PRACTICE ALERT ON *RAMIREZ V. BROWN*

How the Ninth Circuit's Holding that TPS Is an Admission Can Help TPS Holders

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I. Introduction

A recent Ninth Circuit Court of Appeals decision, *Ramirez v. Brown*, 852 F.3d 954 (9th Cir. 2017),[1] has provided an opportunity for certain people with Temporary Protected Status (TPS) to apply to adjust status (obtain a green card). This advisory aims to explain the implications of the *Ramirez* decision, with examples to illustrate. Because the future of TPS is uncertain, this advisory urges practitioners to consider taking action in appropriate cases now, should the U.S. Supreme Court take up this issue and overturn this decision, or the current Administration change or end TPS.

Following the *Ramirez* decision, people who originally entered the United States without inspection and who were subsequently granted TPS may now be eligible for adjustment of status based on an immediate relative petition. The Sixth Circuit in 2013 reached a similar conclusion, that TPS is an "admission" for purposes of adjustment of status.[2] As this advisory will explain, people who qualify to apply for adjustment of status based on this decision should do so; people who do not currently qualify should consider Advance Parole.

A. Brief Background on Temporary Protected Status (TPS)

Temporary Protected Status, or TPS, is a form of temporary immigration relief available to people from specific countries that the Department of Homeland Security (DHS) has designated are unsafe to return to, for example due to ongoing civil war or recent natural disaster. Current countries with TPS designation are El Salvador, Haiti, Honduras, Nepal, Nicaragua, Somalia, Sudan, South Sudan, Syria, and Yemen.[3] TPS designation is a discretionary determination that the government can end upon notice. If the government decides to terminate a country's TPS designation, notice must be published no later than 60 days before the termination will take effect.[4] Often, DHS gives more than the minimum 60 days' notice. For example, DHS published notice in the Federal Register in September 2016 of its intent to terminate TPS for people from Guinea, Liberia, and Sierra Leone in May 2017.[5] The latest countries whose TPS designation are up for review are Sudan and South Sudan, and soon thereafter Haiti, Honduras, and Nicaragua.[6] In order to be granted TPS, applicants

must undergo an extensive application process, including establishing admissibility under all applicable inadmissibility grounds. Once granted TPS, recipients must regularly re-register to maintain their TPS status for as long as the designation continues. As long as an individual has TPS, she is protected from removal and has authorization to work legally in the United States.

B. Brief Background on Adjustment of Status

Generally, in order for someone to be able to apply for permanent residency (a green card) through the Adjustment of Status process at INA § 245(a), she must have been "inspected and admitted or paroled" into the United States. She must also be admissible, and an immigrant visa must be immediately available. The requirement that someone be admitted or paroled has traditionally prevented many people who are otherwise eligible to adjust status—but who entered unlawfully and were never granted parole—from obtaining a green card.

"Admission" and "parole" have specific legal definitions in immigration law. "Parole" is when someone enters the country lawfully pursuant to a grant of parole, such as through Humanitarian Parole or Advance Parole. "Admission" has been interpreted to cover several different scenarios. In the most standard case, an "admission" for adjustment of status refers to when someone presents herself at a port of entry with valid immigration documents, and is formally admitted to the United States. Such documentation might be a valid nonimmigrant tourist visa (commonly referred to as a "visitor visa" or B-2 visa) or other visa, such as an H-1B visa. However, some other grants of nonimmigrant status in which the individual is already inside the United States, such as U nonimmigrant status,[7] have also been held to be an "admission," even though technically the person was already in the United States, rather than at a port of entry trying to gain admittance to the United States.

C. The *Ramirez* Decision

On March 31, 2017, the Ninth Circuit held that a grant of TPS is an "admission" as required for adjustment of status eligibility pursuant to INA § 245(a). Specifically, the Court analyzed the language at INA § 244(f)(4) governing TPS, which states that an individual granted TPS "shall be considered as being in, and maintaining, lawful status as a nonimmigrant" for purposes of "adjustment of status under section 1255 of this title." It found that the plain language of the statute required "for purposes of adjustment of status under section 245" to mean all requirements under INA § 245, including having been "admitted or paroled." Thus, the Court reasoned, a grant of TPS must constitute an "admission" for adjusting status.[8]

The Sixth Circuit has also found that TPS is an "admission," in *Flores v. USCIS*, 718 F.3d 548 (6th Cir. 2013). For now, the Ninth and Sixth Circuits are the only two circuit courts of appeal that have held TPS to be an "admission."[9] As in the Sixth Circuit, people residing in the Ninth Circuit may now go forward and apply for adjustment of status, if they have been granted TPS, are immediate relatives, and are otherwise admissible.

