PRACTICE ADVISORY[1]
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ADJUSTMENT ELIGIBILITY OF TPS HOLDERS AFTER RETURN WITH ADVANCE PAROLE, EVEN WHEN INITIAL ENTRY WITHOUT INSPECTION

For years, U.S. Citizenship and Immigration Services (USCIS) and its predecessor, the Immigration and Naturalization Service (INS), have found that TPS holders who travel on advance parole satisfy the "inspected and … paroled" requirement of INA § 245(a) and are able to adjust their status to that of lawful permanent resident if they satisfy all other statutory requirements and are found to warrant a favorable exercise of USCIS discretion. This is true even for those whose initial entry into the United States was without inspection, as USCIS considers the individual's more recent parole entry rather than the original entry when determining if the applicant meets § 245(a).

Recently, AILA's USCIS HQ/Benefits Committee and the American Immigration Council (Council) have learned that some—though not all—USCIS offices are denying adjustment applications of this group of TPS holders. In doing so, USCIS cites §§ 304(c)(1)(A)(ii) and 304(c)(2)(b) of the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 (MTINA), Pub. L. No. 102-232, 105 Stat 1733, 1749 (Dec. 12, 1991), which amended the Immigration Act of 1990. Reportedly, some trial attorneys also are making this argument in removal proceedings where the individual seeks to adjust before an immigration judge.

This Practice Advisory is intended to provide practitioners with arguments as to why USCIS' and ICE trial attorneys' interpretation of the relevance of MTINA is wrong. These arguments can be used during an adjustment interview, or in response to a USCIS Notice of Intent to Deny (NOID), a Motion to Reconsider a denial, or a brief to an immigration judge or the Board of Immigration Appeals (BIA). These arguments also may be used in a federal court challenge to a denial of an adjustment application.

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1) Background: Advance Parole, Adjustment and TPS

A foreign national who is paroled into the United States with an Advance Parole Travel Document satisfies the threshold eligibility requirement of INA § 245(a), which provides:

> The status of a[] [noncitizen] who was inspected and admitted or paroled into the United States … may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of a[] [noncitizen] lawfully admitted for permanent residence if
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> (1) [he or she] makes an application for such adjustment,
> (2) [he or she] 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 [or her] at the time his [or her] application is filed.

In a 1991 General Counsel Opinion, INS made clear that a TPS holder who initially entered without inspection nevertheless would be found to satisfy INA § 245(a) if, after being granted TPS, he or she departed the United States and was permitted to return with an Advance Parole Travel Document issued pursuant to INA § 244(f)(3). Legal Opinion from Paul W. Virtue, Acting General Counsel, INS to Jim Puleo, Assoc. Comm'r, Examinations, INS, *Temporary Protected Status and Eligibility for Adjustment of Status under Section 245*, INS Gen. Counsel Op. No. 91-27, 1991 WL 1185138, at *2 (Mar. 4, 1991).

The General Counsel Opinion further explains that, if the TPS holder was an "immediate relative" or a "special immigrant," he or she would not be barred from adjusting status under INA § 245(c)(2). *Id*. INA § 245(c)(2) bars adjustment for any applicant who has been in unlawful status or worked without authorization at any time after entry. Immediate relatives, currently defined at INA § 201(b), and special immigrants, currently defined at INA §§ 101(a)(27)(H), (I), (J) and (K), specifically are exempted from this bar. INA § 245(c)(2). The bar also does not apply to employment-based adjustment applicants who qualify for a waiver under INA § 245(k). *Id.* Because all TPS holders who enter without inspection have some period of unlawful presence between their unlawful entry and their grant of TPS, only those exempted from the § 245(c)(2) bar will be able to adjust following a subsequent entry on parole.

This General Counsel Opinion has not been rescinded. Moreover, USCIS has explicitly adopted this position in its online Policy Manual, which states:

> If a[] [noncitizen] under TPS departs the United States and is admitted or paroled upon return to a port of entry, the [noncitizen] meets the inspected and admitted or inspected and paroled requirement [of INA § 245(a)] provided the inspection and parole occurred before he or she filed an adjustment application.

USCIS Policy Manual, vol. 7, pt. B, ch. 2, § A.5, available at https://www.uscis.gov/policy-manual/volume-7-part-b-chapter-2.

Moreover, *Matter of Arrabally and Yerrabelly*, 25 I&N Dec. 771 (BIA 2012), further supports the conclusion that TPS holders who travel and return with an Advance Parole Travel Document issued pursuant to INA § 244(f)(3) are "paroled" into the U.S. in accord with § 245(a). The decision also explains that these individuals do not trigger the unlawful presence grounds of inadmissability.

