



**Practice Advisory Series**  
**TEMPORARY PROTECTED STATUS**

**STATUTORY OVERVIEW**

**First Installment**

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**Center for Human Rights and Constitutional Law**  
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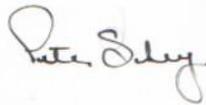
## Practice Advisory Forward

The Center for Human Rights and Constitutional Law is a non-profit, public interest legal foundation dedicated to furthering and protecting the civil, constitutional, and human rights of immigrants, refugees, children, prisoners, and the poor. Since its incorporation in 1980, under the leadership of a board of directors comprising civil rights attorneys, community advocates and religious leaders, the Center has provided a wide range of legal services to vulnerable low-income victims of human and civil rights violations and technical support and training to hundreds of legal aid attorneys and paralegals in the areas of immigration law, constitutional law, and complex and class action litigation.

The Center has achieved major victories in numerous major cases in the courts of the United States and before international bodies that have directly benefited hundreds of thousands of disadvantaged persons.

This practice advisory reviews the legal framework of Temporary Protection Status (TPS), including relevant statutes, regulations, policy, and legislative history. It is part of a seven-part series focused on various aspects of TPS. Given the catastrophic situation several hundred thousand TPS recipients face with President Trump's TPS terminations, it is important for lawyers, representatives and advocates to be familiar with the legal framework of the program. There will be individual and class claims in many forums about the legality of President Trump's TPS terminations, and alternative remedies sought that may in some ways dovetail with TPS, including individual applications for deferred action status, suppression of TPS data in removal hearings, applications for asylum with the changed circumstance being the termination of TPS, etc. Making effective claims or new applications will require an understanding of the TPS law itself.

Manuals and advisories prepared by the Center constantly being examined for improvements and updated to reflect current developments. Please feel free to email [pschey@centerforhumanrights.org](mailto:pschey@centerforhumanrights.org) if you have suggested updates or edits to portions of this practice advisory.



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## **I. Introduction**

This practice advisory acts as the second installment in a series about the United States creation, utilization, and termination of Temporary Protected Status (“TPS”) programs. TPS has been a necessary immigration tool since 1990, providing legal status to hundreds of thousands of U.S. residents who cannot return to their home countries due to natural disasters and the unstable economies and dangerous conditions caused by such disasters.

In the past year TPS has gained significant attention due to the Trump administration’s determination to terminate TPS. As the expiration dates for various TPS-designated countries have arrived in the past year, the Trump administration has refused to renew or extend TPS. This has placed hundreds of thousands of US residents at risk of losing their legal status, becoming undocumented, and driven deeper underground.

Installments three, four, and five discuss specific countries at risk of losing TPS due to the Trump administration’s refusal to extend their designation, installment six provides an overview of pending TPS litigation seeking to prevent the termination of this status, and installment seven focuses on potential remedies for TPS recipients who may lose their status.

This installment provides an overview of the statutory framework for TPS, including the various subsections of 8 U.S.C. § 1254a, 8 C.F.R. § 244, the USCIS policy manual on TPS, and the legislative history.

## **II. Background**

TPS is a form of humanitarian immigration relief and when civil unrest, violence, or natural disasters erupt in countries around the world, concerns arise about the ability of foreign nationals in the United States from those countries to safely return. Section 244(c)(2) of the Immigration and Nationality Act (“INA”), 8 U.S.C. § 1254a, provides for TPS when the

Secretary of Homeland Security finds that conditions in the country temporarily prevent nationals from returning safely or, in certain circumstances, where the country is unable to adequately handle the return of nationals.

Congress created TPS to establish formal criteria and procedures to replace more *ad hoc* practices the Executive Branch had used for decades to provide similar relief. Although some countries are designated for TPS only for short periods, others have been designated for many years, including El Salvador (designated since 2001), Nicaragua (designated since 1999), Sudan (designated since 1997), and Haiti (designated since 2010).

Foreign nationals protected by TPS cannot be removed from the United States during the period in which the status is in effect<sup>1</sup>. A foreign national who is granted TPS receives a registration document and employment authorization<sup>2</sup>. When TPS is terminated, the foreign immigrant's status reverts to her status prior to the TPS grant<sup>3</sup>.

The Secretary of Homeland Security may grant TPS protections to immigrants if she determines that, *inter alia*, (a) there has been an earthquake, flood, drought, epidemic, or other environmental disaster in the foreign state resulting in a substantial, but temporary, disruption of living conditions in the area affected; the foreign state is unable, temporarily, to handle adequately the return to the state of migrants who are nationals of the state; and the foreign state officially has requested TPS designation; or (b) there exist extraordinary and temporary

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<sup>1</sup> Adjudicator's Field Manual, Chapter 38 Temporary Protected Status and Deferred Enforced Departure. 38.1 Temporary Protected Status.; available at <https://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-16606/0-0-0-16616.html>

<sup>2</sup> [https://my.uscis.gov/exploremyoptions/temporary\\_protected\\_status](https://my.uscis.gov/exploremyoptions/temporary_protected_status)

<sup>3</sup> Adjudicator's Field Manual, Chapter 38 Temporary Protected Status and Deferred Enforced Departure. 38.1 Temporary Protected Status.; available at <https://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-16606/0-0-0-16616.html>

conditions in the foreign state that prevent migrants who are nationals of the state from returning to the state in safety<sup>4</sup>.