Outside the Ninth and Sixth Circuits, the government continues to maintain that a grant of TPS is *not* an "admission" for purposes of adjustment of status. The Eleventh Circuit has upheld this view, in *Serrano v. U.S. Attorney General*, 655 F.3d 1260 (11th Cir. 2011). In every circuit but the Ninth and Sixth, people with TPS who initially entered the United States unlawfully and have not been granted parole, must depart the United States to obtain a green card through family-based immigration, through consular processing. Consular processing occurs at the U.S. consulate in their home country--notwithstanding the fact that by virtue of having TPS, their home country has been deemed unsafe, justifying the TPS designation to begin with. Many people with TPS may also have prior removal orders or other complications preventing them from departing the United States to pursue consular processing.

WARNING: The *Ramirez* decision does not change any of the adjustment of status requirements. Applicants for adjustment of status, even after this decision, must still meet all of the eligibility critiera, including the requirement that they are admissible (have no other, new inadmissibility issues), and if not immediate relatives, that they are not subject to the bars in INA § 245(c), such as the bar against adjustment for applicants who have accepted employment without authorization or who have failed to maintain lawful immigration status. The *Ramirez* decision does not cure any grounds of inadmissibility. Rather, it clarifies that TPS holders within the Ninth Circuit meet the "inspected and admitted" requirement for adjusting status under INA § 245(a). For the most part, in order for someone to be granted TPS, the person has already shown that she is admissible, or has received a waiver for any applicable inadmissibility grounds. Regardless, however, the person will still have to show that she is eligible for adjustment of status and that she meets all of the requirements.

Example 1 – Prior to *Ramirez* Decision

Facts: Maria MADRE from El Salvador originally entered the United States without inspection in 1993. Maria lives in California and was subsequently granted TPS. Maria gave birth to her only U.S. citizen child, Dolores DAUGHTER, 22 years ago. Maria has never left the United States since her entry in 1993. Once Dolores turned 21, she submitted an I-130 petition for her mother that was approved soon after. Maria is unmarried, and her parents do not have lawful immigration status.

If she leaves to consular process, she will trigger the unlawful presence bar at INA § 212(a)(9)(B). This bar applies to noncitizens who (a) beginning on April 1, 1997, are unlawfully present in the United States for a continuous period of one year or more, (b) leave the United States voluntarily or by deportation/removal, and (c) then apply for admission to the United States. Anyone who triggers this bar is inadmissible for a period of ten years from the date of departure or removal.[10] There is a discretionary waiver of the unlawful presence bar, available only to someone who can show extreme hardship to a U.S. citizen or lawful permanent resident spouse or parent.[11]

Maria has no citizen or lawful permanent resident parent or spouse upon whom she could base an extreme hardship waiver of the unlawful presence bar. Thus, if she were to depart the United States to consular process, she would trigger the bar and be ineligible for a waiver. Knowing this, her attorney has warned her not to leave the country. She is stuck at the approved I-130 stage, and cannot go forward with an adjustment application.

Analysis: Prior to the *Ramirez* decision, Maria would not have been able to immigrate through her 22-year-old U.S. citizen daughter because Maria was not able to adjust her status. She entered the United States without inspection and was never granted parole. She therefore did not have the requisite lawful admission or parole. Maria could only immigrate through consular processing at the U.S. Consulate in San Salvador. In practice, Maria was not able to immigrate through consular processing either, because as soon as she left the United States, she would have been subject to the ten-year unlawful presence bar of INA § 212(a)(9)(B). She would not qualify for the waiver because she does not have a U.S. citizen or permanent resident spouse or parent.

Example 2 – After the *Ramirez* Decision

Facts: Same facts as in **EXAMPLE 1** above.

