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Temporary Protection, Admission and Lawful Permanent Residency: Taking Congress at its Word

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Part I. Introduction¹

At the age of 21, Jose fled the civil war in his home country of El Salvador and crossed the border into the United States without permission.² After crossing the border Jose understandably took any job he could get, whether it was as a dishwasher or a deliveryman.³ In 2001, former U.S. President George W. Bush declared that nationals of El Salvador, who were already in the United States, could apply for Temporary Protected Status (“TPS”).⁴ Jose was granted TPS status, enrolled in school in the United States, received his associate’s degree, and is currently employed as a paralegal.⁵ Following a similar path, in 2006, 29 year old Jean left his native Haiti with his brother in 2006 and was admitted to the U.S. on a tourist visa.⁶ In 2010, after a vicious earthquake struck Haiti, former U.S. President Barack Obama declared that Haitian nationals in the United States could obtain permission to temporarily remain and work in the United States by procurement of TPS.⁷ Like Jose, Jean obtained TPS, started working, is currently in the final stages of completing his high school diploma program and plans on starting college next year with a goal

¹ This note would have not been possible without the help of many people. I would first like to thank my family and friends, and professors who have supported me throughout law school. I would like to specially thank my faculty supervisor, Professor Lori Nessel, and my student mentor and close friend, Stephen Krachie whose help, guidance, and support made this note possible. I would finally like to thank my former boss, Harlan York, for suggesting that I write about this important issue.

² Teo Armus. *Central Americans Fighting Trump Administration to Keep Legal Status*. NBC Washington (Aug. 11, 2017), <https://www.nbcwashington.com/news/politics/Honduras-Salvador-Temporary-Protected-Status-Fighting-Trump-Administration-439888683.html>.

³ *Id.*

⁴ Temporary Protected Status (“TPS”) is a designation given by the United States Government when it determines that nationals of a particular country cannot return home safely. The conditions that allow the Secretary of Homeland Security to designate a country with TPS are listed in Section 244(b) of the Immigration and Nationality Act (“INA”)⁴, and include: (i) ongoing armed conflict in the state that would pose a serious threat to the nationals of that state should they be returned; (ii) environmental disasters (like earthquakes, floods, epidemics) that are substantial (but temporary) and result in the disruption of living conditions in the area impacted; (iii) the foreign state is unable to handle the return of their nationals to the state; (iv) the foreign state has officially requested TPS designation; or (v) the Secretary of Homeland Security determines that there is an extraordinary and temporary condition that prohibits the nationals of that country from returning safely. INA § 244.

⁵ *See supra* note 2.

⁶ Khorri Atkinson, *Haitian Immigrants with Temporary Status Await Trump’s Next Move*. New York Times (July 21, 2017), <https://www.nytimes.com/2017/07/21/nyregion/haiti-immigrants-trump.html>.

⁷ *Id.*

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of becoming a nurse or pediatrician.⁸ Jose and Jean have these opportunities because their TPS allows them to work, study and live in the United States without the fear of removal (deportation).

For TPS, the fact that Jose entered the United States without inspection and Jean was admitted on a tourist visa but overstayed his authorized period is irrelevant.⁹

While Jose and Jean may currently enjoy legal status in the United States, their TPS, as the name suggests, is temporary.¹⁰ If the United States Government decides to terminate the TPS designation for these countries, people like Jose and Jean would either have to return to their home country, or remain in the United States without legal status (thus losing their right to work, study, and be safe from removal).¹¹ This is exactly what happened on November 20, 2017, and January 8, 2018, when the United States Department of Homeland Security announced that it would be terminating the TPS designation for Haiti and El Salvador, respectively.¹² However, under the immigration laws of the United States, there may be ways for Jose and Jean to stay in the United States permanently, especially if they are eligible to file for permanent residency through a process known as an “adjustment of status.”¹³ Adjustment of status is a process that permits immigrants

⁸ *Id.*

⁹ INA 244(a)(1)(A-B).

¹⁰ INA 244(a)(1)(A).

¹¹ INA § 212(d)(3).

¹² On November 20, 2017, then Acting-Secretary of the U.S. Department of Homeland Security, Elaine Duke, announced that the government would be terminating Haiti’s TPS designation on July 22, 2019 on the account of Haiti making “considerable progress” with regards to displaced people and “improve the stability and quality of life for Haitian citizens. *Acting Secretary Elaine Duke Announcement on Temporary Protected Status For Haiti*. Department of Homeland Security (Nov. 20, 2017), <https://www.dhs.gov/news/2017/11/20/acting-secretary-elaine-duke-announcement-temporary-protected-status-haiti>;

On January 8, 2018, Secretary of the U.S. Department of Homeland Security, Kristjen Nielsen, announced that the government would be terminating El Salvador’s TPS designation on September 9, 2019 on the account of “the substantial disruption of living conditions caused by the earthquake no longer exist. *Security of Homeland Security Kirstjen M. Nielsen Announcement on Temporary Protected Status for El Salvador*. Department of Homeland Security (Jan 8, 2018) <https://www.dhs.gov/news/2018/01/08/secretary-homeland-security-kirstjen-m-nielsen-announcement-temporary-protected>.

¹³ INA § 245; *See also Adjustment of Status*. U.S. Citizenship and Immigration Services (Jan. 11, 2018), <https://www.uscis.gov/greencard/adjustment-of-status>.

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who are already in the United States to become lawful permanent residents without having to depart and procure an immigrant visa from an American consulate abroad as is normally required.¹⁴ One of the ways to file for an adjustment of status is through a qualified family member.¹⁵

Using the examples above, if Jose and Jean married United States citizens while in the U.S., they would each be eligible to obtain an immigrant visa (as an immediate relative¹⁶ of a United States citizen spouse), and could each obtain the visa from within the United States, through adjustment of status.¹⁷ While there are many requirements for adjustment of status, one of them, the topic of this comment, is that the applicant must currently be in the United States after being “inspected and admitted or paroled.”¹⁸ The Immigration and Nationality Act (“INA”)¹⁹ states that a person is “inspected and admitted” into the United States after he/she presents him/herself and is authorized to enter the country by an Immigration Officer at a designated port-of-entry.²⁰ A person can also be paroled temporarily into the United States under certain circumstances, however he/she can be paroled only if he/she was initially applying for regular admission in to the United States.²¹ As discussed, Jose entered the United States by crossing the border without inspection, and Jean entered the United States with a tourist visa obtained in his native country, Haiti, and

¹⁴ INA § 222(a).

¹⁵ INA § 201(a)(1). *See also Green Card Eligibility Categories*. U.S. Citizenship and Immigration Services (Sept. 12, 2017), <https://www.uscis.gov/greencard/adjustment-of-status>.

¹⁶ Immediate Relatives mean the children, spouses, and parents of a citizen of the United States, except that, in the case of parents, such citizens shall be at least 21 years of age. INA §201(b)(2).

¹⁷ INA § 201(b)(2).

¹⁸ INA §245(a).

¹⁹ The Immigration National Act (“INA”) was created in 1952 through the McCarran-Walter bill of 1952, Public Law No. 82-414. The creation of the INA collected the various statutes relating to immigration law and codified it into one place, centralizing it into a body of law. The INA itself is divided in the titles, chapters, and sections, but it can also be found in parts of Title 8 of the United States Code (U.S.C.). Since it was enacted in 1952, the INA has been amended multiple times and is still a stand alone body of law that contains the law related to United States Immigration and Nationality. *Immigration and Nationality Act*. United States Citizenship and Immigration Services (Sept. 10, 2013), <https://www.uscis.gov/laws/immigration-and-nationality-act>.

²⁰ INA 101(a)(13)(A).

²¹ INA § 212(d)(5)(A).

