Court Decisions Ensure TPS Holders in Sixth and Ninth Circuits May Become Permanent Residents

Practice Advisory[1]
September 16, 2017

Introduction

In *Ramirez v. Brown*, 852 F.3d 954 (9th Cir. 2017), the Ninth Circuit held that a grant of Temporary Protected Status (TPS) constitutes an "admission" for purposes of adjustment of status under section 245(a) of the Immigration and Nationality Act (INA). In so holding, the Ninth Circuit joined the Sixth Circuit, *see Flores v. USCIS*, 718 F.3d 548 (6th Cir. 2013). Pursuant to these decisions, an individual in TPS status who initially entered without inspection (EWI) satisfies the "inspected and admitted or paroled" statutory requirement. INA § 245(a).

A large number of TPS recipients—though far from all—are able to adjust to lawful permanent residence under *Ramirez* and *Flores*. To benefit from these decisions, the individual must:

- Have entered the United States without inspection prior to receipt of TPS;
- Currently be in valid TPS status;
- Be otherwise eligible for adjustment. This means that:
  - a visa must be immediately available for the person;
  - he or she is not inadmissible; and
  - none of the statutory or regulatory bars to adjustment apply; and
- Live within a state within the jurisdiction of the Sixth or Ninth Circuits.

In practical terms, TPS recipients most clearly able to benefit from *Ramirez* and *Flores* are those: (1) currently in TPS status; (2) who are "immediate relatives" of U.S. citizens, i.e. children and spouses of U.S. citizens and the parents of U.S. citizens who are 21 or older, INA § 201(b)(2)(A)(1); and (3) who would be eligible to adjust to lawful permanent resident status but for having entered without inspection. Each of these factors is discussed below.

Additionally, this advisory addresses the general categories of family- and employment-based adjustment applicants who benefit from these two decisions and options that may be available to TPS recipients who do not live within these two circuits.

What did the *Ramirez* and *Flores* courts decide?

Both courts held, as a matter of statutory interpretation, that Congress intended TPS recipients to be considered "admitted" for purposes of INA § 245(a). Specifically, the courts relied on INA § 244(f)(4), which reads:

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[1] This Practice Advisory is intended for lawyers and is not a substitute for independent legal advice supplied by a lawyer familiar with a client's case. Mary Kenney authored this practice advisory.

(f) Benefits and Status During Period of Temporary Protected Status.—During a period in which an alien is granted temporary protected status under this section—

(4) for purposes of adjustment of status under section 245 and change of status under section 248, the alien shall be considered as being in, and maintaining, lawful status as a nonimmigrant.

The courts read the phrase "for purposes of adjustment of status under section 245" in accord with its plain meaning as applying to *all* of § 245, including § 245(a). *Ramirez*, 852 F.3d at 962; *Flores*, 718 F.2d at 553. Section 245(a) requires, inter alia, that an adjustment applicant be "inspected and admitted or paroled" into the United States. Those who enter without inspection—such as the plaintiffs in both *Ramirez* and *Flores*—therefore generally are ineligible for adjustment under INA § 245(a).[2] Pursuant to *Ramirez* and *Flores*, however, a grant of TPS status subsequent to the unlawful entry constitutes an inspection and admission, thus satisfying this § 245(a) requirement. *Ramirez*, 852 F.3d at 959-61 (interpreting § 244(f)(4) in accord with related statutory provisions, including the statutory definition of "admission" at INA § 101(a)(13)); *Flores*, 718 F.2d at 553-54 (same).

As discussed below, however, the TPS recipient must satisfy—independent of the TPS statute—all other eligibility requirements for adjustment and cannot be barred from adjusting under INA § 245(c). The TPS statute, as interpreted in *Ramirez* and *Flores*, does not render a recipient eligible to adjust but rather provides only that the individual meets the one threshold requirement for adjustment.

Have any other courts ruled on this issue?

