NEW POLICY ON TPS AND TRAVEL

By Ariel Brown

USCIS announced a new travel policy, and corresponding travel authorization document, for individuals with Temporary Protected Status (TPS) that went into effect on July 1, 2022.[1] Previously, individuals with TPS sought travel permission through advance parole. While individuals with *pending* initial applications for TPS may still seek advance parole, those with *approved* TPS status are no longer granted "advance parole" to travel.[2] Instead, individuals with TPS request a unique form of travel authorization that upon return to the United States results in them being "admitted" (back) into TPS, rather than "paroled."

This practice alert will summarize the key changes and main takeaways from this new policy on TPS and travel, which also includes the rescission of *Matter of Z-R-Z-C-*,[3] clarifying the legal effect of TPS-authorized travel, especially for adjustment of status. This alert will also address how these changes affect individuals with TPS in various postures, including those who have already traveled and subsequently filed an adjustment of status application that relied upon the travel to meet adjustment eligibility.[4]

I. What the New Guidance Says

USCIS is no longer following *Matter of Z-R-Z-C-*. This AAO decision from August 2020 held that a TPS recipient who traveled and returned with TPS advance parole on or after August 20, 2020, was not, in fact, "paroled" back into the United States and therefore if they had

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[1] *See* USCIS, *Policy Memorandum: Rescission of* Matter of Z-R-Z-C- *as an Adopted Decision; agency interpretation of authorized travel by TPS beneficiaries*, (July 1, 2022), [hereinafter *USCIS TPS Travel Memo*], https://www.uscis.gov/sites/default/files/document/memos/PM-602-0188-RescissionofMatterofZ-R-Z-C-.pdf; USCIS, *Policy Alert: Temporary Protected Status and Eligibility for Adjustment of Status under Section 245(a) of the Immigration and Nationality Act*, (July 1, 2022), https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20220701-TPSAndAOS.pdf.

[2] Note advance parole remains the travel mechanism for others, such as individuals granted Deferred Action for Childhood Arrivals (DACA); this change only affects TPS recipients.

[3] *Matter of Z-R-Z-C-* (AAO Aug. 20, 2020).

[4] A full discussion of adjustment eligibility is outside the scope of this practice alert. For more information on adjustment eligibility for those applying through a family petition see ILRC, *Family-Based Adjustment of Status Options*, (Dec. 21, 2018), https://www.ilrc.org/resources/family-based-adjustment-status-options. Note this 2018 practice advisory was written prior to the Supreme Court's *Sanchez* decision, so the 2018 advisory's discussion of TPS holders in the Sixth and Ninth Circuits is out-of-date and no longer applies, however the rest of the advisory remains current.

previously entered without inspection (EWI), their return on advance parole did not change that. Thus, traveling with TPS advance parole would have no effect on their adjustment eligibility. This decision upended years of settled policy and its recission clarifies the legal effect of travel on adjustment eligibility for TPS holders. Although USCIS is no longer following *Z-R-Z-C-*, someone who travels and returns with TPS travel authorization does not revert to the previous policy of being treated as having been paroled, see below. Nonetheless, their travel with permission may lead to threshold adjustment eligibility as an "admission" rather than a "parole" entry.

USCIS is no longer using advance parole as the travel mechanism for TPS recipients.[5] Under the new policy, USCIS has started issuing a new travel authorization document on Form I-512T that is unique to TPS holders. But note that individuals with pending initial applications for TPS, however, can continue to apply for travel permission through advance parole and are issued a Form I-512L. In either situation, individuals seeking travel permission through TPS still apply on Form I-131.

When a TPS recipient returns from authorized travel after July 1, 2022, they will be admitted (back) into TPS. Such an admission will enable them to meet the threshold INA § 245(a) adjustment requirement. TPS recipients who travel and return with the new I-512T travel document will be inspected and admitted into TPS under MTINA[6] and will also be "inspected and admitted" for INA § 245(a) adjustment purposes. This includes TPS holders who previously entered without inspection and were present without authorization when they were initially granted TPS. An admission is different from a parole entry, see below, but for most applicants the practical effect of the two types of re-entries on adjustment eligibility will be the same as both fulfill the 245(a) threshold requirement.