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stayed in the United States beyond the time that was initially authorized. In regards to Jean, the latter, because he was initially admitted and inspected into the United States, he meets that particular requirement for his adjustment of status application, even though he overstayed on his tourist visa. But what about Jose? By crossing the border without permission, hence not presenting himself to a United States immigration officer at a designated port-of-entry, Jose was never ‘inspected and admitted or paroled’ into the United States, and he is thus not eligible to file an application for his adjustment of status.²²

Does the fact that Jose received TPS in 2001 help him adjust his status? It depends. United States Circuit Courts of Appeal are currently split on the issue of whether receiving Temporary Protected Status counts as being “inspected and admitted” for the purpose of adjustment of status.²³ The Eleventh Circuit,²⁴ has held that a person who receives TPS, after entering the United States without being inspected and admitted or paroled, is not eligible for adjustment of status through INA Section 245(a).²⁵ However the Sixth Circuit,²⁶ and more recently in 2017 the Ninth Circuit,²⁷ have both held that aliens who entered the United States without inspection but subsequently acquired TPS are considered to be “admitted” for the purposes of adjustment of status under Section 245(a) of the INA.²⁸ While the Sixth Circuit published its holding permitting adjustment of status in 2013, the Ninth Circuit’s decision to follow suit in March of 2017 is much more

²² INA §245(a).

²³ Andrew Arthur. *Ninth Circuit Significantly Extends TPS Eligibility for Adjustment of Status*. Center for Immigration Studies (Apr. 12, 2017), <https://cis.org/Arthur/Ninth-Circuit-Significantly-Extends-TPS-Eligibility-Adjustment-Status>.

²⁴ The Eleventh Circuit encompasses the states of Alabama, Florida, and Georgia. *About the Court*. United States Court of Appeals for the Eleventh Circuit. <http://www.ca11.uscourts.gov/about-court>.

²⁵ See *Serrano v. U.S. Att’y Gen.*, 655 F.3d 1260, 1265 (11th Cir. 2011).

²⁶ The Sixth Circuit encompasses Kentucky, Michigan, Ohio and Tennessee *About the Court*. United States Court of Appeals for the Sixth Circuit, <http://www.ca6.uscourts.gov/about-court>.

²⁷ The Ninth Circuit encompasses the states and territories of Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Northern Mariana Islands, Oregon, and Washington. *What is the Ninth Circuit?* United States Court of Appel for the Ninth Circuit, https://www.ca9.uscourts.gov/judicial_council/what_is_the_ninth_circuit.php.

²⁸ See *Flores v. U.S. Citizenship & Immigration Servs.*, 718 F.3d 548 (6th Cir. 2013); *Ramirez v. Brown*, 852 F.3d 954, 955 (9th Cir. 2017).

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significant, simply because the Ninth Circuit encompasses the states of California, Arizona, and Nevada, three states that were “each on the list of the top 10 states of residence of the unauthorized immigrant population in January 2000.”²⁹

Hence, while the answer to the question of whether Jose (the citizen of El Salvador who entered the United States illegally and subsequently received TPS) can apply for his adjustment of status is dependent on what state he lives in, this is merely one example. It is estimated that more than 300,000 people, from 10 designated countries, are present in the United States with a TPS designation.³⁰ Whether or not these other people can file for the adjustment of status is currently dependent on what state s/he live in. The United States Supreme Court should weigh in on this issue that is affecting the futures of hundreds of thousands of people and should hold that an alien who entered the United States without inspection, but subsequently received Temporary Protected Status, should be considered as “admitted” for the purposes of adjustment of status under INA Section 245(a).

This paper will provide an overview of the TPS program, adjustment of status, and Admission in Part II. In Part III, this paper analyzes *Serrano v. U.S. Attn’y Gen.*, 655 F.3d 1260 (11 Cir. 2011), the Eleventh Circuit decision that held that an alien who entered the United States without inspection and subsequently received TPS is not considered to be “admitted” for the purposes of adjustment of status. Part IV analyzes the Circuit Courts that do consider aliens that entered the United States without inspection and subsequently received TPS as “admitted” for the purposes of adjustment of status. Finally, Part V argues that those who receive TPS subsequent to his/her unlawful entry into the United States should be considered “admitted” for adjustment of status. This paper will also make the argument that considering TPS recipients as admitted for the

²⁹ See *supra* note 23.

³⁰ See *supra* note 6.

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purpose of adjustment of status is not novel, as there are other pathways under United States immigration law that permit aliens to apply for adjustment of status after receiving some sort of status subsequent to his/her initial entry (such as U Visas³¹, or T Visas³²).

Part II. Temporary Protected Status and Adjustment of Status Background

A. Temporary Protected Status (TPS)

Temporary Protected Status (“TPS”) is a designation given by the United States Government when it determines that nationals of a particular country cannot return home safely.³³

The conditions that allow the Secretary of Homeland Security to designate a country with TPS are listed in Section 244(b) of the Immigration and Nationality Act (“INA”)³⁴, and include:

(i) ongoing armed conflict in the state that would pose a serious threat to the nationals of that state should they be returned; (ii) environmental disasters (like earthquakes, floods, epidemics) that are substantial (but temporary) and result in the disruption of living conditions in the area impacted; (iii) the foreign state is unable to handle the return of their nationals to the state; (iv) the foreign state has officially requested TPS designation; or (v) the Secretary of Homeland Security determines that there is an extraordinary and temporary condition that prohibits the nationals of that country from returning safely.³⁵

While TPS was first enacted under the *Immigration Act of 1990*,³⁶ the idea of providing a temporary safe haven to those in need was discussed in the *Chinese and Central American*

³¹ An alien is eligible to receive U Nonimmigrant Status if s/he was a victim of a qualifying criminal activity and if they agree to cooperate with law enforcement in the investigation and or prosecution of said criminal activity. INA § 101(a)(15)(U).

³² An alien is eligible to receive T Nonimmigrant Status if s/he is or has been a victim of a severe form of trafficking, present in the United States, has reasonably complied with all requests of law enforcement, and would face extreme hardship involving unusual and severe harm upon removal. INA § 101(a)(15)(T).

³³ INA §244; *See also* STEPHEN H. LEGOMSKY & CRISTINA M. RODRIGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 1140 (6th ed. 2015).

³⁴ *See supra* note 19.

³⁵ INA §244(b)(1)(A-C).

³⁶ Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990) (prior to 1996 amendment).

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Temporary Protected Status Act of 1989 (“*Chinese and Central American TPS Act*”).³⁷

Congressional records show that the major purposes behind creating TPS was to ensure that “nationals of countries undergoing civil war or extreme tragedy” are protected and that “immediate relief [is provided to]...aliens whose lives would be in danger if they were forced to return home.”³⁸ In the case of the *Chinese and Central American TPS Act*, the bill sought to provide temporary protected status to the nationals of China (due to the country’s crackdown on pro-democracy demonstrations) and for the nationals of El Salvador, and Nicaragua (due to the politically-motivated violence which caused the deaths of thousands).³⁹ The humanitarian intent behind creating TPS can be clearly seen. While Representative Levine of California supported the bill by stating that “[i]t would be cruel and contrary to the fundamental principles of our Nation to push these immigrants from our shores under these conditions,”⁴⁰ the bill’s sponsor, Representative John Moakley of Massachusetts, supported the bill by stating that its enactment gave lawmakers a choice:

We can maintain the status quo by defeating this bill and seek to deport 750,000 refugees. We all know what that will mean: more human suffering; more taxpayer money wasted, less dignity in the eyes of the world, and the same of future generations. Or we can make the right decision and provide leadership. Enactment of this legislation does honor to our refugee traditions and it establishes our ability to enact wise policies on tough issues.⁴¹

³⁷ The Chinese and Central American Temporary Protected Status Act of 1989, H.R. 45, 101st Cong. (1989-90).

The *Chinese and Central American Temporary Protected Status Act of 1989* passed the United States House of Representatives on October 25, 1989. While the bill was ultimately referred to the Subcommittee on Immigration and Refugees by the Committee on the Judiciary, the content of the bill was enacted in the Temporary Protected Status provisions of Immigration Act of 1990.

³⁸ 135 CONG. REC. H7501 (daily ed. Oct. 25, 1989) (statement of Rep. Richardson), 135 Cong Rec H 7501, at *H7501 (LEXIS).