Once the Secretary has designated a particular country for TPS, individuals from that country (or persons without nationality who last habitually resided in that country) may apply for immigration status under the program. To be eligible for TPS, however, individuals from a designated country must meet additional requirements. These include, among other things, continued physical presence and continued residence in the United States from the most recent date of designation; satisfaction of the criteria for admissibility as an immigrant; lack of disqualifying criminal history; and payment of fees.<sup>5</sup>

Congress ensured that individuals who are ultimately granted protected status could enjoy the freedom to live and work in the United States without fear of deportation. Under the statute, as enacted by Congress, an individual who receives and maintains TPS shall be authorized to engage in employment in the United States; shall not be detained by the Secretary of Homeland Security on the basis of immigration status; and shall not be removed from the United States by the Department of Homeland Security.<sup>6</sup>

Under the TPS statute, the Secretary must periodically re-evaluate country designations. At least 60 days before a particular designation expires, the Secretary must “review the conditions in the foreign state . . . for which a designation is in effect” and determine whether the country still meets the conditions for TPS.<sup>7</sup> If the Secretary does not terminate TPS for a particular country, then by default the designation will be extended for a period of six months, or

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<sup>4</sup> *Id.*

<sup>5</sup> 8 U.S.C. § 1254a(c)(1); 8 C.F.R. §§ 244.2, 244.4, 244.9.

<sup>6</sup> 8 U.S.C. § 1254a(a)(1), (d)(4)

<sup>7</sup> 8 U.S.C. § 1254a(b)(3).

by discretion of the Secretary, for a period of twelve or eighteen months.<sup>8</sup> This periodic-review requirement also entails consultation with appropriate government agencies and, ultimately, publication of notice in the Federal Register.

The periodic review must consider the conditions in the foreign state for which the designation is in effect and must determine whether the conditions for such designation continue to be met<sup>9</sup>. If the Secretary determines that a foreign state continues to meet the conditions for designation under the TPS statute, the period of designation may be extended for up to 18 months. If the Secretary determines that the foreign state no longer meets the conditions for designation under the statute, she must terminate the designation<sup>10</sup>.

The Secretary's decision - whether to renew or rescind TPS - must be published in the Federal Register on a timely basis<sup>11</sup>. The timing of that publication has important consequences for TPS recipients because their employment authorization and other authorization documents expire when their TPS expires.

### **III. Changes Under the Trump Administration**

Under previous administrations, DHS regularly considered natural disasters and social or economic crises that occurred *after* a country was originally designated for TPS in deciding whether to continue or instead terminate a country's designation. Now DHS — without any formal announcement or other explanation — has adopted a new interpretation of the TPS statute that appears to eschew consideration of intervening country conditions.

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<sup>8</sup> 8 U.S.C. § 1254a(b)(3)(C).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

The Administration's new legal rule has dramatically altered the lives of many immigrants and their US citizen family members. Currently, more than 400,000 individuals from ten countries have TPS.<sup>12</sup> They have homes, spouses, jobs, and other long-term social ties to their communities.<sup>13</sup>

The new rule may violate the due process protection against arbitrary government invasion of personal liberty. The new rule constitutes an arbitrary, unexplained abandonment of the government's longstanding interpretation of the TPS statute, on which several hundred thousand people have come to rely. The Due Process Clause does not permit the government to engage in such arbitrary action when individual liberty interests are at stake. Some or maybe all terminations may also violate Fifth Amendment equal protection if they were motivated by racial animus.

#### **IV. Statutory Structure**

8 U.S.C. § 1254a provides for TPS when the Secretary of Homeland Security finds that conditions in the country temporarily prevent nationals from returning safely or, in certain circumstances, where the country is unable to adequately handle the return of nationals. Congress created TPS to establish formal criteria and procedures to replace more *ad hoc* practices the Executive Branch had used for decades to provide similar relief. Although some countries are designated for TPS only for short periods, others have been designated for many

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<sup>12</sup> Nicole Acevedo, *TPS Holders Want Their Voice Heard Throughout Immigration Negotiations*, NBC News (Feb. 05, 2018) (available at: <https://www.nbcnews.com/news/latino/tps-holders-want-their-voices-heard-throughout-immigration-negotiations-n8447960>).

<sup>13</sup> Cecilia Menjivar, *Temporary Protected Status in the United States: The Experience of Honduran and Salvadoran Immigrants*, Center for Migration Research (May 2017) (available at: [http://ipsr.ku.edu/migration/pdf/TPS\\_Report.pdf](http://ipsr.ku.edu/migration/pdf/TPS_Report.pdf)).

years, including El Salvador (designated since 2001), Nicaragua (designated since 1999), Sudan (designated since 1997), and Haiti (designated since 2010).