Many practitioners have successfully represented clients with this fact situation before both USCIS and the immigration courts without any issue.

2) USCIS' Reliance on MTINA to Deny Adjustment to Paroled TPS Applicants

In recent months, some local USCIS offices no longer are approving these cases but rather, are issuing NOIDs and ultimately denying the cases. It is unclear how widespread this practice is or if these decisions are the result of a directive from USCIS headquarters or simply based upon local office initiatives. The decisions cite § 304(c) of MTINA, which provides in relevant part:

> (1) In the case of a[] [noncitizen] described in paragraph (2) [covering, inter alia, TPS beneficiaries] whom the Attorney General authorizes to travel abroad temporarily and who returns to the United States in accordance with such authorization-
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> (A) the [noncitizen] shall be *inspected and admitted* in the same immigration status [he or she] had at the time of departure if-
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> (ii) in the case of a[] [noncitizen] described in paragraph [(c)](2)(B) [TPS beneficiaries], [he or she] is found not to be excludable on a ground of exclusion referred to in section 244A(c)(2)(A)(iii) of the Immigration and Nationality Act ....

MTINA § 304(c), Pub. L. No. 102-232, 105 Stat. at 1749 (emphasis added).[2]

These NOIDS and denials state that, per MTINA, a foreign national who originally entered without inspection, subsequently received TPS and then traveled abroad pursuant to a grant of Advance Parole, will be found to return to the United States in the same immigration status he or she had at the time of departure. MTINA § 304(c)(1)(A)(ii), (2)(B). USCIS contends that the "immigration status" that the foreign national returns to is that of someone who entered without inspection. For a TPS holder outside of the jurisdictions of the Sixth and Ninth Circuit Courts of Appeals, this would place the applicant back in TPS status, but once again without being "inspected and admitted or paroled" as required for adjustment under INA § 245(a).[3] Under

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[2] *See* INA § 244(c)(2)(A) (providing that certain grounds of inadmissibility are waived for TPS applicants while others may be waived at the discretion of the government).

[3] USCIS' erroneous interpretation of MTINA should not affect TPS-based adjustment of status applicants within the jurisdictions of the Sixth and Ninth Circuits as these courts have held that the grant of TPS is, itself, considered—or deemed—to be an inspection and admission for purposes of § 245(a) pursuant to the TPS statute, INA § 244(f)(4). Thus, all TPS holders within

USCIS' faulty reasoning, the TPS holder's subsequent return with advance parole does not override his or her initial entry without inspection.

3) Arguments Why TPS Holder Remains Eligible to Adjust Under INA § 245(a) Upon Return with an Advance Parole Document

There are several solid arguments that USCIS is misreading MTINA, which instead should be interpreted to render the TPS holder eligible for adjustment. One argument is for treating the TPS holder's return on advance parole as parole, while the other is for treating it as an admission. Consequently, the arguments should be made in the alternative. Both of these arguments must be made in conjunction with a third argument relating to USCIS' erroneous treatment of the TPS holder's status upon return to the United States. Each of these is discussed below.

a. **Under USCIS policy and practice, the TPS holder's return on advance parole can be found to be a parole.** USCIS must find that the applicant satisfies § 245(a)'s "inspected and admitted or paroled" requirement as a matter of agency policy. As discussed above, USCIS' policy memo specifies that a TPS holder who travels on advance parole satisfies the statutory "inspected and admitted or paroled" requirement.[4] In fact, the policy permits adjudicators to find that the individual's return is either a parole or an admission. The Policy Manual further mandates that all adjudicators follow the policy: "The USCIS Policy Manual contains the official policies of USCIS and must be followed by all USCIS officers in the performance of their duties." *See About the Policy Manual*, available at https://www.uscis.gov/policy-manual.