³⁹ 135 CONG. REC. H7501 (daily ed. Oct. 25, 1989) (statement of Rep. Levine), 135 Cong Rec H 7501, at *H7501 (LEXIS).

⁴⁰ *Id.*

⁴¹ 135 CONG. REC. H7501 (daily ed. Oct. 25, 1989) (statement of Rep. Richardson), 135 Cong Rec H 7501, at *H7501 (LEXIS).

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Since its enactment, various countries have received TPS designation.⁴² Kuwait, for example, received TPS designation from 1991-1992, during the Iraqi Invasion of Kuwait.⁴³ Similarly, Rwanda received TPS designation in 1995 during the Rwandan Genocide.⁴⁴ As of November 1, 2017, there are 10 countries that currently have TPS designation, including but not limited to war-torn Syria and Yemen.⁴⁵ However on November 6, 2017, the Secretary of the United States Department of Homeland Security announced that the TPS designation for Nicaragua would end by January 2019 and the 2,500 Nicaraguan citizens with TPS status are expected to depart the United States by that time.⁴⁶ The same announcement also stated that the United States Government is deferring its decision on whether or not TPS designation should be extended for the 57,000 Honduran citizens in the country.⁴⁷

The Immigration Nationality Act states that a country may not receive an initial TPS designation for period longer than 18 months and that the Attorney General is required to periodically review whether or not the designated country still meets the requirements to receive the designation.⁴⁸ If the Attorney General finds that the designation is no longer appropriate given the conditions in the country in question, then the TPS status must be terminated for its nationals.⁴⁹

⁴² *Temporary Protected Status*. The United States Department of Justice (Jan. 23, 2018), <https://www.justice.gov/eoir/temporary-protected-status>.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Temporary Protected Status*. U.S. Citizenship and Immigration Services (Feb. 20, 2018), <https://www.uscis.gov/humanitarian/temporary-protected-status>. As of November 1, 2017 the countries of El Salvador, Haiti, Honduras, Nepal, Nicaragua, Somalia, Sudan, South Sudan, Syria, and Yemen currently have TPS Designation.

⁴⁶ *Acting Secretary Elaine Duke Announcement on Temporary Protected Status for Nicaragua And Honduras*. Department of Homeland Security (Nov. 6, 2018), <https://www.dhs.gov/news/2017/11/06/acting-secretary-elaine-duke-announcement-temporary-protected-status-nicaragua-and>; *See also* Nick Miroff. *DHS ends protected immigration status for Nicaraguans, but Hondurans get extension*. Washington Post (Nov. 6, 2017), https://www.washingtonpost.com/world/national-security/immigrants-from-central-america-haiti-await-dhs-announcement-on-protected-status/2017/11/06/7b690c80-c305-11e7-84bc-5e285c7f4512_story.html?utm_term=.408d2bdd62a1.

⁴⁷ *Id.*

⁴⁸ INA §244(b)(2)(B) - (3)(A).

⁴⁹ INA §244(b)(3)(B).

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As the U.S. Department of Homeland Security has announced that the TPS designation periods for both Haiti and El Salvador not be renewed,⁵⁰ the status of the 250,000 TPS recipients from the two countries will be terminated in July and September 2019, respectively.⁵¹ There are also approximately 190,000 United States children that are born to TPS recipients.⁵²

B. Adjustment of Status

Adjustment of status is a procedure that allows certain aliens to apply for lawful permanent residence status, while s/he are within the United States, thus not having to go abroad for consular processing.⁵³ Section 245 of the INA states that an alien who was inspected and admitted, or paroled (unless s/he is a VAWA self-petitioner⁵⁴) may apply to adjust her/his status within the United States based on the discretion of the Attorney General (now the Secretary of Homeland Security) if s/he (1) makes an application for such adjustment; (2) is eligible to receive an immigrant visa and is admissible to the United States; and (3) an immigrant visa is immediately available at the time the application is filed.⁵⁵ Immigrant visas are immediately available in certain cases, for example in the cases of immediate relatives of U.S. Citizens (“Immediate Relatives”).⁵⁶ Immediate relatives are aliens that are either: (1) the Spouse of U.S. Citizens, (2) unmarried

⁵⁰ See *supra* note 12.

⁵¹ Nick Miroff. *DHS ends protected immigration status for Nicaraguans, but Hondurans get extension*. Washington Post (Nov. 6, 2017), https://www.washingtonpost.com/world/national-security/immigrants-from-central-america-haiti-await-dhs-announcement-on-protected-status/2017/11/06/7b690c80-c305-11e7-84bc-5e285c7f4512_story.html?utm_term=.408d2bdd62a1.

⁵² Bishop Mark Seitz. *But what about the children? What happens to the 192,000 US citizen children of Salvadoran TPS parents?* The Hill (Jan. 1, 2018), <http://thehill.com/opinion/immigration/366777-but-what-about-the-children-what-happens-to-the-192000-us-citizen>.

⁵³ INA § 245. See also *Adjustment of Status*. U.S. Citizenship and Immigration Services (Jan. 11, 2018), <https://www.uscis.gov/greencard/adjustment-of-status>.

⁵⁴ Relief under the Violence Against Women Act (“VAWA”) is for certain battered spouses, children, and parents of U.S. Citizens. INA § 204(a)(1)(A); See also *Battered Spouses, Children & Parents*. U.S. Citizenship and Immigration Services (Feb. 16, 2016), <https://www.uscis.gov/humanitarian/battered-spouse-children-parents>.

Should an alien be determined to be a VAWA self-petitioner, they are not required to have been “inspected and admitted or paroled” in order for Adjustment of Status. INA § 245(a).

⁵⁵ INA § 245(a).

⁵⁶ INA § 201(b)(2).

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children of a U.S. Citizen under the age of 21, or (3) parent of a U.S. Citizen (if the U.S. Citizen is 21 years or older).⁵⁷ If an immediate relative is within the United States (after being inspected and admitted or paroled), and should s/he meet all of the other requirements (such as being admissible), then the immediate relative may be able to adjust her/his status to that of a lawful permanent residence from within the United States, and thus not be required to travel abroad for the standard consular processing.

Congress created the adjustment of status mechanism in 1952 in order to save certain aliens already within the United States from the expense and inconvenience of going abroad to obtain lawful permanent resident status.⁵⁸ Prior to 1952, all aliens intending to secure immigrant visas were required to obtain his/her lawful permanent resident visas abroad at a U.S. Embassy or Consulate.⁵⁹ Commentator Joe A. Tucker described the old system in the Yale Law and Policy Review as:

In effect, the alien was required to leave the country in order to return. This illogical requirement did not escape the notice of either the immigration bureaucracy or interested aliens. Not only did the practice cause monetary and emotional hardship for the alien and her family, but it generated unnecessary paper work and delay for the agencies involved.⁶⁰

Through adjustment of status, Congress aimed to “promote family unity; advance economic growth and a robust immigrant labor force; accommodate humanitarian resettlement; and ensure national security and public safety.”⁶¹ While the adjustment of status mechanism is for certain aliens within the United States, “adjustment in no way relaxes the substantive criteria for LPR

⁵⁷ *Id.*

⁵⁸ *Volume 7 – Adjustment of Status*. USCIS Policy Manual (Aug. 23, 2017), <https://www.uscis.gov/policymanual/Print/PolicyManual-Volume7-PartA.html#footnote-3>.

⁵⁹ *Id.*

⁶⁰ STEPHEN H. LEGOMSKY & CRISTINA M. RODRIGUEZ, *IMMIGRATION AND REFUGEE LAW AND POLICY*, 526 (6th ed. 2015) (quoting Joe A. Tucker, Comment, *Assimilation to the United States: A Study of the Adjustment of Status and the Immigration Marriage Fraud Statutes*, 7 *YALE L. & Policy Rev.* 20, 42-43 (1989).

⁶¹ *Volume 7 – Adjustment of Status*. USCIS Policy Manual (Aug. 23, 2017), <https://www.uscis.gov/policymanual/Print/PolicyManual-Volume7-PartA.html#footnote-3>.