**a. Relevant Statutes**

**i. 8 U.S.C. § 1254**

Pursuant to 8 U.S.C. § 1254a(1) the Attorney General of the United States may grant a national of a foreign state temporary protected status in the United States and shall not remove the person “from the United States during the period in which such status is in effect, and shall authorize the person to engage in employment in the United States.”<sup>14</sup> 8 U.S.C. § 1254a(1) grants a person work authorization throughout the period the person is in temporary protected status.<sup>15</sup>

**1. Notice**

8 U.S.C. § 1254a(3)(B) requires that notice be provided to nationals of designated TPS countries who are in removal proceedings, that temporary protected status may be available to them<sup>16</sup>. Notice must be provided in a form and language that the person can understand.<sup>17</sup>

**2. Country Designation**

8 U.S.C. § 1254b states the following:

(1) In general The Attorney General, after consultation with appropriate agencies of the Government, may designate any foreign state (or any part of such foreign state) under this subsection only if—

(A) the Attorney General finds that there is an ongoing armed conflict within the state and, due to such conflict, requiring the return of aliens who are nationals of that state to that state (or to the part of the state) would pose a serious threat to their personal safety;

(B) the Attorney General finds that—

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<sup>14</sup> 8 U.S.C. § 1254a(1); available at <https://www.law.cornell.edu/uscode/text/8/1254a>

<sup>15</sup> 8 U.S.C. § 1254a(2); available at <https://www.law.cornell.edu/uscode/text/8/1254a>

<sup>16</sup> 8 U.S.C. § 1254a(3); available at <https://www.law.cornell.edu/uscode/text/8/1254a>

<sup>17</sup> 8 U.S.C. § 1254a(3); available at <https://www.law.cornell.edu/uscode/text/8/1254a>

- (i) there has been an earthquake, flood, drought, epidemic, or other environmental disaster in the state resulting in a substantial, but temporary, disruption of living conditions in the area affected,
- (ii) the foreign state is unable, temporarily, to handle adequately the return to the state of aliens who are nationals of the state, and
- (iii) the foreign state officially has requested designation under this subparagraph; or

(C) the Attorney General finds that there exist extraordinary and temporary conditions in the foreign state that prevent aliens who are nationals of the state from returning to the state in safety, unless the Attorney General finds that permitting the aliens to remain temporarily in the United States is contrary to the national interest of the United States.

A designation of a foreign state (or part of such foreign state)... shall not become effective unless notice of the designation (including a statement of the findings under this paragraph and the effective date of the designation) is published in the Federal Register. In such notice, the Attorney General shall also state an estimate of the number of nationals of the foreign state designated who are (or within the effective period of the designation are likely to become) eligible for temporary protected status under this section and their immigration status in the United States.

8 U.S.C. § 1254b; available at <https://www.law.cornell.edu/uscode/text/8/1254a>

### 3. Effective Dates

The designation will take effect “upon the date of publication of the designation under such paragraph, or such later date as the Attorney General may specify in the notice published under such paragraph, and shall remain in effect until the effective date of the termination of the designation.”<sup>18</sup> The initial period of designation of a foreign state for TPS cannot be less than 6 months and not more than 18 months.<sup>19</sup>

At least 60 days before end of the initial period of designation, and any extended period of designation, the Attorney General, after consultation with appropriate agencies of the Government, is required to review the conditions in the foreign state and shall determine whether

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<sup>18</sup> 8 U.S.C. § 1254b(2); available at <https://www.law.cornell.edu/uscode/text/8/1254a>

<sup>19</sup> *Id.*

the conditions for such designation continue to be met. The Attorney General shall provide on a timely basis for the publication of notice of each such determination (including the basis for the determination, and, in the case of an affirmative determination, the period of extension of designation in the Federal Register.<sup>20</sup>

#### **4. Termination**

If the Attorney General determines that a country no longer continues to meet the conditions for designation, the Attorney General “shall terminate the designation by publishing notice in the Federal Register of the determination...including the basis for the determination. Such termination...shall not be effective earlier than 60 days after the date the notice is published”. 8 U.S.C. § 1254b(3)(b).

#### **5. Extension**

If the Attorney General determines that a foreign state (or part of such foreign state) continues to meet the conditions for designation, “the period of designation of the foreign state is extended for an additional period of 6 months (or, in the discretion of the Attorney General, a period of 12 or 18 months).” 8 U.S.C. § 1254b(3)(c).

