. 486 (BIA 2011). Respondent in *Matter of A-G-G* fled Mauritania where he had been arrested based on his ethnic group and then was deported to Senegal. He spent eight years in Senegal, where he married and had children. He registered with the government in Senegal as a foreigner but never sought permanent residence there. He testified that he left Senegal because he did not have legal status there and was uncomfortable with its proximity to Mauritania. The Judge found that he has suffered past persecution in Senegal. The government appealed a grant of asylum, arguing that respondent's registry with the Senegalese government and marriage to a citizen of Senegal were indirect evidence of firm resettlement. Conflicting evidence of the laws of Senegal regarding permanent residence was introduced, but the BIA found that a letter from the Library of Congress and the law of Senegal regarding marriage to a Senegalese citizen and a path to permanent residence was enough to establish a *prima facie* showing of an offer of firm resettlement. However, because the evidence referred to a path to residence for a foreign woman marrying a Senegalese man, and not vice versa, the BIA remanded the case to the Immigration Judge to determine whether respondent had successfully rebutted DHS's indirect evidence of firm resettlement.

<sup>28</sup> USCIS, RAIO Directorate - *Officer Training, RAIO Combined Training Program, Firm Resettlement, Training Module*, p.11. (Dec. 20, 2019).

## A. Step One: Government has the Initial Burden of Proof to Present *Prima Facie* Evidence of an Offer of Firm Resettlement

The issue of whether an offer of firm resettlement was made turns on highly specific factual analysis of the existence of legal mechanisms in the country in question to obtain permanent residence. The determination should consider the law of the country as well as the actual implementation of those laws. Any legal mechanism that does less than offer “the ability to stay in a country indefinitely” should not be considered an offer of firm resettlement.<sup>29</sup>

USCIS should first consider direct evidence that indicates firm resettlement. Such evidence may include proof of refugee status, a passport, or a travel document that indicates firm resettlement.<sup>30</sup> If no direct evidence is available, adjudicators may look to indirect evidence such as laws of a country, length of an individual’s stay, the person’s intent, family ties, business or property connections, social and economic ties, receipt of government benefits, education opportunities, right to work, right to travel abroad and return, and access to permanent housing.<sup>31</sup>

The firm resettlement inquiry ends if the government fails to present *prima facie* evidence of an offer or existence of firm resettlement.<sup>32</sup>

In the TPS context, because the government has the initial burden on firm resettlement, many practitioners believe the best approach is to provide only short, annotated answers to relevant questions on Form I-821. The annotated answers could provide additional detail about the lack of an offer that would be permanent, the nature of any non-permanent status that the individual had in the third country, or other relevant information.

Some practitioners provide accurate responses to the application questions but elect not to volunteer any extra detail. Other practitioners take a different approach and provide as much detail as possible on Form I-821 to head off a Request for Evidence (RFE) on this same issue when it is clear that the applicant has spent some time in a third country before arriving in the United States. There is not a single, correct approach but it is important to remember that the burden of proof initially lies with the government and therefore most practitioners prefer to provide, at most, brief responses.

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<sup>29</sup> *Matter of A-G-G-*, 25 I&N Dec. 486,501 (BIA 2011).

<sup>30</sup> USCIS, RAIO Directorate - *Officer Training, RAIO Combined Training Program, Firm Resettlement, Training Module* p. 22 (Dec. 20, 2019).

<sup>31</sup> *Id.* at p. 22 -23.

<sup>32</sup> *Matter of A-G-G-*, 25 I&N Dec. 486 (BIA 2011).