For people who traveled prior to July 1, 2022, USCIS will consider whether to retroactively apply this new policy (in which return on a TPS travel document results in a legal admission) at time of adjustment on a case-by-case basis, if it will make a difference.[7] TPS holders who traveled with advance parole documentation prior to August 20, 2020 were considered *paroled* upon their return, and accordingly met the threshold "inspected and admitted or paroled" requirement to adjust under § 245(a) based on that parole entry. Those who traveled between August 20, 2020 and July 1, 2022 (when *Z-R-Z-C-* was in effect) will also be considered to have been *paroled*, now that *Z-R-Z-C-* has been rescinded. Finally, TPS holders who travel with permission on or after July 1, 2022 will meet this requirement because they will have been *admitted*. For most adjustment applicants, it makes no difference whether they meet this requirement by having been "paroled" versus "admitted"; USCIS says it will only undergo a retroactivity analysis in adjustment cases where it will make a difference,

[5] DHS intends to amend current TPS regulations, which refer to "advance parole," but until then all references to "advance parole" will be interpreted by DHS as encompassing TPS travel authorization.
[6] Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 (MTINA), PL 102-232, 105 Stat. 1733, § 304(c).
[7] For cases arising in the Fifth Circuit, USCIS follows a different approach: all TPS-authorized travel, regardless of when it occurred, will be considered to have resulted in an "admission." This is based on the case *Duarte v. Mayorkas*, 27 F.4th 1044 (5th Cir. 2022). *See USCIS TPS Travel Memo; see also* U.S. Citizenship and Immigration Services Policy Manual (USCIS-PM) at Vol. 7, Part B, Ch. 2, section A(5).

where someone who traveled prior to July 1, 2022 needs the re-entry to be considered an admission, rather than parole (for example in an employment-based adjustment[8]).

Note in either situation, however, the TPS travel only satisfies the threshold inspected and admitted or paroled requirement; an adjustment applicant must still meet all other requirements under § 245(a). This includes having an immigrant visa immediately available to them, not being barred by § 245(c),[9] and being admissible (or eligible for and granted a waiver). Importantly, individuals who are protected by 245(i) need not worry about the bars at 245(c) or travel pursuant to TPS to overcome a previous entry without inspection since 245(i) allows someone to adjust even if barred by 245(c) or not inspected and admitted or paroled, but they will still need to meet the other requirements of adjustment (visa availability and admissibility).[10]

NOTE: In 2021, the U.S. Supreme Court held that a *grant* of TPS is not an "admission" for purposes of adjustment of status. This practice alert focuses on whether an individual who has been granted TPS *and subsequently travels with TPS travel authorization* meets the threshold "inspected and admitted or paroled" 245(a) adjustment requirement upon their return. As a separate issue, for several years there was a circuit split on whether a TPS grant alone, without any related travel, resulted in a person meeting this requirement.[11] The Supreme Court resolved that circuit split in 2021, holding in the case *Sanchez v. Mayorkas*,[12] that a grant of TPS did *not* result in an admission for adjustment purposes. This means that a TPS holder cannot meet the inspected and admitted or paroled requirement to adjust solely by virtue of having been granted TPS. However, they may be able to meet the threshold requirement in some other way, for example if they were admitted on a nonimmigrant visa like a B-2 visitor visa or were waved through, *or* by traveling with permission as is discussed in this practice alert.[13]

USCIS will continue to apply *Matter of Arrabally and Yerrabelly* to TPS travel. Under *Matter of Arrabally and Yerrabelly*,[14] a noncitizen who leaves the United States temporarily with advance parole does not make a "departure" within the meaning of INA § 212(a)(9)(B), and thus does not trigger the three- and ten-year unlawful presence bars when they leave with

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[8] *See* § 245(k).
[9] Note the 245(c) bars relating to unauthorized employment and failure to continuously maintain lawful status do not apply to immediate relatives.
[10] For more information on 245(i), see ILRC, *245(i): Everything You Always Wanted to Know but Were Afraid to Ask*, (July 2, 2021), https://www.ilrc.org/resources/245i-everything-you-always-wanted-know-were-afraid-ask.
[11] *Compare Flores v. USCIS*, 718 F.3d 548 (6th Cir. 2013); *Ramirez v. Brown*, 852 F.3d 954 (9th Cir. 2017); *Velasquez v. Barr*, 979 F.3d 572 (8th Cir. 2020) (holding that TPS grant was an "admission" for adjustment of status purposes) *with Serrano v. United States Atty. Gen.*, 655 F.3d 1260 (11th Cir. 2011); *Nolasco v. Crockett*, 978 F.3d 955 (5th Cir. 2020); *Sanchez v. Secretary U.S. Dept. of Homeland Security*, 967 F.3d 242 (3rd Cir. 2020) (finding that TPS grant was not an "admission" for adjustment of status purposes).
[12] 141 S. Ct. 1809 (2021).
[13] Or, they could avoid the threshold 245(a) requirement entirely if eligible to adjust under 245(i). *See* ILRC, *245(i): Everything You Always Wanted to Know but Were Afraid to Ask*, (July 2, 2021), https://www.ilrc.org/resources/245i-everything-you-always-wanted-know-were-afraid-ask.
[14] 25 I&N Dec. 771 (BIA 2012).