#### **6. Judicial Review**

According to 8 U.S.C. § 1254b(5)(A), “there is no judicial review of any determination of the Attorney General with respect to the designation, or termination or extension of a designation, of a foreign state under this subsection.”<sup>21</sup>

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<sup>20</sup> 8 U.S.C. § 1254b(3); available at <https://www.law.cornell.edu/uscode/text/8/1254a>

<sup>21</sup> 8 U.S.C. § 1254b(5)(A); available at <https://www.law.cornell.edu/uscode/text/8/1254a>

## **7. Eligibility**

In order to be eligible for TPS, nationals of a designated TPS country must meet the following requirements:

- (i) the person has been continuously physically present in the United States since the effective date of the most recent designation of that state;
- (ii) the person has continuously resided in the United States since such date as the Attorney General may designate;
- (iii) the person is admissible as an immigrant; and
- (iv) to the extent and in a manner which the Attorney General establishes, the person registers for the temporary protected status under this section during a registration period of not less than 180 days.

8 U.S.C. § 1254c(1)(a)

## **8. Fees**

The Attorney General may require payment of a reasonable fee as a condition of registering a person for TPS. The amount of any such fee shall not exceed \$50. However, for people registered after July 17, 1991, the Attorney General may impose a separate, additional fee for providing an documentation for work authorization.<sup>22</sup>

## **9. Ineligibility**

A person shall not be eligible for temporary protected status under this section if the Attorney General finds that:

- (i) the person has been convicted of any felony or 2 or more misdemeanors committed in the United States, or

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<sup>22</sup> 8 U.S.C. § 1254c(1)(b); available at <https://www.law.cornell.edu/uscode/text/8/1254a>

(ii) the person is described in section 1158(b)(2)(A)<sup>23</sup> of this title.

8 U.S.C. § 1254c(2)(b)

### **10. Withdrawal of TPS**

8 U.S.C. § 1254c(3) states the following:

The [Attorney General](#) shall withdraw temporary protected status granted to an alien under this section if—

(A) the [Attorney General](#) finds that the alien was not in fact eligible for such status under this section,

(B) the [alien](#) has not remained continuously physically present in the [United States](#) from the date the alien first was granted temporary protected status under this section, or

(C) the [alien](#) fails, without good cause, to register with the [Attorney General](#) annually, at the end of each 12-month period after the granting of such status, in a form and manner specified by the [Attorney General](#).

8 U.S.C. § 1254c(3)

### **11. Brief Departures from the United States**

An alien shall not be considered to have failed to maintain continuous physical presence in the United States “by virtue of brief, casual, and innocent absences from the United States, without regard to whether such absences were authorized by the Attorney General.” 8 U.S.C. § 1254c(4). A brief temporary trip abroad required by emergency or extenuating circumstances

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<sup>23</sup> 8 U.S.C. § 1254b(2)(A); (i) the [alien](#) ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion; (ii) the [alien](#), having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the [United States](#); (iii) there are serious reasons for believing that the [alien](#) has committed a serious nonpolitical crime outside the [United States](#) prior to the arrival of the alien in the [United States](#); (iv) there are reasonable grounds for regarding the [alien](#) as a danger to the security of the [United States](#); (vi) the [alien](#) was firmly resettled in another country prior to arriving in the [United States](#)

outside the control of the person will not prohibit the person from maintaining continuous physical presence in the United States.<sup>24</sup>

## **12. Confidentiality of Information**

The Attorney General shall establish procedures to protect the confidentiality of information provided by aliens under this section.<sup>25</sup>

## **13. Detention**

An immigrant provided temporary protected status may not be detained by the Attorney General “on the basis of the alien’s immigration status in the United States.”<sup>26</sup>

## **14. Benefits and Status During the Period of TPS**

8 U.S.C. § 1254f states the following:

During a period in which an alien is granted temporary protected status:

- (1) the [alien](#) shall not be considered to be permanently residing in the [United States](#) under color of law;
- (2) the [alien](#) may be deemed ineligible for public assistance by a [State](#)... or any political subdivision thereof which furnishes such assistance;
- (3) the [alien](#) may travel abroad with the prior consent of the [Attorney General](#); and
- (4) for purposes of adjustment of status... and change of status... the alien shall be considered as being in, and maintaining, lawful status as a nonimmigrant.

8 U.S.C. § 1254f

## **15. Annual Report**

8 U.S.C. § 1254i states the following:

Not later than March 1 of each year, the Attorney General, after consultation with the appropriate agencies of the Government, shall submit a report to the Committees on the

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<sup>24</sup> 8 U.S.C. § 1254c(4); available at <https://www.law.cornell.edu/uscode/text/8/1254a>

<sup>25</sup> 8 U.S.C. § 1254c(6); available at <https://www.law.cornell.edu/uscode/text/8/1254a>

<sup>26</sup> 8 U.S.C. § 1254d(4); available at <https://www.law.cornell.edu/uscode/text/8/1254a>

Judiciary of the House of Representatives and of the Senate on the operation of this section during the previous year. Each report shall include:

- (A) a listing of the foreign states or parts thereof designated under this section,
- (B) the number of nationals of each such state who have been granted temporary protected status under this section and their immigration status before being granted such status, and
- (C) an explanation of the reasons why foreign states or parts thereof were designated for TPS, and with respect to foreign states or parts thereof previously designated, why the designation was terminated or extended.