In *Serrano v. United States Attorney General*, 655 F.3d 1260 (11th Cir. 2011), the Eleventh Circuit held that a grant of TPS was *not* an admission for purposes of adjustment under § 245(a). Thus, TPS recipients living within the states of the Eleventh Circuit are barred from adjusting if they entered without inspection, unless they can satisfy the requirements of INA § 245(i).

In contrast, two district courts followed *Flores*. *Medina v. Beers*, 65 F.Supp. 3d 419 (E.D. Pa. 2014); *Bonilla v. Johnson*, 149 F.Supp.3d 1135 (D. Minn. 2016). DHS failed to pursue appeals in these cases.

Do the decisions in *Ramirez* and *Flores* only apply to individuals whose most recent entry was without inspection?

Yes. The two courts addressed only the question of whether a grant of TPS constituted an admission for purposes of adjustment of status under INA § 245, thus satisfying the "inspected and admitted or paroled" requirement of INA 245(a). An individual who, prior to receipt of TPS, already had been admitted—for instance, on a nonimmigrant visa—or a paroled into the United States would have no need to rely on the grant of TPS to satisfy this § 245(a) requirement.

Must a person be in TPS status in order to benefit from these decisions?

Yes. The plaintiffs in both cases were in valid TPS status throughout the entire period in which USCIS and the federal courts were considering their adjustment applications. Thus, the courts had no reason to address—much less decide—whether someone who entered without inspection

[2] INA § 245(i) provides a limited exception to the admission or parole requirement.

and subsequently gained TPS status, but whose TPS status then expired or was terminated, would continue to satisfy the "inspected and admitted" requirement for adjustment.

While there may be an argument that a prior grant of TPS continues to constitute an admission for adjustment purposes even after it has expired or been terminated, there is a counterargument based on the statute on which DHS likely would rely.[3] Even within the Sixth and Ninth Circuits, it is likely that the issue would have to be litigated. Moreover, filing an adjustment application on behalf of a client who no longer has TPS and is not in removal proceedings is risky, as it might bring your client to the attention of DHS and trigger removal proceedings.

Given the possibility that DHS will terminate or fail to extend the TPS designation for one or more countries currently designated,[4] adjustment-eligible individuals currently in TPS status should not delay filing their adjustment applications. An individual who is in TPS status at the time of filing his or her adjustment application and then loses TPS status while the adjustment application is pending would have a stronger argument that he or she satisfies the § 245(a) "admission" requirement then one who loses TPS status prior to filing for adjustment. Because this remains an unresolved issue, however, the safest course would be for the TPS recipient to make every effort to have the application for adjustment adjudicated before his or her TPS status expires.[5]

Is a TPS recipient who entered without inspection and is living in a state within the jurisdiction of the Ninth or Sixth Circuits automatically eligible for adjustment?

No. Even under *Ramirez* and *Flores*, an applicant must be otherwise eligible for adjustment. Applicants for adjustment must satisfy three eligibility requirements under INA § 245(a): he or she must

- have been inspected and admitted or paroled into the United States;
- be eligible to receive a visa and not inadmissible to the United States; and
- have a visa is immediately available.

Additionally, an adjustment applicant cannot adjust if barred under any ground listed in INA § 245(c). Relevant here, an applicant is barred if he or she:

- worked without authorization prior to applying for adjustment;
- is in unlawful immigrant status on the date the adjustment application is filed; or
- failed to maintain a lawful status since entry into the United States.

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[3] *See, e.g., Medina v. Beers*, 65 F.Supp. 3d 419, 431 (E.D. Pa. 2014) (noting that a TPS recipient's "failure to maintain [TPS] status—by failing to re-register for TPS or by otherwise making him or herself ineligible for TPS—would be grounds for denying an adjustment to lawful permanent resident status."); *see also* "Possible Limits to 'TPS as an Admission,'" Brad Jenkins, Catholic Legal Immigration Network, Inc.

[4] *See, e.g.*, *What Does the Future Hold for Haitians with TPS? The Trump Administration May Terminate It* (April 24, 2017).

[5] *See infra*, discussion regarding steps to take to encourage agency action on an adjustment application.