advance parole. USCIS will apply *Arrabally and Yerrabelly* to travel with the new TPS travel document as well. As a result, TPS travel, whether with advance parole or the new travel authorization document, does not trigger these unlawful presence bars.[15] *Arrabelly and Yerrabelly* does not address other grounds of inadmissibility that may be triggered by a departure, however, such as § 212(a)(9)(A).[16]

II. How the New Guidance Affects TPS Recipients Applying to Adjust Status

A. Those who have already submitted an adjustment of status application that was denied based on not having been inspected and admitted or paroled, in reliance on *Z-R-Z-C-*

Unfortunately, USCIS has not provided a specific basis to seek reopening of previously denied adjustments where the basis for the denial was that the person had traveled with TPS advance parole during the time period that *Z-R-Z-C-* was in effect (TPS travel between August 20, 2020 and July 1, 2022), such that the travel was not considered to have resulted in a parole entry upon return.[17]

However, TPS recipients who traveled within this window should not have to travel again in order to have a qualifying entry for adjustment purposes since the new policy states that TPS travel in that period will be considered a parole entry. Such applicants will have to refile the adjustment application, though, to take advantage of the new policy.

> **Example:** Fernando, who has TPS, had been planning to apply for adjustment of status for some time and an attorney he had consulted with in early 2020 had told him that to be eligible, he needed to travel with advance parole. However, he did not travel with TPS advance parole until December 2020, due to worries about traveling during the COVID-19 pandemic. After he returned, he submitted an adjustment of status application through his U.S. citizen spouse, hoping to rely upon the TPS travel to meet the threshold inspected and admitted or paroled requirement. However, his adjustment application was denied by USCIS in April 2022 because at that time they were following *Z-R-Z-C-* so his travel was not considered to have resulted in a parole entry. Fernando can reapply for adjustment of status now, providing proof of his December 2020 travel to demonstrate he meets the inspected and admitted or paroled requirement.

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[15] *See USCIS TPS Travel Memo* at 13, note 59; *see also* 7 USCIS-PM B.2(A)(5) note 65.

[16] In the new memo, USCIS states that TPS travel *will* trigger inadmissibility under §§ 212(a)(6)(B) and 212(a)(9)(A), two other grounds of inadmissibility that are triggered by a departure. *See USCIS TPS Travel Memo* at 13.

[17] Note this discussion is only about the impact of TPS travel and thus only pertains to cases denied based on *Z-R-Z-C-*, in other words where the adjustment was denied on the basis that *TPS travel* did not enable the applicant to meet the "inspected and admitted or paroled" requirement. This discussion is *not* about adjustment applications that were denied after the Supreme Court's decision in *Sanchez* (which held that a *TPS grant* is not an "admission" for purposes of the "inspected and admitted or paroled" requirement).

B. Those who have already submitted an adjustment of status application that is currently pending

If the travel upon which the applicant is relying for adjustment eligibility occurred prior to July 1, 2022, in most cases USCIS will treat TPS travel prior to July 1, 2022 as having resulted in the person being "paroled" into the United States. However, if retroactive application of current policy (that TPS travel results in an "admission") is warranted and makes a difference to the case—or if the case arises in the Fifth Circuit, regardless of when the travel was and regardless if retroactive application is warranted—USCIS will treat the travel as resulting in an "admission."[18]

> **Example:** Ana lives in California. She traveled with TPS advance parole in 2017 and applied for adjustment of status through her adult U.S. citizen son in December 2022, using the 2017 parole entry to show that she met the inspected and admitted or paroled requirement. It doesn't matter for her case whether USCIS treats her travel as having resulted in a parole entry or an admission; in either scenario it allows her to meet the threshold 245(a) adjustment of status requirement. When USCIS adjudicates her adjustment application, they will determine retroactive application of current policy is unnecessary and will treat her 2017 travel as having resulted in her being paroled.
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> **Example:** Suppose Ana from the example above lives in Texas, which is in the Fifth Circuit. Because USCIS is applying slightly different policy to Fifth Circuit cases, even though the TPS-authorized travel occurred prior to July 1, 2022, they would treat her travel as having resulted in an admission. This would not change her adjustment eligibility in any material way.