8 U.S.C. § 1254i

## V. Regulations

### a. 8 CFR § 244

#### 1. Definitions

8 C.F.R. § 244.1 states the following:

*Brief, casual, and innocent absence* means a departure from the United States that satisfies the following criteria:

- (1) Each such absence was of short duration and reasonably calculated to accomplish the purpose(s) for the absence;
- (2) The absence was not the result of an order of deportation, an order of voluntary departure, or an administrative grant of voluntary departure without the institution of deportation proceedings; and
- (3) The purposes for the absence from the United States or actions while outside of the United States were not contrary to law.

*Charging document* means the written instrument which initiates a proceeding before an immigration judge. For proceedings initiated prior to April 1, 1997, these documents include an Order to Show Cause, a Notice to Applicant for Admission Detained for Hearing before immigration judge, and a Notice of Intention to Rescind and Request for Hearing by Alien. For proceedings initiated after April 1, 1997, these documents include a Notice to Appear, a Notice of Referral to immigration judge, and a Notice of Intention to Rescind and Request for Hearing by Alien.

*Continuously physically present* means actual physical presence in the United States for the entire period specified in the regulations. An alien shall not be considered to have failed to maintain continuous physical presence in the United States by virtue of brief, casual, and innocent absences as defined within this section.

*Continuously resided* means residing in the United States for the entire period specified in the regulations. An alien shall not be considered to have failed to maintain continuous residence in the United States by reason of a brief, casual and innocent absence as defined within this section or due merely to a brief temporary trip abroad required by emergency or extenuating circumstances outside the control of the alien.

*Felony* means a crime committed in the United States, punishable by imprisonment for a term of more than one year, regardless of the term such alien actually served, if any, except: When the offense is defined by the State as a misdemeanor and the sentence actually imposed is one year or less regardless of the term such alien actually served.

*Foreign state* means any foreign country or part thereof as designated by the Attorney General

*Misdemeanor* means a crime committed in the United States, either:

(1) Punishable by imprisonment for a term of one year or less, regardless of the term such alien actually served, if any, or

(2) A crime treated as a misdemeanor under the term “felony” of this section.

For purposes of this definition, any crime punishable by imprisonment for a maximum term of five days or less shall not be considered a felony or misdemeanor.

*Prima facie* means eligibility established with the filing of a completed application for Temporary Protected Status containing factual information that if unrebutted will establish a claim of eligibility.

*Register* means to properly file, with the director, a completed application, with proper fee, for Temporary Protected Status during the registration period.

8 C.F.R. § 244.1 Definitions; available at [www.law.cornell.edu/cfr/text/8/244.1](http://www.law.cornell.edu/cfr/text/8/244.1)

## **2. Eligibility**

According to 8 C.F.R. § 244.2:

A person may be granted TPS if he or she:

- (a) Is a national of a foreign state designated for TPS;
- (b) Has been continuously physically present in the United States since the effective date of the most recent designation of that foreign state;
- (c) Has continuously resided in the United States since such date as the Attorney General may designate;
- (d) Is admissible as an immigrant;
- (e) Is not ineligible; and

(f) Registers for TPS during the initial registration period announced by public notice in the Federal Register, or during any subsequent extension of such designation if at the time of the initial registration period:

- The applicant is a nonimmigrant or has been granted voluntary departure status or any relief from removal;
- The 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;
- The applicant is a parolee or has a pending request for reparole; or
- The applicant is a spouse or child of an alien currently eligible to be a TPS registrant.

(g) Has filed an application for late registration with the appropriate Service director within a 60-day period immediately following the expiration or termination of conditions.

8 C.F.R. § 244.2; available at [www.law.cornell.edu/cfr/text/8/244.2](http://www.law.cornell.edu/cfr/text/8/244.2)

### **3. Inadmissibility**

According to 8 C.F.R. § 244.3:

The following shall not render an immigrant ineligible for Temporary Protected Status:

- Public charge: Any immigrant who, in the opinion of the consular officer at the time of application for a visa, or in the opinion of the Attorney General at the time of application for admission or adjustment of status, is likely at any time to become a public charge.
- Any immigrant who seeks to enter the United States for the purpose of performing skilled or unskilled labor.
- Any immigrant at the time of application for admission who is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document or whose visa has been issued without compliance.

8 C.F.R. § 244.3; available at [www.law.cornell.edu/cfr/text/8/244.3](http://www.law.cornell.edu/cfr/text/8/244.3)

## **VI. USCIS Policy Manual**

### **a. Adjudicator's Field Manual – Chapter 38.1 - Temporary Protected Status**

#### **1. Background Information**

According to the USCIS Policy Manual on TPS

In 1990 Congress established a procedure by which the Attorney General may provide TPS to nationals of a particular country who are in the United States and are unable to return to their homeland due to:

- Ongoing armed conflict within the state and, due to that conflict, the return of nationals to that state would pose a serious threat to their personal safety.
- An environmental disaster resulting in a substantial, temporary disruption of living conditions, the state is temporarily unable to adequately handle returning nationals and the state therefore requests TPS designation.
- Other extraordinary and temporary conditions in the state that prevent nationals from returning safely, unless the Attorney General finds that permitting nationals of the state to remain temporarily is contrary to the national interest of the United States.