Practitioners can argue that USCIS should treat the return as a parole. In support, they can point to USCIS' and Customs and Border Protection's (CBP) long-standing practice of doing just that. For example, TPS holders must apply for advance permission to depart the United States on a form that explicitly states that its purpose is to obtain advance parole in order to be "paroled" into the United States upon their return. Similarly, for those with paper versions of Form I-94, the Arrival-Departure Record, CBP often stamps the word parole with a citation to INA § 212(d)(5) (the parole statute), upon the individual's return. Finally, the class of admission to which these individuals are assigned is "parole."

b. **MTINA dictates that the TPS holder be "inspected and admitted" upon return from authorized travel abroad.** In the USCIS Policy Manual, USCIS cites § 304(c) of MTINA as giving DHS the option of considering the TPS holder's return as either a parole or an admission. USCIS Policy Manual, vol. 7, pt. B, ch. 2, § A.5 and n.59. In fact, however, MTINA mandates that a TPS holder is to be "inspected and admitted" upon return from authorized travel abroad. MTINA § 304(c)(1)(A), Pub. L. No. 102-232, 105 Stat. at 1749. In accord with this plain language, USCIS does not have discretion to do anything but this. Those USCIS offices which are relying on MTINA to deny these applications misstate the clear language of the statute by

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these circuits satisfy § 245(a), including those who initially entered without inspection, irrespective of whether they travel and return on advance parole. *See Ramirez v. Brown*, 852 F.3d 954 (9th Cir. 2017); *Flores v. U.S. Citizenship & Immigration Servs.*, 718 F.3d 548 (6th Cir. 2013)); *see also* the Council's Practice Advisory, *Court Decisions Ensure TPS Holders in the Sixth and Ninth Circuits May Become Permanent Residents*,

[4] USCIS Policy Manual, vol. 7, pt. B, chg. 2, § A.5, *supra*.

failing to accord meaning to this mandatory language. Notably, the phrase "inspected and admitted" is the very language of the adjustment of status statute. Congress' use of the same phrase in these related statutes should be found to be deliberate and to indicate its intent that the TPS holder would thus satisfy § 245(a). *Accord Cohen v. de la Cruz*, 523 U.S. 213, 220 (1998) (citing the "presumption that equivalent words have equivalent meaning when repeated in the same statute."); *Sullivan* v. *Stroop*, 496 U.S. 478, 484 (1990) (reading the same term used in different parts of the same act to have the same meaning). Pursuant to MTINA, USCIS should find that the TPS holder was inspected and admitted upon return.[5]

For immediate relatives, it will not matter whether the return is treated as a parole or an admission. This is not true for certain employment-based adjustment applicants, however. INA § 245(k) exempts certain employment-based adjustment applicants from the bar to adjustment for unlawful presence in INA § 245(c)(2), provided they satisfy the requirements of § 245(k)—that is, that at the time of filing the adjustment application, they are present pursuant to a lawful admission; subsequent to such admission, they have not failed to maintain lawful status or engaged in unauthorized employment for more than an aggregate of 180 days; and they have not otherwise violated the terms of admission. If a TPS holder's return following travel on advance parole is considered an admission—as the plain language of MTINA indicates—this admission arguably will satisfy the "lawful admission" requirement of INA § 245(k). If so, and provided the individual has maintained TPS without interruption, he or she likely would be eligible for a § 245(k) waiver and thus not barred from adjustment under § 245(c)(2). USCIS rejects this argument, but it may be tested in federal district courts.

c. A TPS holder's immigration status upon return from authorized travel is TPS and not that of a person who entered without inspection. MTINA states that the TPS holder shall be inspected and admitted in the same immigration status he or she had *at the time of departure*. USCIS ignores the key phrase "at the time of departure" by claiming that the status to which the TPS holder returns is an unlawful one due to his or her earlier entry without inspection. Contrary to this, the only status these individuals held at the time of departure—that is, when they left the United States with the Advance Parole approval—is TPS. TPS is a lawful, though temporary, status. *See, e.g., Matter of Sosa Ventura*, 25 I&N Dec. 391, 395 (BIA 2010) (finding that TPS renders a noncitizen's presence "lawful" and citing cases). A person cannot be

[5] Pursuant to the reasoning of *Matter of Arrabally and Yerrabelly*, *supra*, the TPS holder should not be inadmissible under INA § 212(a)(9)(B)(i)(II) even if his or her return is considered an admission rather than parole. In that case, the BIA held that the word "departure," as used in § 212(a)(9)(B)(i)(II), did not encompass a departure pursuant to a grant of advance parole. 25 I&N Dec. at 775-79. The BIA read the term "departure" in the context of advance parole and concluded that Congress did not intend to apply this ground of inadmissibility to a person who had requested advance authorization to depart the United States in order to preserve his eligibility for adjustment of status, whose request for advance authorization to travel was approved, and who was expected to return to the United States. *Id.* at 778. This reasoning is equally applicable to the term "departure" as used in INA § 244(f)(3): Congress specifically granted TPS holders the right to travel with the "prior consent" of USCIS, *see id.*; USCIS provides this prior consent through advance parole; a TPS holder seeks prior consent to travel in order to preserve his or her TPS status; and, pursuant to the grant of USCIS consent—that is, advance parole—the TPS holder is expected to return to the United States.

simultaneously in a lawful TPS status and an unlawful status. The fact that a TPS holder may be in an unlawful status upon termination of TPS does not render his or her status while in TPS unlawful. Per MTINA's plain statutory language, the determinative status is that which the person held at the time of departure, i.e., TPS.