## B. Step Two: Applicant has the Opportunity to Rebut the *Prima Facie* Evidence of Firm Resettlement

If the adjudicator finds evidence of an offer of firm resettlement, the applicant must have the opportunity to rebut it by showing that such an offer was not actually made, or that they did not qualify for it.<sup>33</sup> This is usually done through a response to an RFE after the application is reviewed by USCIS. The applicant has to exercise the rebuttal opportunity and present evidence to be successful in setting aside the bar. If applicant fails to present any rebuttal evidence, the bar may be found to apply.<sup>34</sup>

A successful rebuttal, however, would be one that shows that an offer or resettlement has not been made, or the individual would not qualify for it. This usually depends on providing details about the legal process in question, showing how the relevant law actually works in practice, and describing the applicant's own experience of the legal process in the third country.

While the applicant argues at this stage that the firm resettlement bar does not apply, they may present evidence that they qualify for an exception to the firm resettlement bar in the alternative (See Step 4 below), particularly if they believe a finding of firm resettlement is likely given the facts of their case.

## C. Step Three: Government Must Weight the Totality of the Evidence and Evaluate the Rebuttal

All evidence presented must be evaluated after giving the applicant an opportunity for rebuttal. Indirect evidence, if relied on, must be sufficiently clear and credible to be more than speculation. If USCIS determines that the applicant was able to provide evidence to successfully rebut the presumption, then the applicant, if otherwise eligible, may be granted TPS and the inquiry stops there. If USCIS determines the evidence was insufficient to overcome the presumption of firm resettlement, then the case may be denied based on the bar or a Notice of Intent to Deny (NOID) may be issued to the applicant.<sup>35</sup>

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<sup>33</sup> USCIS, RAIO Directorate - *Officer Training, RAIO Combined Training Program, Firm Resettlement, Training Module* p. 23 (Dec. 20, 2019).

<sup>34</sup> *Matter of D-X and Y-Z*, 25 I&N Dec. 664 (BIA 2012)

<sup>35</sup> Authors were unable to confirm whether NOIDs would be routinely issued in cases where, after USCIS received a response to an RFE, there was a finding of firm resettlement.

Again, if the applicant fails to rebut by not responding to the RFE, the firm resettlement bar may be found to apply.<sup>36</sup>

#### **D. Step Four: If Government Finds that the Firm Resettlement Bar Applies, Burden Shifts to the Applicant to Establish One of the Exceptions**

If the government finds that the firm resettlement bar applies, the burden shifts to the applicant to establish one of the exceptions in 8 CFR § 208.15(a) and (b). At this point in the analysis, if the applicant can show by a preponderance of the evidence - that is, a more than fifty percent possibility - that one of the exceptions apply then they will not be barred. Again, eligibility for one of the exceptions to the bar can be raised in the alternative as part of a response to an RFE arguing against applicability of firm resettlement to the case (See Step 2 above) and in response to the issuance of a NOID.

As described above, an exception will apply to the applicant if they can show that their entry was a necessary consequence of their flight, that they remained only as long as necessary to arrange onward travel and did not establish “significant ties” in the country.<sup>37</sup> The second exception is where the conditions of the noncitizen’s stay in the country were so “substantially and consciously” restricted that they were not in fact resettled, a fact-based analysis delineated in 8 CFR § 208.15(b).

In addition to the factors outlined in the regulations, USCIS advises adjudicators to consider the following factors: whether government has a policy to limit the rights of non-citizen residents; whether government can ensure that non-citizens will receive the benefits outlined in the regulations at 8 CFR § 208.15(b); and whether there is a continuing threat of harm by a persecutor in the country of alleged resettlement which may limit the individual’s ability to obtain any benefits of firm resettlement.<sup>38</sup>

In 2020, the BIA issued a further precedential decision on firm resettlement, *Matter of K-S-E*.<sup>39</sup> While this decision has been vacated and remanded to the BIA by the 9<sup>th</sup> Circuit Court of Appeals,

<sup>36</sup> USCIS, RAIO Directorate - *Officer Training, RAIO Combined Training Program, Firm Resettlement, Training Module* p. 24 (Dec. 20, 2019).

<sup>37</sup> 8 CFR § 208.15(a).