Adjudicator's Field Manual, Chapter 38.1; available at [www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-16606/0-0-0-16616.html#0-0-0-589](http://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-16606/0-0-0-16616.html#0-0-0-589)

## **2. Designation**

According to Ch. 38.1 of the USCIS Policy Manual on TPS

After consultation with the appropriate agencies of the government, the Attorney General may decide to designate a foreign state or part of a foreign state as eligible for TPS because one or more of the reasons listed above have been met. Notice of the designation is published in the Federal Register, and must include an estimate of the number of nationals of the foreign state who are or will become eligible for TPS as a result of the designation.

During the period for which the Attorney General has designated a country under the TPS program, TPS beneficiaries are not required to leave the United States and may obtain work authorization. However, TPS does not lead to permanent resident status. When the Attorney General terminates a country's TPS designation, beneficiaries return to the same immigration status they maintained before TPS (unless that status had since expired or been terminated) or to any other status they may have acquired while registered for TPS. Accordingly, if an alien had unlawful status prior to receiving TPS and did not obtain any status during the TPS period, he or she will revert to that unlawful status upon the termination of that TPS designation.

A TPS designation will be effective for a minimum of 6 months to a maximum of 18 months. Before the end of the TPS designation period, the Attorney General will review the conditions in the designated state and determine (60 days prior to the end of the designation period) whether the conditions that led to the designation continue to be met.

Based on this assessment, the TPS designation may be extended for an additional 6, 12, or 18 months. If the conditions that led to the TPS designation are no longer

me t, the Attorney General will terminate the designation. Designations, extensions, terminations, and other information regarding TPS are published in the Federal Register.

USCIS Adjudicator's Field Manual, Chapter 38.1, Temporary Protected Status; available at [www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-16606/0-0-0-16616.html#0-0-0-589](http://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-16606/0-0-0-16616.html#0-0-0-589)

### **3. Eligibility**

An individual may be eligible for TPS if they are “a national of a country designated by the Attorney General for TPS, or if the individual is a person who has no nationality but last habitually resided in a designated country. Individuals must apply for TPS during the specified registration period. The registration period is stated in the Federal Register notices of designation and is also generally advertised in the USCIS press releases.” USCIS Adjudicator's Field Manual, Chapter 38.1. A list of TPS- designated countries is available on the USCIS website at:

<https://www.uscis.gov/humanitarian/temporary-protected-status>

### **4. Forms**

TPS applicants are required to “submit an Application for Temporary Protected Status (Form I-821), an Application for Employment Authorization (Form I-765), and evidence to satisfy several requirements pertaining to residence and presence in the United States.

Additionally, the applicant will be scheduled for fingerprinting through an Application Support Center.” USCIS Adjudicator's Field Manual, Chapter 38.1.<sup>27</sup>

### **5. Work Authorization Form**

Form I-765 is required “even if the alien already has or does not desire employment authorization because it provides information for registration of the alien in the TPS program. If

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<sup>27</sup> Available at [www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-16606/0-0-0-16616.html#0-0-0-589](http://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-16606/0-0-0-16616.html#0-0-0-589)

an I-765 is being submitted only as a registration document, and employment authorization is not requested, the form will be marked with a red “X” in the fee receipt block and placed directly below the Form I-821 in the file. No fee is required for an I-765 submitted only as a registration document.” USCIS Adjudicator's Field Manual, Chapter 38.1.

## **6. Evidence of Identity and Nationality**

According to the USCIS policy manual, “an applicant must provide evidence that he or she is a national of a country designated by the Attorney General for TPS. He or she must also provide evidence of his or her identity.” USCIS Adjudicator's Field Manual, Chapter 38.1.<sup>28</sup>

Acceptable evidence for both identity and nationality might include:

- Passport
- Birth certificate and photo identity document.

The identity document must be issued by a local, State, or any federal civil authority. Examples: State identity documents, driver’s license, military identity documents, or public educational documents. Documents must be reasonably current.

If these documents are unavailable, “the applicant may file an affidavit showing proof of unsuccessful efforts to obtain such identity documents, explaining why the consular process is unavailable, and affirming that he or she is a national of the designated country.” USCIS Adjudicator's Field Manual, Chapter 38.1.