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Temporary Protection, Admission and Lawful Permanent Residency: Taking Congress at its Word status.”⁶² There are other requirements that must be met even if the alien is for example, an immediate relative. One of the main requirements is that s/he must have been “inspected, admitted or paroled into the United States.”⁶³

C. Admission, Parole and Entry Without Inspection

Unless one is a VAWA Self-Petitioner, in order to be eligible for adjustment of status under Section 245 of the INA, an alien must have been “inspected and admitted or paroled into the United States.”⁶⁴ The INA defines “admission” and “admitted” as: “with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.”⁶⁵ Aliens who legally enter the United States through a port-of-entry usually encounter an officer from U.S. Customs and Border Protection (“CBP”), who would determine whether the applicant seeking admission is either: (a) a United States Citizen; or (b) a foreign national who is not subject to any of the inadmissibility grounds under Section 212 of the INA.⁶⁶

Even if the alien has not been inspected and admitted, adjustment of status may still be possible if the alien was “paroled” into the United States.⁶⁷ The INA allows for an alien to be temporarily paroled into the United States by the Attorney General under certain conditions, on a case-by-case basis for “urgent humanitarian reasons or significant public benefit.”⁶⁸ While the alien may be paroled into the United States, such parole shall not be considered as an admission;

⁶² STEPHEN H. LEGOMSKY & CRISTINA M. RODRIGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY, 526 (6th ed. 2015).

⁶³ INA § 245(a).

⁶⁴ INA § 245(a).

⁶⁵ INA § 101(a)(13)(A). *See also* STEPHEN H. LEGOMSKY & CRISTINA M. RODRIGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY, 539 (6th ed. 2015).

⁶⁶ *Id.* *See also Applying for Admission into the United States*. U.S. Customs and Border Protection, (Mar. 10, 2015), <https://www.cbp.gov/travel/international-visitors/applying-admission-united-states>.

⁶⁷ INA § 245(a).

⁶⁸ INA § 212(d)(5)(A).

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the alien must be returned to the place from which s/he were paroled and seek admission when the Attorney General deems it to be appropriate.⁶⁹

Other than inspection and admission or parole, it is possible for an alien to enter the United States illegally, without going through the proper procedure. The United States Code states that any alien who:

(1) enters or attempts to enter the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immigration officers, or (3) attempts to enter or obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact, shall...be fined...or imprisoned.⁷⁰

Aliens who enter the United States illegally are commonly referred to have “entered without inspection” or “EWI”.⁷¹

In reference to the examples described at the start of this paper, Jean who entered the United States on a tourist visa from Haiti, is considered inspected and admitted for the purposes of adjustment of status. Even though he overstayed the validity of his visa, his initial entry into the United States was legal at a designated port-of-entry. Jose who entered the United States from El Salvador on the other hand, entered the country without inspection. Without considering his TPS Status, Jose would be ineligible for adjustment of status because he was not initially inspected and admitted, or paroled into the United States. However with his TPS status, Jose may be able to file for adjustment of status (assuming he married a U.S. Citizen), depending on what state he lived in.

Part III. Circuits That Do Not Permit TPS Recipients Who Entered Without Inspection to Adjust His/Her Status

A. Eleventh Circuit

⁶⁹ INA § 212(d)(5)(A).

⁷⁰ 8 U.S.C § 1325 (2018).

⁷¹ *Adjudicator’s Field Manual: 43.1 – Consent to Reapply after Removal or Deportation*. U.S. Citizenship and Immigration Services, <https://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-19162/0-0-0-19167.html>.

While the Supreme Court has not weighed in on whether or not an alien who received TPS subsequent to his/her illegal entry into the United States would be eligible for adjustment of status, Circuit Courts have split on the issue. In *Serrano*, the United States Court of Appeals held that aliens who entered the United States illegally and subsequently obtained Temporary Protected Status could not be considered as “admitted” for the purposes of Adjustment of Status under Section 245(a) of the INA.⁷² In *Serrano*, the appellate, Jose Serrano was a native and citizen of El Salvador who entered the United States without inspection in 1996 (similar to Jose from our initial example).⁷³ After Serrano’s initial entry he registered for and received Temporary Protected Status from then United States Immigration and Naturalization Service (“INS”) (now United States Citizenship and Immigration Service “USCIS”) in 2001 and re-registered in 2006, 2008, and 2009.⁷⁴ In 2006, Serrano married his wife, a United States Citizen, who then filed an *I-130: Petition for Alien Relative* (“I-130”) on his behalf.⁷⁵ While USCIS approved the I-130 petition, USCIS denied his *I-485: Application to Register Permanent Residence or Adjust Status* (“I-485”) on the grounds that Serrano entered the United States without being inspected by an immigration officer and thus initially entered without admission or parole.⁷⁶

USCIS stated that being admitted or paroled after inspection by an immigration officer was required for Adjustment of Status under 8 U.S.C. § 1255(a) (INA § 245(a)).⁷⁷ Serrano challenged USCIS’s denial in the United States District Court in the Northern District of Georgia arguing that his Temporary Protected Status under 8 U.S.C. § 1254a (INA § 244) alters the requirements of admission under INA § 245 and that he was therefore eligible for adjustment of status.⁷⁸ The U.S.

⁷² *Serrano v. U.S. Attn’y Gen.*, 655 F.3d 1260 (11th Cir. 2011).

⁷³ *Id.* at 1263.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Serrano*, 655 F.3d at 1263.

⁷⁸ *Id.*

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District Court disagreed, stating that an alien receiving TPS does not change the requirements of admission for adjustment of status.⁷⁹ Serrano appealed to the Eleventh Circuit who reviewed the decision *de novo*.⁸⁰

On appeal, the Eleventh Circuit first outlined the statutory provisions related to adjustment of status and Temporary Protected Status. With regards to adjustment of status, the Court states that the Secretary of Homeland Security may adjust the status of an alien:

[W]ho was inspected and admitted or paroled into the United States . . . to that of an alien lawfully admitted for permanent residence if: (1) the alien makes an application for such adjustment; (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence; and (3) an immigrant visa is immediately available to him at the time his application is filed.⁸¹

After reviewing the relevant statute, the Court examined the provision with Title 8, Section 8 C.F.R. § 245.1(b)(3) of the Code of Federal Regulations (“C.F.R.”) which states that “[t]he following categories of aliens are ineligible to apply for adjustment of status . . . (3) Any alien who was not admitted or paroled following inspection by an immigration officer.”⁸² After reviewing provisions related to adjustment of status, the Court next outlined the rights associated with Temporary Protected Status, with the statute stating that “[d]uring a period in which an alien is granted temporary protected status under this section . . . (4) for purposes of adjustment of status under section 1255 of this title . . . , the alien shall be considered as being in, and maintaining, lawful status as a nonimmigrant.”⁸³

The Eleventh Circuit ultimately rejected the plaintiff’s argument that his TPS status alters

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 1264 *citing* INA § 245(a).

⁸² *Serrano*, 655 F.3d at 1264 *citing* 8 C.F.R. § 245.1(b)(3).

⁸³ *Id.* at 1265 *citing* 8 U.S.C § 1254a(f)(4) (2018).