INA § 245(c)(2).[6] Immediate relatives are exempted from the unlawful status and employment bars. *Id*.[7] A modified rule is applied to certain employment-based adjustment applicants. INA § 245(k).

- **Family-based cases:** The plaintiffs in *Ramirez* and *Flores* both were married to U.S. citizens and thus were adjusting status on the basis of approved immediate relative visa petitions. As such, the bars to adjustment based on failure to maintain lawful status and unauthorized work were not applicable. Similarly, other TPS recipients who are immediate relatives will most clearly be able to benefit from these decisions. In addition to not facing a bar to adjustment, TPS recipients applying to adjust based upon an approved immediate relative visa petition will always have a visa available to them. *See* INA § 245(a)(3). Because there are no numerical restrictions on visas in the immediate relative category, *see* INA § 201(b)(2)(A), a visa is always "immediately available." Thus, unless such a TPS recipient is inadmissible, he or she would be "otherwise eligible" to adjust and able to benefit from *Ramirez* or *Flores*.

  For TPS recipients who are not immediate relatives or otherwise exempt from the § 245(c)(2) bar, their unlawful status at entry raises an issue that neither *Ramirez* nor *Flores* resolved. USCIS takes the position that the § (c)(2) bar—which applies to unlawful status since "entry"—applies to any entry, not simply the most recent entry.[8] As such, USCIS likely would find that TPS recipients in the Sixth and Ninth Circuit who were not immediate relatives were barred due to their unauthorized status at the time they entered without inspection.[9]

  One court has addressed this issue directly by holding, shortly after *Ramirez* was decided, that the grant of TPS constitutes the relevant "entry" for purposes of the § (c)(2) bar. *Figueroa v. Rodriguez*, No. CV-16-8218- PA, 2017 U.S. Dist. LEXIS 128120 (C.D. Cal. Aug. 10, 2017); *see also Medina*, 65 F. Supp. 3d at 433 n.8 ("Defendants contend that … § 1254a(f)(4) does not provide complete relief from ineligibility for adjustment because,

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[6] *See also* INA § 245(c)(8) (barring adjustment eligibility to any applicant who was employed while in unauthorized status). Although § 245(c)(8) does not exempt immediate relatives, USCIS interprets the § 245(c)(2) exemption for immediate relatives as also applying to this bar. USCIS Policy Manual, Vol. 7, Part B, Chap. 2, n.97, at https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume7-PartB-Chapter2.html#footnotelink-97.

[7] Immediate relatives are the children and spouses of U.S. citizens and the parents of U.S. citizens who are 21 or older. INA § 201(b)(2)(A)(1).

[8] USCIS Policy Manual, Vol. 7, Part B, Chap. 4, § A, at https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume7-PartB-Chapter4.html.

[9] USCIS does not apply the bar to any period of unlawful status that exits while the adjustment application is pending. USCIS Policy Manual, Vol. 7, Part B, Chap. 4, § G, at https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume7-PartB-Chapter4.html. Thus, a TPS recipient who is not barred due to unlawful status at the time that she applies for adjustment will remain eligible even if she loses TPS status while the adjustment application is pending. Note that a person will be barred, however, if she works without authorization while the application is pending. *Id*.

to avoid § 1255(c)(2), a foreign national must 'maintain continuously a lawful status since entry into the United States.' 8 U.S.C. § 1255(c)(2). The Court disagrees. By stating that a TPS beneficiary shall be deemed as 'being in and maintaining' lawful nonimmigrant status, Congress deems the date of entry to be the date of the grant of TPS.")

- **Employment-based cases:** A limited number of TPS recipients who entered without inspection may be eligible to adjust status pursuant to an employment-based visa category. Pursuant to INA § 245(k), individuals eligible for a visa under the 1st through 4th employment preference categories are not subject to the § 245(c) bar to adjustment for unlawful status or unauthorized employment. Instead, these individuals are eligible to adjust if they:

    - are present in the United States pursuant to a lawful admission on the date of applying for adjustment; and
    - subsequent to such admission, have not—for an aggregate period of more than 180 days—failed to maintain lawful status, engaged in unauthorized employment, or otherwise violated a condition of admission.