<sup>38</sup> USCIS, RAIO Directorate - *Officer Training, RAIO Combined Training Program, Firm Resettlement, Training Module* p. 24 (Dec. 20, 2019).

<sup>39</sup> 27 I&N Dec. 818 (2020); note that this decision was vacated after a petition to review to the Ninth Circuit and was remanded to the BIA. Therefore, it should no longer be controlling authority. *Sylvestre v. Garland*, 2021 WL 2453043 (9<sup>th</sup> Cir. June 9, 2021).

practitioners should be aware of its existence should the government try to continue to apply it.<sup>40</sup> Respondent in *K-S-E* was a Haitian who had lived in Brazil prior to applying for asylum in the United States. While DHS presented evidence that Brazil may have offered a form of residence, respondent had not applied for it. He also testified that the offer was only valid for five years and was contingent on ongoing employment. The BIA took the position that if the asylum seeker failed to avail themselves of an offer, whether or not he has a country to return to, he does not merit asylum for having failed to take advantage of the offer.<sup>41</sup> The case was vacated by the 9<sup>th</sup> Circuit court of appeals on June 9, 2021.<sup>42</sup>

In a 2012 decision, the BIA found that firm resettlement could bar an applicant from asylum even where the permit that may have been from the third country was obtained fraudulently. The respondents in *Matter of D-X- and Y-Z*<sup>43</sup> were a Chinese couple who had purchased a fraudulent permit in Belize before coming to the United States and applying for asylum. The female respondent had used the false permit to re-enter Belize after a trip abroad. The BIA found that the respondent did not present any evidence to rebut the *prima facie* showing of firm resettlement and therefore the bar applied.

If the applicant is able to show by a preponderance of the evidence that one of the two exceptions apply and the applicant is otherwise eligible for TPS, their case will be granted. If they fail to do so, the case will be denied. They can appeal the denial to the AAO or, if in removal proceedings, have the application reviewed *de novo* by an Immigration Judge.

## VI. Dual Nationality

Dual nationality (that is, citizenship in two countries) is not a bar to TPS. Neither the statute nor the regulations contain any language that excludes a dual national. In public engagements discussing Syrian TPS, USCIS stated that dual nationality does not prevent an individual from eligibility for TPS, as long as they can satisfy the requirement of Syrian nationality (or alternatively, showing that they are stateless). "As long as the applicant can provide sufficient evidence that he or she is a Syrian national (e.g., passport, birth certificate and photo identification, and/or any national identity document from country of origin bearing a photo and/or fingerprint), then the applicant should be able to meet the nationality requirement. The applicant

<sup>40</sup> The DOJ Executive Office for Immigration Review continues to list *K-S-E* in its precedent decisions on its web page, despite the order vacating the decision.

<sup>41</sup> *Matter of K-S-E*, 27 I&N Dec. 818 (BIA 2020), <https://www.justice.gov/eoir/page/file/1267846/download>,

<sup>42</sup> *Sylvestre v. Garland*, 2021 WL 2453043 (9<sup>th</sup> Cir. June 9, 2021).

<sup>43</sup> 25 I&N Dec. 664 (BIA 2012).

may also provide secondary evidence of nationality if he or she does not have primary evidence.”<sup>44</sup>

While dual nationality and firm resettlement may overlap, they are very distinct concepts. For example, firm resettlement does not require citizenship in a third country, while dual nationality does. Firm resettlement requires entry into the third country and an offer of permanent status, whether or not that offer is accepted. Dual nationality does require actual citizenship and may not be based on a mere offer of citizenship.<sup>45</sup>

Persons who have more than one country of citizenship may present facts that could raise questions about firm resettlement. Firm resettlement is usually raised in these situations when the dual national travelled through the other (non-TPS) country of citizenship before last entering the United States, or, for example, if they used the travel document of the other (non-TPS) country in entering the United States. If the TPS applicant lived for a period of time in the other country of citizenship (not the one designated for TPS) before entering the United States, then it is possible that USCIS could allege that they were “firmly resettled” in that country.