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the requirements of being inspected and admitted for the purposes of adjustment of status.⁸⁴ The Eleventh Circuit provided two reasons behind its holding. First, the Eleventh Circuit stated that a plain reading of the adjustment of status statute shows that the mechanism is reserved for aliens who have been inspected and admitted or paroled.⁸⁵ While the Court acknowledged that a TPS recipient has “lawful status as a nonimmigrant” for the purposes of adjusting his/her status, the court held that this is still insufficient, as the adjustment of status statute requires that an alien was *initially* inspected and admitted, or paroled into the United States.⁸⁶ Second, the Eleventh Circuit stated that statutory language in the adjustment of status statute is not ambiguous, and that even if it were, Serrano’s claim would still fail.⁸⁷ The Court referred to *Genco* and held that Department of Homeland Security (“DHS”) and its predecessor, the INS, have similarly interpreted the interplay between the adjustment of status statute and the Temporary Protected Status Statute.⁸⁸ The Eleventh Circuit stated that DHS interpretations would receive the deference by the court under *Skidmore*, a Supreme Court decision that instructed courts to give significant weight to the decisions of administrative agencies.⁸⁹

Part IV. Circuits That Do Permit TPS Recipients Who Entered Without Inspection to Adjust His/Her Status

A. Sixth Circuit

While the Eleventh Circuit has held that aliens who entered the United States illegally cannot file for adjustment of status even if s/he receive TPS status subsequent to his/her entry, two

⁸⁴ *Serrano*, 655 F.3d at 1265

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Serrano*, 655 F.3d at 1265-66 *citing* *Genco*. Op. No. 91-27, 1991 WL 1185138 (INS Mar. 4, 1991) (“concluding that an alien who entered the United States without inspection is ineligible for adjustment of status under § 1255, even if granted Temporary Protected Status under § 1254a”).

⁸⁹ *Serrano*, 655 F.3d at 1266 *citing* *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

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sister circuits, the Sixth and Ninth Circuits, in more recent decisions, have disagreed and held that TPS recipients who initially entered the United States without inspection are allowed to file for adjustment of status. The Sixth Circuit rendered its decision, notably the first circuit court to split with the Eleventh Circuit, in *Flores v. U.S. Citizenship & Immigration Servs.*, in 2013. There, the appellant Mr. Suazo, a citizen of Honduras, initially entered the United States without inspection in 1998.⁹⁰ In 1999, Mr. Suazo received Temporary Protected Status that allowed him to work and sheltered him from removal.⁹¹ After marrying a United States Citizen in 2010, he filed for adjustment of status based off his marriage to his United States citizen wife.⁹² USCIS denied the adjustment of status application on that grounds that Mr. Suazo entered the United States without inspection during his initial 1998 entry.⁹³

Prior to addressing the appellant's argument (that the plain language of the TPS provision permits a recipient to file for adjustment of status), the Sixth Circuit first measured the weight the court must provide to administrative agencies.⁹⁴ Unlike the Ninth Circuit decision, which only considered simple deference to administrative agencies under *Skidmore*,⁹⁵ the Sixth Circuit stated that under the Administrative Procedures Act ("APA"), the court does have the authority to review administrative agency decisions, and that both the court and agency must give deference to Congressional intent when it is clear.⁹⁶ In this case, the court made it clear that both the appellant and appellee agree that adjustment of status statute has three requirements, and Mr. Suazo met two of the three requirements: (1) he made an application for adjustment of status; and (2) there is an

⁹⁰ *Flores v. United States Citizenship & Immigration Servs.*, 718 F.3d 548, 549-50 (6th Cir. 2013).

⁹¹ *Id.* at 550.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at 551.

⁹⁵ *Serrano*, 655 F.3d at 1266 citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

⁹⁶ *Flores*, 718 F.3d at 551 *citing* 5 U.S.C. § 706; *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

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immigrant visa available to him through his United States Citizen spouse.⁹⁷ The only requirement disputed was whether or not Mr. Suazo's TPS status made him admitted for the purposes of adjustment of status. The Court recognized the arguments of both parties. While the appellants argued that Mr. Suazo should be allowed to adjust his status because of his subsequent TPS status, USCIS argued that while TPS beneficiaries are entitled to protection during the time TPS designation is conferred upon them, s/he should not be able to adjust his/her status through an independent basis (such as marriage to a United States Citizen) if s/he were never initially inspected and admitted.⁹⁸

After considering the arguments made by the parties, the Sixth Circuit rejected USCIS's view and agreed with the appellant. The Sixth Circuit looked at the TPS provision which states that: "during a period in which an alien is granted temporary protected status[,] . . . for purposes of adjustment of status...the alien shall be considered as being in, and maintaining, lawful status as a nonimmigrant,"⁹⁹ and "interpret[ed] the statute exactly as written—as allowing Suazo to be considered as being in lawful status as a nonimmigrant for purposes of adjustment of status."¹⁰⁰ The Court pointed out that this decision does not mean that all TPS recipients can automatically adjust his/her status and become lawful permanent residents, but that those who have an independent visa available for them (like Mr. Suazo who is married to a United States Citizen), have good moral character and make his/her application for adjustment of status should meet the final requirement of being considered admitted, as the plain reading of TPS provision provides that recipients have lawful status for the purposes of adjustment of status.¹⁰¹ The court emphasized

⁹⁷ *Flores*, 718 F.3d at 551.

⁹⁸ *Id.* at 552.

⁹⁹ 8 U.S.C. § 1254a(f)(4) (2018).

¹⁰⁰ *Flores*, 718 F.3d at 553.

¹⁰¹ *Id.*

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that no deference is due to the administrative agencies of DHS since the court's holding is based on the plain language of the statute.¹⁰² The Sixth Circuit concluded its decision on important policy consideration and found that:

Mr. Suazo seems to be the *exact type of person that Congress would have in mind to allow adjustment of status from TPS beneficiary to LPR*. He has been in the United States for about fifteen years...His wife and minor child are here. They are both United States citizens. He is of good moral character and a contributing member of society. He has waited his turn for an independent, legal, and legitimate pathway to citizenship, through the immediate relative visa application. If the statutes are interpreted as the Government argues they should be the result would be absurd. *The Government is essentially telling him that he is protected and can stay here, but that he will never be allowed to become an LPR, even for an independent basis*. Under the Government's interpretation, Mr. Suazo would have to leave the United States, be readmitted, and then go through the immigration process all over again. This is *simply a waste of energy, time, government resources, and will have negative effects on his family—United States citizens. We are disturbed by the Government's incessant and injudicious opposition in cases like this, where the only purpose seems to be a general policy of opposition for the sake of opposition.*¹⁰³

B. Ninth Circuit

The Ninth Circuit is the most recent Circuit Court of Appeal to join the Sixth Circuit in holding that TPS provides an alien a pathway for adjustment of status (despite his/her initial illegal entry) if s/he later qualify for such an adjustment on an independent basis. While the Sixth Circuit was the first to split from the Eleventh Circuit's decision, the Ninth Circuit's decision in *Ramirez v. Brown* is more significant because the Ninth Circuit is home to a large population of aliens who have entered the United States illegally.¹⁰⁴ According to the Center for Immigration Studies, California, Nevada, and Arizona, all within the Ninth Circuit, are each on the "list of the top 10 states of residence of the unauthorized immigrant population in January 2000...[with] the three

¹⁰² *Id.* at 554.

¹⁰³ *Id.* at 555-56 (emphasis added).

¹⁰⁴ Andrew Arthur. *Ninth Circuit Significantly Extends TPS Eligibility for Adjustment of Status*. Center for Immigration Studies (Apr. 12, 2017), <https://cis.org/Arthur/Ninth-Circuit-Significantly-Extends-TPS-Eligibility-Adjustment-Status>.

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states...home to more than 35 percent of the total illegal alien population in January 2000.”¹⁰⁵

California tops the list with over 2.5 million aliens, and as the state with the most foreign-born residents from El Salvador, with over 35 percent of the total Salvadoran-born population.¹⁰⁶

In *Ramirez v. Brown*, the Ninth Circuit began its opinion by stating that the appeal was based on the interplay of the Temporary Protected Status statute with the adjustment of status statute.¹⁰⁷ The court summarized the facts by stating Jesus Ramirez, a native and citizen of El Salvador, entered the United States illegally in 1999. After getting Temporary Protected Status in 2001, Ramirez remained in that status ever since.¹⁰⁸ In 2012, he married his wife, Barbara Lopez, a U.S. Citizen, and filed for adjustment of status, which was denied by USCIS on the grounds that Ramirez was not inspected and admitted during his initial entry, thus making him “ineligible as a matter of law to adjust status in the United States”.¹⁰⁹ While USCIS agreed that Ramirez’s TPS status allowed him to be “considered as if he was in a lawful non-immigrant status,” USCIS argued that the lawful status did not override the adjustment of status statute’s “general requirement to be inspected and admitted, or paroled.”¹¹⁰

After stating the three requirements for adjustment of status,¹¹¹ the Ninth Circuit pointed out that the only issue in regards to Ramirez’s adjustment of status application was whether he was inspected and admitted or paroled into the United States.¹¹² As both parties agreed that Ramirez was never paroled in to the United States, the court narrowed its focus on the “inspected and admitted” prong of the requirement.¹¹³ The Court noted that the “inspected and admitted”

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Ramirez v. Brown*, 852 F.3d 954, 955 (9th Cir. 2017).