Analysis: After the *Ramirez* decision, Maria is able to immigrate through her U.S. citizen daughter because Maria will be able to adjust her status. Although she originally entered the United States without inspection, and has never been granted parole, her grant of TPS constitutes the requisite lawful "admission." She is also not subject to the ten-year unlawful presence bar at INA § 212(a)(9)(B), because it is only triggered upon a departure from the United States. She has never left the United States, and she will not have to leave the United States to consular process since she will be able to adjust her status here.

D. Advance Parole as an Alternative Option

The *Ramirez* decision expands the number of TPS holders who will qualify for adjustment of status based on being "admitted," as the Court clarified that a grant of TPS constitutes an "admission" for this purpose. Another way to qualify for adjustment of status, as discussed in Sections B and C above, is through being "paroled" into the United States. Parole remains an option for TPS holders, and is particularly important for TPS holders outside of the Ninth and Sixth Circuits. Advance Parole is permission to re-enter the country within a set period of time and is granted *before* someone departs the United States. Advance parole allows the person to have a lawful means of returning to the country after a brief trip abroad. The standard for obtaining Advance Parole for persons is provided by statute for TPS holders,[12] and the standard is especially generous.[13]

WARNING: The law and policy regarding Advance Parole could change at any time. Moreover, leaving on Advance Parole can be risky for someone with prior immigration and criminal violations. Thus,

anyone considering leaving the country with Advance Parole should consult with a trusted immigration attorney before pursuing this alternative. Further, **if an individual is presently eligible to adjust under *Ramirez*, she should do so**. Travel on advance parole is not legally necessary in the Ninth and Sixth Circuits for a TPS holder who entered unlawfully to adjust *as long as* Ramirez *(and* Flores*) remain good law*. We present advance parole to suggest an alternative that may be available to some people, at the time of writing this advisory, who do not live within the Ninth or Sixth Circuits, or who are not immediate relatives and cannot currently adjust, notwithstanding *Ramirez*. Practitioners should make sure their clients fully understand and evaluate any risks of leaving the country before pursuing Advance Parole.

Advance Parole may be most helpful in providing or preserving an opportunity to adjust status in the future for current TPS recipients who:

1) Live outside of the Ninth and Sixth Circuits; and/or
2) Do not currently have an immediate relative through whom they can adjust status, such as those who are:
    a. married to a lawful permanent resident who may later become a U.S. citizen;
    b. unmarried, but may later marry a spouse who is or becomes a U.S. citizen; or
    c. parents of a U.S. citizen child who is not yet old enough to petition for them.

Example 3 – Advance Parole as an Alternative

Facts: Maria MADRE from El Salvador originally entered the United States without inspection in 1998. Maria lives in Arizona and has never left the country since she entered. She was granted TPS. Maria gave birth to her only U.S. citizen child, Dolores DAUGHTER, 15 years ago. Maria is unmarried, and her parents do not have lawful immigration status. If Maria left to consular process, she would trigger the unlawful presence bar under INA § 212(a)(9)(B). Maria has no U.S. citizen or lawful permanent resident parent or spouse upon whom she could base an extreme hardship waiver of the INA § 212(a)(9)(B) unlawful presence bar, and thus she would be stuck outside of the country for ten years if she tried to consular process.

Analysis: The practitioner screens and finds no problems in terms of Maria's eligibility for Advance Parole as a current TPS recipient, nor any possible "red flags" (such as prior criminal or immigration violations) that could result in DHS barring her re-entry into the United States with Advance Parole. Additionally, the practitioner fully explains the risks to Maria of traveling on Advance Parole, and makes an assessment of the current status of TPS, Advance Parole, and the law underpinning the ability to reenter on Advance Parole and subsequently apply for adjustment of status.[14] The practitioner explains to Maria that under current law, Maria's grant of TPS constitutes an "admission" under *Ramirez*. The practitioner explains that there is also another way to meet the INA § 245(a) "admitted or paroled" requirement by traveling abroad and returning to the United States with Advance Parole. Maria may decide that she wants to travel on Advance Parole, so that she will be eligible to apply for adjustment of status as soon as her U.S. citizen daughter turns 21 and is able to submit a petition on Maria's behalf--even if *Ramirez* is later overturned. Note that as long as *Ramirez*

and *Flores* remain good law, Maria does not legally need to take this additional step of traveling on Advance Parole. The aim of Advance Parole in this case is to offer Maria the strongest possibility of being able to adjust her status in six years *even if*:

1) the designation of TPS for which she has qualified has ended *and* the DHS or a court determines that the *Ramirez* decision no longer applies to individuals whose TPS grant has lapsed; or
2) the U.S. Supreme Court overturns the *Ramirez* decision in the future.