If the travel occurred on or after July 1, 2022, USCIS will treat the entry after TPS-authorized travel as an "admission," including for purposes of meeting the inspected and admitted or paroled requirement.

> **Example:** Jorge traveled with the new TPS travel document, I-512T, in September 2022. In November 2022, he submitted his adjustment application with USCIS, which is still pending. When USCIS decides his adjustment application, applying current guidance they will treat his September 2022 travel as having resulted in an "admission" for adjustment of status purposes.

C. Those who have not yet submitted an adjustment of status application

For those who have not yet submitted an adjustment application (and who are not in the Fifth Circuit), what matters is *when the TPS-authorized travel upon which they are relying to meet the threshold adjustment of status requirement occurred*, not when they submit the adjustment application.

If the travel upon which the applicant intends to rely for adjustment eligibility occurred prior to July 1, 2022, USCIS will follow the approach outlined in the section above—

[18] This is based on a Fifth Circuit case, *Duarte*, 27 F.4th 1044. *See USCIS TPS Travel Memo*; *see also* 7 USCIS-PM B.2(A)(5).

everywhere except the Fifth Circuit, treating most TPS-authorized travel as having resulted in a parole entry unless it matters that it be treated as an "admission" instead for some other reason. For all cases in the Fifth Circuit, the TPS-authorized travel will be considered to have resulted in an admission.

If the travel upon which the applicant intends to rely for adjustment eligibility occurred on or after July 1, 2022, USCIS will treat the entry after TPS-authorized travel as an "admission," including for purposes of meeting the inspected and admitted or paroled requirement. Again, in most cases, whether an entry is considered an admission or parole has no practical effect on adjustment eligibility as either will meet the 245(a) inspected and admitted or paroled requirement.

NOTE: Special issues for TPS recipients with prior orders of removal. In a departure from longstanding policy that (1) travel on advance parole executes a prior removal order and (2) for those in proceedings, shifts jurisdiction over an adjustment application to USCIS, in late 2019 USCIS took the position that travel on TPS advance parole did not execute a prior removal order or shift jurisdiction.[19] This meant that if an individual with a prior order wanted to adjust, the immigration court would have jurisdiction over the adjustment application. Therefore, to pursue adjustment, they first would have to reopen their removal case, an extra step that during the Trump administration was nearly impossible and even now can prove difficult, due to general time and numerical limitations on filing motions to reopen. The Central American Resource Center in Washington, D.C. (CARECEN) and multiple individual plaintiffs filed a lawsuit challenging this 2019 policy change and as part of the settlement agreement reached in this lawsuit, dated March 21, 2022, ICE Office of the Principal Legal Advisor (OPLA) will generally agree to joint motions to reopen and dismiss proceedings of certain TPS beneficiaries with prior orders who traveled on advance parole and are otherwise adjustment-eligible, thereby giving USCIS jurisdiction over the adjustment application.[20] Consequently, while DHS did not concede the jurisdictional issue, it agreed to an avenue through which jurisdiction could be restored to USCIS in at least some of these cases.[21] The settlement agreement remains in effect until at least January 19, 2025. For those who can benefit from the settlement agreement, they should file their joint motion to reopen and adjustment application as soon as possible.

[19] USCIS, *Policy Memorandum: Effect of Travel Abroad by Temporary Protected Status Beneficiaries with Final Orders of Removal* (Dec. 20, 2019), https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20191220-TPSTravel.pdf.

[20] For more information on the settlement agreement, see USCIS, "Certain Temporary Protected Status (TPS) Recipients with Orders of Removal or Deportation Seeking Adjustment of Status With USCIS," https://www.uscis.gov/laws-and-policy/other-resources/class-action-settlement-notices-and-agreements/certain-temporary-protected-status-tps-recipients-with-orders-of-removal-or-deportation-seeking.

[21] Note under current policy, USCIS maintains that TPS travel does *not* execute a prior order, although the ILRC believes this interpretation is legally incorrect, especially now that *Z-R-Z-C-* has been rescinded. *See* 7 USCIS-PM B.2(A)(5) ("[T]ravel with TPS authorization does not execute an outstanding removal order.").

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