¹⁰⁸ *Id.* at 955-56.

¹⁰⁹ *Id.* at 956-57.

¹¹⁰ *Id.* at 956-57.

¹¹¹ *Ramirez*, 852 F.3d at 954 *citing* INA § 245(a). *See also supra* note 55.

¹¹² *Ramirez*, 852 F.3d at 958.

¹¹³ *Id.*

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requirement can also be further narrowed as the Government “downplays or fails to make a separate argument about inspection” as Ramirez “soundly argued that he has been ‘inspected’ because TPS applicants undergo a rigorous inspection process by an immigration officer.”¹¹⁴ Thus for the purposes of Ramirez the only question was if he was considered admitted for the purposes of adjustment of status.¹¹⁵

The Ninth Circuit proceeded to look at the TPS provision and found that the statute was not unambiguous, as it states that a “TPS recipient ‘shall be considered as being in and maintaining, lawful status as nonimmigrant’ for the purposes of adjustment of status.”¹¹⁶ The Ninth Circuit stated that it therefore owed no deference to the administrative decisions of the Department of Homeland Security, under *Chevron*, and that the administrative agency thus has no interpretive role and must follow the clear intent of Congress.¹¹⁷ The Court stated that the plain language of the TPS provision is clear as it explicitly refers to ‘adjustment of status,’ in the provision “the alien shall be considered as being in lawful status as a nonimmigrant for the purposes of adjustment of status under § 1255 [INA § 245(a)]”¹¹⁸ The court referred to the Sixth Circuit decision in *Flores* and stated that it also “interpret[s] the statute exactly as written—as allowing [a TPS recipient] to be considered as being in lawful status as a nonimmigrant for purposes of adjustment of status.”¹¹⁹ The Ninth Circuit also mentioned the Eleventh Circuit’s contrary position in *Serrano*, and stated that it considers the facts in both matters to be more or less the same but still declined to follow the Eleventh Circuit’s decision.¹²⁰

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* citing 8 U.S.C §1254a(f)(4) (2018).

¹¹⁷ *Ramirez*, 852 F.3d at 958.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* at 959-60.

The Ninth Circuit stated that “an alien who has obtained lawful status as a nonimmigrant has necessarily been admitted,” with the court noting that the application and approval process for obtaining TPS “share many of the main attributes of the usual ‘admission’ process for nonimmigrants,” including establishing identity and citizenship documents, and admissibility or inadmissibility grounds that may be waived in the Attorney General.”¹²¹ The Court added that the fact that the application is scrutinized through a rigorous process for compliance, which may even require an interview, and may ultimately either be approved or denied by USCIS show that the TPS application process is comparable to any other admission process, and thus a successful recipient of TPS has been admitted.¹²² The Court also rejected the government’s position that admission requires a process seen at a port-of-entry by stating that decisions of the Board of Immigration Appeals have acknowledge that aliens can be subsequently “admitted” even s/he were not initially admitted at a port-of-entry.¹²³ The Court stated that the plain language of the TPS provision shows a link to the adjustment of status statute demonstrating that “Congress contemplated that TPS recipients, via their treatment as lawful nonimmigrants, would be able to make sure of the [adjustment of status statute].”¹²⁴ The Ninth Circuit thus held that an Alien who subsequently receives TPS status is considered “admitted” for the purposes of adjustment of status.¹²⁵

Part V. The Supreme Court Should Allow TPS Recipients Who Initially Entered the United States Without Inspection to Adjust His/Her Status

¹²¹ *Id.* at 960.

¹²² *Ramirez*, 852 F.3d at 960.

¹²³ *Id.* at 961 *citing* *In re Alyazji*, 25 I. & N. Dec. 397, 399 (BIA 2011) (holding that aliens who entered the United States illegally but who later adjusted to lawful permanent residents qualify as “admitted”).

¹²⁴ *Ramirez*, 852 F.3d at 961.

¹²⁵ *Id.* at 964.

While there is a circuit split on the issue of whether or not aliens who receive TPS status subsequent to his/her illegal entry into the United States are considered “admitted” for the purposes of adjustment of status, the analyses of the Sixth Circuit and the Ninth Circuit, are the proper ones. A plain reading of the interplay between TPS provision and the Adjustment of Status statute demonstrates that adjustment is permitted. Permitting adjustment of status for an alien after his/her initial illegal entry is also not a novel or revolutionary idea as the mechanism is available for aliens who are recipients of other humanitarian visas, such as U Visas and T Visas. Finally denying the adjustment of status to TPS recipients who have an independent basis to adjust brings unnecessary hardship to them and his/her U.S. Citizen immediate relatives.

A. TPS provision is clear when it states that the recipient is a lawful nonimmigrant for Adjustment of Status.

The central question confronted by all of the Circuit Courts was the proper interpretation of the interplay between the temporary protected status statute and the adjustment of status statute. In each of the circuits, the principal argument of the Government has always been that TPS recipients have no legal basis to adjust his/her status within the United States if his/her initial entry into the United States was done without inspection.¹²⁶ The Government’s argument rests on Section 245(a) of the Immigration and Nationality Act, which states that that an alien who was inspected and admitted, or paroled may be able to adjust his/her status.¹²⁷ The Government’s argument is best articulated in *Flores*, where it argued that while TPS beneficiaries are entitled to protection during the time TPS designation is conferred upon them, s/he will not be able to adjust his/her status through an independent basis (such as marriage to a United States Citizen) if s/he

¹²⁶ See *Serrano*, 655 F.3d at 1263; *Flores*, 718 F.3d at 552; *Ramirez*, 852 F.3d at 956-57.

¹²⁷ INA § 245(a).

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were never initially inspected and admitted.¹²⁸ However, the Government’s argument had a shortcoming as it only relied on the language contained in the adjustment of status statute but not the TPS statute.

The Temporary Protected Status statute, Section 244(f)(4) of the Immigration and National Act explicitly states:

“During a period in which an alien is granted temporary protected status under this section...*for the purposes of adjustment of status* under section 245[9 U.S.C.A. §1255] and the change of status under section 248 [8 U.S.C.A. §1258], *the alien shall be considered as being in, and maintaining lawful status as a nonimmigrant.*”¹²⁹

The TPS provision explicitly mentions adjustment of status as well as the relevant sections in both the Immigration and National Act as well as the in the United States Code. The Ninth Circuit stated in *Ramirez* that the plain language of the TPS provision is clear as it explicitly refers to ‘adjustment of status,’ in the provision.¹³⁰ The Sixth and Ninth Circuits are correct to find that there is no ambiguity in Congress’s intent in the Temporary Protected Status statute, which provides a way for recipients to file for adjustment of status.¹³¹ The Ninth Circuit in *Ramirez*, acknowledges and agrees with its colleagues from the Sixth Circuit which stated “we interpret the statute exactly as written—as allowing [a TPS recipient] to be considered as being in lawful status as a nonimmigrant for purposes of adjustment of status.”¹³² The Sixth Circuit made it clear that its decision did not mean that all TPS recipients can automatically adjust his/her status and become lawful permanent residents, but that those who have an independent visa available for them (like Mr. Suazo who is married to a United States Citizen), have a good moral character and make his/her application for

¹²⁸ *Flores*, 718 F.3d at 552.

¹²⁹ INA § 244(f)(4) (emphasis added).

¹³⁰ *Ramirez*, 852 F.3d at 958.