E. Next Steps: Pursue Adjustment if Eligible, or if not Eligible, Consider Advance Parole

Adjustment Pursuant to *Ramirez*: It is unclear whether the current administration will renew the TPS designations for El Salvador, Honduras, Nicaragua, and Haiti in 2018.[15] Therefore, we strongly advise those who are eligible for adjustment pursuant to *Ramirez* to do so soon—especially those from El Salvador, Honduras, Nicaragua, and Haiti—so that they are able to adjust prior to the possible termination of their TPS designation.

Adjusting soon, if eligible, protects a TPS holder in three ways. First, it provides a TPS holder with a more secure immigration status—and protects the person if TPS is ended. Whereas TPS is by definition temporary, a green card allows someone to live and work permanently in the United States. Second, given the current circuit split on whether a TPS grant is an "admission," the issue could go before the Supreme Court, and *Ramirez* could be overturned. Third, there is also a possibility that DHS or a subsequent court decision will narrowly construe the *Ramirez* holding as permitting the adjustment only of someone who currently has TPS. In this scenario, if TPS ends (and even if *Ramirez* continues to be good law), the person might not be allowed to adjust status if she were no longer in valid TPS status.

Traveling Pursuant to Advance Parole: A person with TPS will NOT be able to travel pursuant to Advance Parole based on TPS if the TPS designation has ended. If individuals are unable to currently avail themselves of the *Ramirez* decision, as illustrated in Example 3 above, some practitioners might consider submitting TPS-based Advance Parole applications as soon as possible so that their clients are able to travel and return prior to the termination date of their country's TPS designation. To see expiration dates for current TPS designations, go to www.uscis.gov/humanitarian/temporary-protected-status#Countries%20Currently%20Designated%20for%20TPS. As noted above, the law and policy surrounding Advance Parole may also change, so it is critical that the practitioner and client carefully consider any risks of traveling on Advance Parole.

End Notes

[1] The decision is available on the Ninth Circuit's website, at https://cdn.ca9.uscourts.gov/datastore/opinions/2017/03/31/14-35633.pdf.
[2] *Flores v. USCIS*, 718 F.3d 548 (6th Cir. 2013).
[3] USCIS, *Temporary Protected Status* (last visited Sept. 11, 2017), available at www.uscis.gov/humanitarian/temporary-protected-status#Countries%20Currently%20Designated%20for%20TPS. As this list is continually changing, please check the USCIS website for updates.
[4] 8 U.S.C. § 1254a(b)(3)(B).
[5] See https://federalregister.gov/d/2016-23244 (Guinea), https://federalregister.gov/d/2016-23250 (Liberia), and https://federalregister.gov/d/2016-23249 (Sierra Leone).
[6] For more information, see www.uscis.gov/humanitarian/temporary-protected-status.
[7] See, e.g., *Alejando Garnica Silva*, A098 269 615 (BIA June 29, 2017) (unpublished decision).
[8] *Ramirez v. Brown*, 852 F.3d 954, 958-959 (9th Cir. 2017).
[9] *Medina v. Beers*, 65 F.Supp. 3d 419 (E.D. Pa. 2014); *Bonilla v. Johnson*, 149 F.Supp.3d 1135 (D. Minn. 2016).
[10] INA § 212(a)(9)(B)(i)(II).
[11] INA § 212(a)(9)(B)(v).
[12] INA § 244(f)(3).
[13] 8 CFR § 244.15. The regulations allow for travel and do not specify any required reasons except that it be approved within the parameters of Advance Parole. Note that all parole is authorized pursuant to INA § 212(d)(5), which authorizes parole for humanitarian reasons or significant public benefit. In practice, TPS holders will be authorized to travel for any stated personal reason or business purpose. For more information on parole, see the ILRC's manual, *Parole in Immigration law*, available at https://www.ilrc.org/publications/parole-immigration-law.
14 *See Matter of Arrabally and Yerrabelly*, 25 I&N Dec. 771 (BIA 2012).
15 Current TPS designations for Honduras and Nicaragua expire January 5, 2018, Haiti on January 22, 2018, and El Salvador on March 9, 2018.

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