Furthermore, being present without inspection is not an immigration status. As one court has explained, there are no recognized types of unlawful status—a person is either in lawful status (of which there are multiple types) or unlawful status (of which there are no subsidiary types). *Gomez v. Lynch*, 831 F.3d 652, 658 (5th Cir. 2016) ("[T]here are no fine-grained distinctions between and among various forms of unlawful status, so there is no status of 'present without admission' to which Gomez could return."); *see also id*. at 659 n.11 (explaining that grounds of inadmissibility—such as present without admission—are not the same as an immigration status).

4) When a TPS Holder Who has Returned on Advance Parole is in Removal Proceedings

Removal proceedings add an additional level of complexity to this scenario because of uncertainty around whether USCIS or the Executive Office of Immigration Review (EOIR) has jurisdiction to adjudicate the adjustment of status application. Practitioners report that, generally, USCIS takes the position that the immigration court has jurisdiction. In at least one unreported case, the BIA also took this position.[6]

Specifically, the BIA held that, under MTINA, the foreign national was "inspected and admitted" upon his re-entry pursuant to a grant of advance parole and therefore jurisdiction over the adjustment application would remain with the immigration judge. The regulations governing jurisdiction over adjustment applications state that the immigration judge has jurisdiction over all such applications, with a general exception only for "arriving aliens," over whose adjustment applications USCIS has jurisdiction. 8 C.F.R. § 1245.2(a)(1). *See also* 8 C.F.R. § 245.2(a)(1). A person paroled into the United States is generally an "arriving alien," as this classification of individuals is defined, inter alia, as those who seek admission at a port of entry. *See* 8 C.F.R. §§ 1.2, 1001.1(q).[7] The BIA reasoned that, because the returning TPS holder is "inspected and admitted" under MTINA, he or she is not an "arriving alien" and USCIS would not have jurisdiction.

The counter argument to this is that the TPS holder returning pursuant to a grant of advance parole is paroled into the United States and thus the TPS holder is an "arriving alien," in which

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[6] While this case involved a TPS holder who departed on advance parole while under a final order of removal, the BIA's reasoning is equally applicable to someone who is currently in removal proceedings. The Council and AILA will be issuing another practice advisory in early 2020 addressing adjustment issues related to TPS holders who initially entered without inspection, are now under a final order of removal and have traveled on advance parole.

[7] *See also Brito v. Mukasey*, 521 F.3d 160, 164 n.5 (2d Cir. 2008) (noting that the exemption from the "arriving alien" designation in 8 C.F.R. § 1.1(q) for advance parole entrants is limited to the expedited removal context); *In re Oseiwusu*, 22 I&N Dec. 19 (BIA 1998) (holding that a noncitizen who enters the United States under a grant of advance parole is an "arriving alien").

case jurisdiction over the adjustment application would vest solely with USCIS. For the arguments as to why the entry should be considered a parole, see section 3a, above.

As a result, the distinction between whether the foreign national is considered to have been "admitted" or "paroled" following a return pursuant to a grant of advance parole will impact which entity has jurisdiction to adjudicate the adjustment application. There is no formal USCIS guidance or precedential BIA decision resolving this issue; similarly, no court has yet addressed it. Consequently, practitioners can argue to both USCIS and the immigration judge that the TPS holder's return should be treated as a parole pursuant to USCIS' Policy Manual and thus jurisdiction would vest with USCIS; it is likely, however, that the trial attorney will oppose this argument.

5) Conclusion

USCIS' and ICE trial attorneys' use of MTINA as a basis to deny adjustment applications of TPS holders who traveled and re-entered the United States pursuant to Advance Parole is legally flawed. Practitioners are encouraged to use the arguments in this Practice Advisory to oppose this interpretation. Notably, not all USCIS office are adopting this interpretation, some based on the arguments contained herein. If you have a case that has been denied on this basis, please contact the American Immigration Council at clearinghouse@immcouncil.org.