¹³¹ *Flores*, 718 F.3d at 554; *Ramirez*, 852 F.3d at 958.

¹³² *Ramirez*, 852 F.3d at 958.

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adjustment of status should meet the final requirement of being considered admitted, as the plain reading of TPS provision provides that recipients have lawful status for the purposes of adjustment of status.¹³³ When the TPS statute refers to adjustment of status and explicitly states that a recipient is in lawful status for the purposes of adjustment of status, it is difficult to see that in any other way than written.

B. Other forms of relief allow adjustment regardless of illegal entry (U, T, Asylum)

Allowing an alien to file for adjustment of status after his/her illegal entry would not be unique, novel or revolutionary in United States immigration law as the recipients of other types of humanitarian non-immigrant visas are also able to file for adjustment of status, even if his/her initial entry into the United States was done without inspection.

i. U Nonimmigrant Status

A U visa is a nonimmigrant status that is given to those who have been victims of criminal activity.¹³⁴ Victims are able to obtain U nonimmigrant status if s/he can demonstrate substantial physical or mental harm resulting from a qualifying crime that occurred in the United States and if s/he are willing to help law enforcement.¹³⁵ In obtaining a U visa, applicants who may have issues with admissibility must fill out *Form I-192, Application for Advance Permission to Enter as a Non-Immigrant*, in which applicants are able to request a waiver for a variety of inadmissibility issues, including entering the United States without being inspected and admitted or paroled.¹³⁶ For the purposes of adjustment of status, the recipient of a U Visa will be considered as “lawfully

¹³³ *Flores*, 718 F.3d at 554.

¹³⁴ INA § 101(a)(15)(U). *See also Victims of Criminal Activity: U Nonimmigrant Status*. U.S. Citizenship and Immigration Services (Aug. 25, 2017), <https://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity-u-nonimmigrant-status/victims-criminal-activity-u-nonimmigrant-status>

¹³⁵ *Id.*

¹³⁶ *Id.* citing *USCIS Form I-192: Application for Advance Permission to Enter as a Nonimmigrant*. Department of Homeland Security: U.S. Citizenship and Immigration Services (Exp. June 30, 2018), <https://www.uscis.gov/sites/default/files/files/form/i-192.pdf>

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admitted to the United States.”¹³⁷ The adjustment of status provisions for U Visa recipients also state that the Secretary must be satisfied that the alien’s presence in the United States is justified on *humanitarian grounds, to ensure family unity, or is in the public interest.*¹³⁸

ii. T Nonimmigrant status

A T visa is a nonimmigrant status that is given to those who have been victims of human trafficking.¹³⁹ Victims are able to obtain T nonimmigrant status if s/he have been subjected to trafficking as a matter of law, if s/he would suffer extreme hardship involving unusual or severe harm if removed from the United States, complies with any reasonable request to assist law enforcement.¹⁴⁰ In obtaining a T visa, applicants who may have issues with admissibility must fill out *Form I-192, Application for Advance Permission to Enter as a Non-Immigrant*, in which applicants are able to request a waiver for a variety of inadmissibly issues, including entering the United States without being inspected and admitted or paroled.¹⁴¹ For the purposes of adjustment of status, the recipient of a T Visa will be considered as “lawfully admitted to the United States.”¹⁴²

iii. Asylum

Asylum is a form of relief for those within the United States who have faced or may face persecution on the grounds of his/her race, religion, nationality, membership in a particular social

¹³⁷ 8 C.F.R. § 245.24(a)(2)(i).

¹³⁸ 8 C.F.R. § 245.24(6).

¹³⁹ INA § 101(a)(15)(T). *See also Victims of Human Trafficking: T Nonimmigrant Status*. U.S. Citizenship and Immigration Services (Oct. 3, 2011), <https://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-human-trafficking-t-nonimmigrant-status>.

¹⁴⁰ *Id.*

¹⁴¹ *Id. citing USCIS Form I-192: Application for Advance Permission to Enter as a Nonimmigrant*. Department of Homeland Security: U.S. Citizenship and Immigration Services (Exp. June 30, 2018), <https://www.uscis.gov/sites/default/files/files/form/i-192.pdf>.

¹⁴² 8 C.F.R. §245.23(a)(2)(i).

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group, or political opinion.¹⁴³ After an alien is granted asylum, s/he is eligible to file for adjustment of status after one year.¹⁴⁴ An alien is also considered as “admitted” based on his/her asylee status.¹⁴⁵ If an alien has any inadmissibility issues, the alien may “have the grounds of inadmissibility waived by USCIS...for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest.”¹⁴⁶

iv. Relationship to TPS

Similar to TPS, U Nonimmigrant Status, T Nonimmigrant Status, and Asylum are all rooted with humanitarian or public policy purposes.¹⁴⁷ These other forms of relief also consider an alien to be admitted, allowing him/her to file for adjustment of status, after s/he receive the respected form of relief.¹⁴⁸ The Ninth Circuit in *Ramirez*, notes that that the application and approval process for obtaining TPS “share many of the main attributes of the usual ‘admission’ process for nonimmigrants,” including establishing identity and citizenship documents, and admissibility or inadmissibility grounds that may be waived in the Attorney General.”¹⁴⁹ The Court adds that the fact that the application is scrutinized through a rigorous process for compliance,

¹⁴³ INA § 208. *See also Asylum*. United States Citizenship and Immigration Services (Jan. 31, 2018), <https://www.uscis.gov/humanitarian/refugees-asylum/asylum>.

¹⁴⁴ 8 C.F.R. § 209.2(a)(1)(ii).

¹⁴⁵ 8 C.F.R. § 209.2.

¹⁴⁶ 8 C.F.R. § 209.2(b).

¹⁴⁷ *See* 135 CONG. REC. H7501 (daily ed. Oct. 25, 1989) (statement of Rep. Richardson), 135 Cong Rec H 7501, at *H7501 (LEXIS) (“Congressional records show that the major purposes behind creating TPS was to ensure that “nationals of countries undergoing civil war or extreme tragedy” are protected and that “immediate relief [is provided to] ... aliens whose lives would be in danger if they were forced to return home”);

8 C.F.R. § 245.24(6) (The Adjustment of Status provisions for U Visa recipients also state that the Secretary must be satisfied that the alien’s presence in the United States is justified on humanitarian grounds, to ensure family unity, or is in the public interest);

Victims of Human Trafficking: T Nonimmigrant Status. U.S. Citizenship and Immigration Services (Oct. 3, 2011), <https://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-human-trafficking-t-nonimmigrant-status> (T Visa recipients must comply with any reasonable request to assist law enforcement); 8 C.F.R. § 209.2(b) (the Secretary may waive grounds of an asylee’s inadmissibility for “humanitarian purposes, to assure family unity, or when it is otherwise in the public interest”).

¹⁴⁸ *See* 8 C.F.R. § 245.24(a)(2)(i) (U Visa recipient is considered admitted for the purposes of adjustment of status);

8 C.F.R. § 245.23(a)(2)(i) (T Visa recipient is considered admitted for the purposes of adjustment of status); 8

C.F.R. § 209.2 (Asylee is considered admitted for the purposes of adjustment of status).

¹⁴⁹ *Ramirez*, 852 F.3d at 960.

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which may even require an interview, and may ultimately either be approved or denied by USCIS show that the TPS application process is comparable to any other admission process, and thus a successful recipient of TPS has been admitted.¹⁵⁰ As those who receive U Nonimmigrant Status, T Nonimmigrant Status, and Asylum, respectively are all considered “admitted” after receiving that status, it is conceivable the TPS recipients, who have received his/her status on humanitarian considerations after his/her application has been vetted receive similar treatment.