Once the documents are submitted, a personal interview before an immigration officer will be scheduled. “Applications adjudicated at the Service Center will be referred to the

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<sup>28</sup> Available at [www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-16606/0-0-0-16616.html#0-0-0-589](http://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-16606/0-0-0-16616.html#0-0-0-589)

appropriate district office. During this interview, the applicant may present any secondary evidence that he or she feels would be helpful in showing nationality.” *Id.*

Minor children who are of school age, 5 to 10 years old, “may use school identity documents. School pictures with names of students listed are acceptable. Children who are under the age of 5 may use their birth certificate along with additional evidence (such as immunization records containing the child’s name and a parent’s signature) to establish identity.” *Id.*

## **7. Evidence of Date of Entry and Residence**

According to USCIS Adjudicator's Field Manual, Chapter 38.1(e)(3)

Individuals must have entered, and continuously resided in, the U.S. since a date specified by the Attorney General. Please note that dates are different for each country designated (example: El Salvador, February 13, 2001). Please refer to the Federal Register for the correct date. Acceptable evidence with the applicant’s legal name might include, but is not limited to:

- Employment records such as payroll stubs, W-2 Forms, signed and dated copies of tax returns, and employment verification letters. Please note that employment verification letters must be on company letterhead, have original signature of the employer, and have specific dates of employment.
- Financial records such as bank statements, printed money transfer receipts, printed money orders, utility bills, rental lease agreements, printed bills of sale, and printed auto registration and tax documentation, as well as letters from companies where the applicant received services. Deeds, mortgages, contracts, insurance policies, printed receipts, and financial letters are also acceptable.
- Medical documentation including appointment notices, medical bills, prescriptions, hospital records or the medical records of the applicant’s children. Birth certificates of children born in the United States may also be accepted if the applicant is the mother or father of the child.
- School records of the applicant or his or her child(ren) (such as report cards, letters, etc.) may be accepted if he or she attended school in the United States. Documentation must show the name of the school, the name of the child and his or her parent, and period(s) of school attendance.
- Attestations from churches, unions, and other organizations may be acceptable evidence if they are accompanied by additional evidence described above. These attestations must identify the applicant by name, state the applicant’s address, seal of

organization (impressed on the letter or on the letter head), and establish how the attester knows the applicant.

USCIS Adjudicator's Field Manual, Chapter 38.1(e)(3)

## **8. Evidence of Physical Presence**

Applicants for TPS “must demonstrate that they have been continuously physically present in the United States since the TPS began, or since the effective date of the most recent re-designation.” USCIS Adjudicator's Field Manual, Chapter 38.1(e)(4). It is important to note “that the dates for physical presence are different for each country under TPS. For specific dates please refer to the Federal Register for the correct dates. Evidence for physical presence is essentially the same as for date of entry and residence.” *Id.*

## **VII. Legislative History**

The following legislative history account comes from Temporary Protection Status After 25 Years: Addressing the Challenges of Long-Term “Temporary” Residents and Strengthening a Centerpiece of US Humanitarian Protection by Claire Bergeron

Although the Immigration Act of 1990 marked the first time that TPS was codified in US law, the United States had, for decades before 1990, granted noncitizens displaced by humanitarian crises or environmental disasters a form of protection known as extended voluntary departure (EVD). EVD provided an administrative mechanism that essentially amounted to an exercise of prosecutorial discretion by the attorney general in deciding that individuals from certain countries would not be pursued for removal. Though the attorney general ultimately decided whether to grant EVD, recommendations for grants of EVD originated with the secretary of state, who would notify the attorney general that the situation in a particular country warranted suspending deportations. Between 1960 and 1990, the attorney general granted EVD to nationals of 16 countries, including Iran, Poland, Afghanistan, Ethiopia, and Uganda. The length of the deferral granted ranged from eight months, for Iran (April to November 1979) to 15 years, for Lebanon (February 1976 to February 1991). Following the 1989 Tiananmen Square Massacre, President George H.W. Bush granted a similar administrative reprieve from deportation, known as deferred enforced departure (DED) to certain Chinese nationals.

By the early 1980s, however, concerns were mounting over the discretionary nature of EVD and its perceived uneven application to different countries. In particular, immigrant advocates expressed concerns over the Reagan administration’s refusal to grant EVD to nationals of El

Salvador, despite growing evidence of political instability and violence in that country. Between 1981 and 1984, groups and individuals ranging from the United States Catholic Conference, the Archbishop of Washington, DC, the Immigration & Refugee Program of the Church World Service, the American Civil Liberties Union (ACLU), and United States Senator Edward Kennedy (D-MA) lobbied for the extension of EVD to Salvadorans. Executive branch officials generally asserted that Salvadorans in the United States were adequately protected from persecution by US asylum law, and that most Salvadorans were coming to the United States for economic rather than political reasons. Those lobbying for EVD for Salvadorans charged that the decision not to grant EVD was politically motivated. They alleged that the true reason for the United States' withholding of EVD was that the Reagan administration generally supported the right-leaning Salvadoran government.