This issue of dual nationality/firm resettlement may also arise when TPS applicants have had children born in a third country they resided in before arriving in the United States.<sup>46</sup> Each person applying for TPS must qualify individually, including minors. Even a minor applicant must show that they have nationality in the TPS-designated country (or that they are stateless and last habitually resided in the TPS country) and are not firmly resettled in a third country entered prior to arrival in the United States. USCIS instructs its asylum officers to consider whether the custodial parents of a minor were firmly resettled in deciding whether there is *prima facie* evidence that the bar applies to a minor, but to disregard the parents’ situation if a minor is not in their custody or control.<sup>47</sup>

As stated by USCIS in a recent public engagement on Haiti, “Merely having another nationality in addition to Haitian nationality - in other words being a dual national - by itself, is not disqualifying. Where the applicant’s citizenship or other immigration status in another country may be relevant is in the consideration of whether the firm resettlement asylum bar applies to

<sup>44</sup> USCIS, *Questions and Answers Designation of Syria for Temporary Protected Status* (Mar. 29, 2012) [https://www.uscis.gov/sites/default/files/document/questions-and-answers/Temporary\\_Protected\\_Status\\_TPS\\_for\\_Haiti\\_Questions\\_and\\_Answers.pdf](https://www.uscis.gov/sites/default/files/document/questions-and-answers/Temporary_Protected_Status_TPS_for_Haiti_Questions_and_Answers.pdf).

<sup>45</sup> USCIS, RAO Directorate - *Officer Training, RAO Combined Training Program, Firm Resettlement, Training Module* p. 27 (Dec. 20, 2019).

<sup>46</sup> See USCIS, *TPS Webinar (Haiti) Questions and Answers*, Question 26 (Aug. 20, 2021) [https://www.uscis.gov/sites/default/files/document/questions-and-answers/Temporary\\_Protected\\_Status\\_TPS\\_for\\_Haiti\\_Questions\\_and\\_Answers.pdf](https://www.uscis.gov/sites/default/files/document/questions-and-answers/Temporary_Protected_Status_TPS_for_Haiti_Questions_and_Answers.pdf).

<sup>47</sup> USCIS, RAO Directorate - *Officer Training, RAO Combined Training Program, Firm Resettlement, Training Module* p. 24 (Dec. 20, 2019).

the specific facts of the applicant. We encourage TPS applicants who have citizenship or another form of permanent immigration status in a country other than Haiti to provide all relevant details, including when they obtained or were offered such other citizenship or status, and any times when they were in that other country prior to arriving in the United States. The applicant should also include any information and supporting documentation that may assist USCIS in determining whether the exceptions in 8 CFR 208.15 to the firm resettlement bar apply in the applicant's particular circumstances."<sup>48</sup>

USCIS has significant discretion to assess whether dual nationals can safely return to the non-TPS designated country, but the last country of residence is a significant factor in this inquiry. In a 1992 Immigration and Naturalization Service (INS) General Counsel opinion regarding a dual Lebanese/Venezuelan citizen who was claiming TPS based on designation of Lebanon, INS reiterated that the government has wide discretion in such cases. Where a dual citizen had entered the United States on a Venezuelan document with a visitor visa but claimed eligibility for TPS from Lebanon, the agency found they could deny TPS in their discretion.<sup>49</sup>

Various AAO decisions on TPS for dual citizens have followed the general counsel memo, parsing which country the individual claimed citizenship from when they entered the United States and holding them bound by that nationality, in line with an earlier BIA decision on an analogous application, *Matter of Ognibene*.<sup>50</sup> The respondent in *Ognibene* was a person who was a dual national of Canada and Italy but claimed Canadian nationality when he entered the U.S. He later tried to assert his Italian nationality in order to change his status to E-2 (only Italy was a treaty investor country, not Canada) and his application was denied. The BIA held *Ognibene* could not just switch nationalities for his own convenience but had to remain with the nationality that he claimed upon entry into the United States.