  INA § 245(k). *Ramirez* and *Flores* both held that a grant of TPS was an admission for purposes of INA § 245. Consistent with this, the grant of TPS arguably must be considered a "lawful admission," as required in § 245(k).[10] As such, an individual who entered without inspection but was in valid TPS status on the date of applying for adjustment would not be barred under this provision.

  However, just as with those seeking to adjust based on a family relationship, the employment-based adjustment applicant would need to demonstrate eligibility under the other requirements of INA § 245(a), including that he or she is eligible for a visa. An applicant would have to qualify for a visa under one of the four employment-based categories referenced in INA § 245(k). The 3rd employment-based preference category—for skilled workers, professionals and other workers—would be the most relevant of these. However, it requires that the Department of Labor issue a labor certification prior to USCIS approving the visa petition. INA § 203(b)(3)(C). This process can take up to a year. Should an individual lose TPS status—whether voluntarily or because DHS terminates the TPS designation of the home country—before she is able to file an adjustment application, she will be barred under INA § 245(k). An attorney with expertise in business immigration should be consulted in any case where adjusting on this basis is a possibility.

- **Change of status under INA § 238:** INA § 244(f)(4) also states that a TPS recipient "shall be considered as being in, and maintaining, lawful status as a nonimmigrant" for purposes of "change of status under [INA §] 238." A lawful admission is one of the requirements for a change of nonimmigrant status under § 238. While neither the Sixth nor the Ninth Circuits addressed this issue, the reasoning of both decisions should apply equally to a TPS recipient who initially entered without inspection and now seeks to

[10] The Council is unaware of any decision addressing this issue.

change from TPS to a nonimmigrant status for which he is otherwise eligible. Under *Flores* and *Ramirez*, the grant of TPS should be considered to be an admission for this purpose.[11] The individual would need to be otherwise eligible to change to the relevant nonimmigrant status. An attorney with expertise in nonimmigrant visas should be consulted in any case in which a change to a nonimmigrant status is a possibility.

Does a TPS recipient have to live in a state within the jurisdiction of the Sixth or Ninth Circuits to benefit from this decision?

Yes. Each decision is binding on USCIS only within the jurisdiction of the respective court.[12] Thus, the decisions apply only to individuals who reside in a state that falls within these jurisdictions.

An otherwise eligible individual who moves to one of these states and applies for adjustment following the move, will be covered by these decisions.

In the states within the Ninth Circuits, is USCIS accepting and processing adjustment applications from TPS recipients who benefit from *Ramirez*?

Ramirez became effective after the Ninth Circuit issued the mandate in the case on July 28, 2017. Prior to this, reports were that USCIS was holding adjustment applications from individuals who fell under *Ramirez*. USCIS now must decide those applications by applying *Ramirez*.

My client is within the Ninth Circuit but USCIS will not decide his adjustment application/ denied his application. What should I do?

According to current reports, USCIS is properly adjudicating adjustment applications in accordance with the Ninth and Sixth Circuit decisions. Please contact us at clearinghouse@immcouncil.org if this does not happen in your client's case.

Because the need to adjudicate adjustment applications may be particularly acute if you are concerned that the TPS designation for your client's home country will be terminated, you may want to ensure that the agency adjudicates your client's application as quickly as possible. In cases where USCIS has not timely adjudicated your client's application, there are steps you may take to encourage agency action. If the application is past processing times, you may inquire with USCIS, AILA, the CIS Ombudsman's Office and your Congressional representative.[13] If there

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[11] We have not heard of any case in which a TPS recipient who initially entered without inspection has applied to USCIS for a change of status in either the Ninth or Sixth Circuits and thus are not sure how USCIS would respond to such an application. If you have such a case, please contact us at clearinghouse@immcouncil.org.