Partly in hopes of remedying these concerns, in July 1987, Congressman Romano Mazzoli (D-KY) introduced the Temporary Safe Haven Act of 1987, which was later re-introduced the following year as the Temporary Safe Haven Act of 1988. The purpose of the bill, as outlined in the 1988 House Judiciary Committee report recommending its passage, was to 'replace the practice known as Extended Voluntary Departure, under which aliens from countries experiencing turmoil are allowed to remain temporarily, with a more formal and orderly mechanism for the selection, processing and registration of such individuals.' The report noted that while the committee was convinced of the need to provide temporary protection or "safe haven" status to individuals who were fleeing danger but would not meet the definition of a refugee, it was concerned about "glaring deficiencies" in the EVD program. These included the fact that: (1) the Immigration and Naturalization Service (INS) did not maintain figures on the number of persons granted EVD; (2) the INS could not effectuate the removal of those whose EVD status was terminated because it did not track their location; (3) the conditions under which a "safe haven" was granted, extended, or terminated by the INS did not appear in any regulation, and were only conveyed to Congress and the public via press releases; and (4) there was nothing in the administrative EVD grants to prohibit 'terrorists, drug traffickers, intelligence agents, and even Nazis' from being eligible for EVD.

The Temporary Safe Haven Act of 1988 called for the creation of a new authorization to remain temporarily (ART) status, which the attorney general could bestow upon noncitizens from designated countries. A country could be designated when the attorney general determined that the foreign state was unable to accept the return of its nationals because of an ongoing armed conflict, a natural disaster, or other 'extraordinary or temporary conditions.' Individuals granted ART would be protected against deportation and have the ability to apply for work authorization, but they would not be eligible for public benefits. While the bill ultimately failed to pass during the 100th Congress, its text formed the backbone of the new provision authorizing TPS in the Immigration Act of 1990.

During the 101st Congress (1989-1990), bills were introduced in the House to stay the deportations and allow work authorization for several discrete groups of foreign nationals, including Salvadorans and Nicaraguans, Lebanese, and Chinese nationals. These bills also called for the creation of a new "Temporary Protected Status," which would include temporary work authorization and protection against deportation for nationals of designated countries.<sup>28</sup> The concept of TPS was eventually incorporated into the House's version of the larger Immigration Act of 1990, which called for the creation of a new TPS status and the designation of four countries for three-year TPS grants: El Salvador, Lebanon, Liberia, and Kuwait.<sup>29</sup> The

companion bill in the Senate contained no such provision.<sup>30</sup> The final version of the Act signed into law on November 29, 1990 authorized the creation of TPS but designated only El Salvador, and only for 18 months.

Absent from almost all of the congressional debates surrounding the creation of TPS was any reference to how to treat TPS recipients when TPS status was perpetually extended. The House-Senate Conference report on the final Immigration Act of 1990 contains no mention of the subject. Following the passage of the Immigration Act of 1990, however, it soon became clear that the lack of legal mechanisms “resolving” the immigration status of those granted long-term TPS posed a serious problem. Writing on the new TPS program in 1995, Bill Frelick and Barbara Kohnen noted the scope of the problem and proposed a solution:

What happens when the AG [attorney general] extends TPS year after year rather than terminating the policy? Recipients of TPS begin to build their lives outside their country while still unsure whether the INS will eventually retract temporary protection. If the INS plans to continue extending TPS, then it should be recognized that dangerous conditions in the home country have not been of a temporary nature and that TPS recipients have built up equities in their respective communities. At some point, perhaps after TPS has been extended for a period of three years, the INS should have the flexibility to adjust their status.

Four years later, at a House subcommittee hearing on extending TPS status to Nicaraguans and Hondurans, Congresswoman Sheila Jackson Lee called on Congress to create an ‘alternative method for encouraging TPS recipients to return home after TPS expires.’ Nevertheless, neither an adjustment mechanism for long-term TPS beneficiaries nor a repatriation assistance mechanism for individuals whose TPS status has been terminated has ever been put into place.

Claire Bergeron, Temporary Protection Status After 25 Years: Addressing the Challenges of Long-Term “Temporary” Residents and Strengthening a Centerpiece of US Humanitarian Protection, *Journal on Migration and Human Security* (2014), pg 26-28 (citations omitted); available at <http://jmhs.cmsny.org/index.php/jmhs/article/view/23>

## **VIII. Conclusion**

Temporary Protection Status is a critical form of immigration relief that hundreds of thousands of U.S. residents have relied on for up to 28 years. It protects an individual from a TPS-designated country from deportation and provides work authorization. More importantly, it provides a safe alternative from returning to their home country, which has been designated dangerous and unstable by various official agencies. Today, many of these countries continue to be designated as dangerous and unstable by official agencies, yet the Trump administration is terminating TPS. Salvadorians who has lived legally in the United States for 28 years, who have

built their lives and families here, are being told to return to their country. This is both unrealistic and unfair. Parents and family members will not be leaving their US-born children here, nor will business owners pick up and leave. The reality is that US residents who lose their TPS status will become undocumented and forced into vulnerable situations where they can be easily exploited due to their loss of status. It is therefore critical that TPS recipients are provided a form of legal status in order to remain in the United States.

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