C. Hardship Suffered by Recipients Should s/he be forced to leave the United States for consular processing abroad.

The alternative to adjustment of status is consular processing, where an alien who has an independent basis for an immigrant visa has to go to a United States Embassy or Consulate in order to receive his/her immigrant visa.¹⁵¹ Consular processing for TPS recipients who initially entered the United States without inspection is problematic for several reasons. First, upon his/her departure from the United States the alien will likely face a bar of either 3 years or 10 years, depending on the duration of his/her unlawful presence in the United States.¹⁵² The INA states that noncitizens who have been “unlawfully present in the United States for more than 180 days but less than one year (and then depart for before the initiation of removal proceedings) are inadmissible for three years. Those who have been unlawfully present for one year or more, and then depart, become inadmissible for ten years.”¹⁵³ Unlawful Presence is defined as if the alien “is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled.”¹⁵⁴ Depending on the

¹⁵⁰ *Id.*

¹⁵¹ INA §245. *See also Consular Processing*. United States Citizenship and Immigration Services (Jan. 11, 2018), <https://www.uscis.gov/greencard/consular-processing>.

¹⁵² INA §212(a)(9)(B).

¹⁵³ STEPHEN H. LEGOMSKY & CRISTINA M. RODRIGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 1140 (6th ed. 2015) *citing* INA § 212(a)(9)(B).

¹⁵⁴ INA § 212(a)(9)(B)(ii).

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alien's unauthorized stay in the United States before receiving TPS status, s/he would face the 3 year of 10 year bar for his/her unlawful presence before the grant of TPS once s/he depart the United States. In our example from above, if Jose and Jean were to leave the United States s/he would both face a 10 year bar from returning because his/her unlawful presence in the United States (prior to the grant of TPS) was in excess of one year.¹⁵⁵ While a discretionary waiver (the Provisional Unlawful Presence Waiver¹⁵⁶) is available for those "whose U.S. Citizens or LPR close family remembers would suffer "extreme hardship,"¹⁵⁷ this waiver would not have to be sought by those filing for adjustment of status as s/he would not have to leave the United States and trigger the bar, the bar applies only once the alien leaves the United States.¹⁵⁸

In addition to facing the bars, leaving the United States for consular processing would be expensive, as well as inconvenient to the alien and his/her family. The Sixth Circuit in *Flores* found that the government was essentially advocating that the appellant "leave the United States, be readmitted, and then go through the immigration process all over again. This is simply a waste of energy, time, government resources, and will have negative effects on his family—United States citizens."¹⁵⁹ The Ninth Circuit's discussion on the stringent process of initially granting TPS to an applicant¹⁶⁰ further demonstrates that forcing the applicant to leave the United States to re-do the process as inefficient and redundant. Finally the Ninth Circuit in *Ramirez* points out the irony in forcing the alien to return to his/her country for consular processing as that is the country that the

¹⁵⁵ Teo Armus. *Central Americans Fighting Trump Administration to Keep Legal Status*. NBC Washington (Aug. 11, 2017), <https://www.nbcwashington.com/news/politics/Honduras-Salvador-Temporary-Protected-Status-Fighting-Trump-Administration-439888683.html>.

¹⁵⁶ INA § 212(a)(9)(B)(v). *See also Provisional Unlawful Presence Waivers*. United States Citizenship and Immigration Services (Jan. 5, 2018), <https://www.uscis.gov/family/family-us-citizens/provisional-waiver/provisional-unlawful-presence-waivers>.

¹⁵⁷ INA § 212(a)(9)(B)(v); *See also* STEPHEN H. LEGOMSKY & CRISTINA M. RODRIGUEZ, *IMMIGRATION AND REFUGEE LAW AND POLICY* 1140 (6th ed. 2015).

¹⁵⁸ INA § 212(a)(9)(B)(ii).

¹⁵⁹ *Flores*, 718 F.3d at 555-56.

¹⁶⁰ *Ramirez*, 852 F.3d at 960.

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Attorney General has determined to be unsafe.¹⁶¹ This directly against the purpose behind the creation of TPS, going against the belief that “[i]t would be cruel and contrary to the fundamental principles of our Nation to push these immigrants from our shores under these conditions,”¹⁶²

Part VI. Conclusion

As the United States Government contemplates renewing or ending a country’s Temporary Protected Status designation, it leaves the status of over 300,000 people, many whom have been in the United States for multiple years and have families in the United States, in complete uncertainty. For those who have qualifying relationships that will enable them to get an immigrant visa on an independent basis, the question turns to what state s/he are a resident of to determine if s/he can qualify for adjustment of status. The United States Supreme Court should weigh in on whether or not an alien who receives TPS subsequent to his/her illegal entry into the United States will be able to file for adjustment of status. As the United States government has announced the termination of the TPS designation for various countries, the interplay between adjustment of status and temporary protected status are not going unnoticed.¹⁶³ On February 22, 2018 the American Immigration Council and the Northwest Immigrant Rights project filed a motion for class certification in the United States District Court for the Eastern District of New York (“E.D.N.Y.”) in order to challenge the Department of Homeland Security’s practice of denying TPS holders from filing for adjustment of status based on an independent basis such as family relations or employment, on the grounds that TPS holders meet the “inspected and admitted”

¹⁶¹ *Id.* at 964.

¹⁶² 135 CONG. REC. H7501 (daily ed. Oct. 25, 1989) (statement of Rep. Levine), 135 Cong Rec H 7501, at *H7501 (LEXIS).

¹⁶³ Kristin Macleod-Ball. *Lawsuit Asks Government to Stop Blocking Temporary Protected Status Holders from Applying for Green Cards*. American Immigration Council: Immigration Impact (Feb. 22, 2018), <http://immigrationimpact.com/2018/02/22/lawsuit-temporary-protected-status-green-cards/>.

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requirement for the purposes of adjustment of status .¹⁶⁴ The members of this particular class come from the First, Second, Third, Fourth, Fifth, Seventh, Eighth, and the Tenth Circuits, respectively.¹⁶⁵ With the recent termination of TPS designations for many other countries and the subsequent litigation it is likely that this issue will arise in front of other Circuit Courts, making the need of Supreme Court intervention even more important.

When the Supreme Court does hear a question on the interplay between the TPS provision and the adjustment of status, it should be clear that an alien who received TPS status should be considered admitted for the purposes of adjustment of status. This comment has analyzed the opinions of all of the Circuit Courts that have answered this question, the Eleventh, Sixth, and Ninth Circuit, respectively. A person who receives TPS status should be considered admitted for the purposes of adjustment of status. The TPS provision explicitly states that a TPS recipient is considered to be in lawful status for the purposes of adjustment of status, with the term and section of the adjustment of status provision explicitly stated. Permitting an alien to file for adjustment of status, after s/he receive humanitarian relief (despite his/her initial legally entry) is also not a novel or revolutionary idea in United States immigration law as this is permitted for U Nonimmigrant Status, T Nonimmigrant Status, and Asylum, reliefs which have similar public policy and humanitarian purposes. Forcing the alien to return his/her home country for consular processing is unnecessarily for the United States government as the stringiest requirements in granting an alien TPS status are similar to standard admission procedures. Finally, forcing an alien to return to his/her home country for consular processing, goes against Congressional Intent as the whole

¹⁶⁴ Complaint at 2, *Moreno v. Nielson* (E.D.N.Y. 2018), http://americanimmigrationcouncil.org/sites/default/files/litigation_documents/moreno_v_nielson_motion_for_class-certification.pdf.

¹⁶⁵ Daniel M. Kowalski. *Class Action Filed Against Feds Over Adjustment of Status Via TPS – Moreno v. Nielson*. LexisNexis Legal Newsroom: Immigration Law (Feb 22, 2018), <https://www.lexisnexis.com/legalnewsroom/immigration/b/immigration-law-blog/archive/2018/02/22/class-action-filed-against-feds-over-adjustment-of-status-via-tps-moreno-v-nielson.aspx?Redirected=true>.

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purpose of TPS was to ensure that the alien would not have to return to the designated country.

The Sixth Circuit in *Flores* best describes the government's opposition to this, despite the many compelling reasons described above, by stating that: [the Court] is "disturbed by the Government's incessant and injudicious opposition in cases like this, where the only purpose seems to be a general policy of opposition for the sake of opposition."¹⁶⁶

¹⁶⁶ *Flores*, 718 F.3d at 555-56.