[12] The Sixth Circuit includes: Kentucky, Michigan, Ohio and Tennessee; the Ninth Circuit includes: Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington.

[13] *See* USCIS Case Inquiry Process (providing on-line options for reaching out to USCIS, including case inquiries and service requests), https://egov.uscis.gov/e-Request/Intro.do; Ombudsman Case Assistance (after waiting 60 says past USCIS posted processing times and contacting USCIS customer service, you may reach out to the Ombudsman's Office for help), https://www.dhs.gov/case-assistance.

are other circumstances that warrant expedited treatment of the application, you may request that the application be adjudicated before the posted processing time has lapsed.[14] And if your client's case is unreasonably delayed and the USCIS will not act, you may decide to pursue a mandamus/APA lawsuit.[15]

If USCIS denies your TPS client's adjustment application by misapplying the law in the Ninth or Sixth Circuits, you may contact our office and file a motion to reopen or a motion to reconsider citing either *Ramirez* or *Flores* and the holdings in those cases.[16] If your client has TPS and is applying for adjustment of status, but is in removal proceedings, the immigration judge has sole jurisdiction over the proceedings, including over the adjustment application. 8 C.F.R. § 1245.2(a)(1); *see generally Matter of Sosa Ventura*, 25 I&N Dec. 391 (BIA 2010) (finding it is not proper for an immigration judge to terminate removal proceedings when a respondent is granted TPS even though a removal order cannot be executed while the respondent is in TPS status; instead, the immigration judges should determine any eligibility for relief from removal).

My client is not in either the Ninth or Sixth Circuit, entered without inspection, currently is in TPS status, and is married to a USC. Is there any way that s/he can adjust?

USCIS has not adopted—and thus is not following—either *Ramirez* or *Flores* outside of the Sixth and Ninth Circuits. If your client does not live in either of these circuits, an alternative option you may want to explore with your client is whether he or she can adjust after leaving and reentering the United States on advance parole. USCIS treats the return as satisfying the "inspection and admission or parole" requirement of INA § 245(a).[17]

Pursuant to the reasoning in *Matter of Arrabelly and Yerrabelly*, 25 I&N Dec. 771 (BIA 2012), an adjustment applicant who travels on advance parole has not undertaken a "departure" and therefore does not trigger the unlawful presence bar at INA § 212(a)(9)(B). Upon re-entering the United States, TPS recipients traveling on advance parole are paroled in and therefore have been "inspected and admitted or paroled" for purposes of § 245(a). However, a TPS recipient who already has triggered the unlawful presence bars under INA § 212(a)(9)(B) or the permanent bar under INA § 212(a)(9)(C) (by previously leaving and re-entering without advance parole) *will be subject to these bars*. Travel under advance parole does not cure previously incurred bars.[18] Moreover, in the current enforcement environment, many attorneys caution their clients against traveling on advance parole because of the risk that CBP may deny their entry at the border.

As discussed, clients with TPS who are otherwise eligible to adjust may move to the Ninth or Sixth Circuits in order to adjust status. There is no prohibition under the law against moving to

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[14] *See* USCIS Policy Manual, Requests to Expedite Applications or Petitions, Vol. 1, Part A, Ch. 12 (providing criteria for expediting a case), at https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume1-PartA-Chapter12.html.

[15] *See* American Immigration Council Practice Advisory, Mandamus Actions: Avoiding Dismissal and Proving the Case (March 2017).

[16] 8 C.F.R. §103.5.

[17] USCIS Policy Manual, Vol. 7, Part B, Ch. 2, § A.5, at https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume7-PartB-Chapter2.html#S-A.

[18] You should review and consider all potential inadmissibility bars. *See generally*, INA § 212.

those circuits in order to benefit from those jurisdictions' interpretation of the immigration laws. Remember, however, that an adjustment applicant who lives in the Ninth or Sixth Circuit or travels on advanced parole must meet all of the other eligibility requirements for adjustment.[19]

[19] *See supra*, suggesting categories of family-based and employment-based adjustment for which clients may be eligible.