Dual nationality, while not itself a bar to TPS, can trigger a firm resettlement inquiry by USCIS. Practitioners representing dual nationals should carefully review travel documents and any other immigration applications that have been submitted in order to accurately complete the TPS application as well as to strategize a response to a possible RFE on the firm resettlement issue.

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<sup>48</sup> See USCIS, *TPS Webinar (Haiti) Questions and Answers*, Questions 25-33 (Aug, 20, 2021) [https://www.uscis.gov/sites/default/files/document/questions-and-answers/Temporary Protected Status TPS for Haiti Questions and Answers.pdf](https://www.uscis.gov/sites/default/files/document/questions-and-answers/Temporary%20Protected%20Status%20TPS%20for%20Haiti%20Questions%20and%20Answers.pdf).

<sup>49</sup> INS General Counsel's Office 1992 Legal Opinion, *Guidance on Eligibility of Dual Nationals for TPS Benefits*, *Genco Op. No. 92-34*, is cited in AAO decisions on issues of dual nationality, such as *In Re: Applicant* 2011 WL 7790573 (DHS).

<sup>50</sup> 18 I&N Dec. 425 (BIA 1983).

## VII. Conclusion

USCIS clearly has the initial burden of proof in raising a claim of firm resettlement. Practitioners can provide concise, annotated answers to relevant questions on Form I-821 but do not need to affirmatively argue and provide evidence against its application in the initial TPS application.<sup>51</sup> Following the framework for analysis outlined in *Matter of A-G-G-*, if the government finds *prima facie* direct evidence, or if unavailable, sufficiently clear indirect evidence, of firm resettlement, applicants and their advocates will have the opportunity to rebut. If the government then finds in the totality of the circumstances that the bar applies, the applicant can prove that they qualify for one of the exceptions because the applicant did not have significant ties to the country or the conditions of their stay there were substantially restricted.

The firm resettlement inquiry is fact-specific and requires a “case-by-case” determination. While USCIS bears the initial burden of proof, if firm resettlement is a possibility in a given case advocates and applicants can begin to gather evidence on the lack of the offer of permanent status, significant ties, and restrictive conditions. By doing so in advance, if the government alleges *prima facie* firm resettlement, the applicant will be ready to refute the finding in the totality of the circumstances or by showing they qualify for one of the exceptions.

Practitioners should discuss the risks and benefits of applying for TPS with potential applicants who have any red flag issue. Because there is a minor risk of enforcement given the current administration’s priorities<sup>52</sup> there is often good reason to apply even if there are facts that might trigger a firm resettlement inquiry. Additionally, a TPS application does not pose a heavy financial hardship, as the \$50 fee for Form I-821 remains static by statute, and a fee waiver is available for eligible low-income individuals.<sup>53</sup>

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<sup>51</sup> USCIS, Form I-821, Questions 16 a – 16 d request information on all countries of nationality; Part 7, Eligibility asks for information about other countries travelled through prior to arriving in the United States, dates there, offers of status made or received, etc. Part 11 provides room for additional information regarding the stay in third countries.

<sup>52</sup> Alejandro Mayorkas, Secretary of the U.S. Department of Homeland Security, *Guidelines for Enforcement of Civil Immigration Law* (Sept. 30, 2021), <https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf>.

<sup>53</sup> INA § 244(c)(1)(B).



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**About the Immigrant Legal Resource Center**

The Immigrant Legal Resource Center (ILRC) works with immigrants, community organizations, legal professionals, law enforcement, and policy makers to build a democratic society that values diversity and the rights of all people. Through community education programs, legal training and technical assistance, and policy development and advocacy, the ILRC's mission is to protect and defend