



PRACTICE ADVISORY¹
November 2, 2020

ADJUSTMENT OF STATUS FOR
TPS HOLDERS AFTER *MATTER OF Z-R-Z-C-*

For years, U.S. Citizenship and Immigration Services (USCIS) and its predecessor, the Immigration and Naturalization Service (INS), found that those with Temporary Protected Status (TPS) who traveled on advance parole issued pursuant to their TPS satisfied the “inspected and . . . paroled” requirement of section 245(a) of the Immigration and Nationality Act (INA). As a result, they were able to adjust their status to that of lawful permanent resident if they satisfied all other statutory requirements and were found to warrant a favorable exercise of USCIS discretion. This was true even for those whose initial entry into the United States was without inspection, as USCIS considered the individual’s more recent parole entry rather than the original entry when determining if the applicant met § 245(a).

Unfortunately, USCIS has reversed this long-established policy. On August 20, 2020, it issued a Policy Memorandum designating the Administrative Appeals Office’s (AAO) decision in *Matter of Z-R-Z-C-* as an Adopted Decision (Policy Memorandum).² Under the Policy Memorandum and *Matter of Z-R-Z-C-*, TPS recipients returning to the United States with advance parole *after August 20, 2020*, will no longer be found to have been paroled for purposes of INA § 245(a) if the advance parole was granted based upon their TPS. TPS recipients who were admitted or paroled into the United States after this date will require evidence of eligibility independent of their grant of TPS to meet § 245(a).

Matter of Z-R-Z-C- involved a TPS recipient who initially entered the United States without inspection, subsequently was granted TPS, and, pursuant to her grant of TPS, left and returned to the United States with an approved advance parole document. She then applied for adjustment of

¹ Copyright (c) 2020, National Immigration Litigation Alliance, American Immigration Lawyers Association, and American Immigration Council. This practice advisory was written by Megan Kludt, partner at Curran, Berger and Kludt; Nicole Simon, partner at Landau, Hess, Simon, Choi & Doebley; and Mary Kenney and Tiffany Lieu of the National Immigration Litigation Alliance (NILA). 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. Questions regarding this practice advisory should be directed to mary@immigrationlitigation.org.

² USCIS, *Policy Memorandum: Matter of Z-R-Z-C-, Adopted Decision 2020-02* (AAO Aug. 20, 2020), PM-602-0179 (Aug. 20, 2020), <https://www.uscis.gov/sites/default/files/document/aa0-decisions/Matter-of-Z-R-Z-C-Adopted-AAO-Decision.pdf>.

status as an immediate relative. She sought adjustment based on USCIS' longstanding policy that her recent parole entry satisfied § 245(a)'s "inspected and admitted or paroled" requirement. The AAO granted the TPS recipient's adjustment application, finding that she reasonably relied on USCIS' past practice.

However, the AAO rejected USCIS' prior interpretation and practice and made clear that, in future cases, this interpretation would no longer be applied. Instead, the AAO held that TPS recipients who travel with advance parole issued pursuant to INA § 244(f)(3) (TPS travel authorization) do not satisfy the "inspected and admitted or paroled" requirement of INA § 245(a) upon reentry, even though they have a document that refers to parole. Instead, the AAO determined that TPS recipients return "in the same immigration status [they] had at the time of departure," which the AAO found was as an entry without inspection.³ The only exceptions are TPS recipients who are inadmissible under certain criminal or national security grounds and those who obtain an immigrant or nonimmigrant visa and present it for admission to the United States.⁴ In so holding, the AAO relied on §§ 304(c)(1)(A)(i), (ii) and 304(c)(2)(b) of the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 (MTINA).⁵

In adopting *Matter of Z-R-Z-C-*, USCIS made clear that this policy change only applies prospectively to TPS recipients who departed and returned to the United States with advance parole after August 20, 2020, the effective date of the AAO's decision.⁶

This Practice Advisory is intended to provide an analysis of the adopted decision and its impact on a range of scenarios for TPS holders seeking adjustment of status. Specifically, this Practice Advisory includes suggestions for responding to denials issued in cases in which 1) the TPS holder traveled and returned to the United States on advance parole prior to August 20, 2020; or 2) the TPS holder traveled and reentered the United States on advance parole after August 20, 2020.

1) For Decades USCIS Recognized that a TPS Holder who Traveled on Advance Parole Satisfied the Inspection and Parole Requirement of INA § 245

As noted in *Matter of Z-R-Z-C-*, Congress established TPS in the Immigration Act of 1990, codified at INA § 244.⁷ The purpose of TPS is to provide temporary immigration status to nationals of specifically designated countries that are experiencing ongoing armed conflict (such as civil war), an environmental disaster (such as earthquake or hurricane), an epidemic, or other extraordinary and temporary conditions.⁸ TPS recipients are eligible for employment

³ *Id.* at 6.

⁴ *Id.* at 8.

⁵ Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, 105 Stat. 1733, 1749 (1991).

⁶ See Policy Memorandum, *supra* note 2 at 1–2; see also *USCIS Adopts AAO Decision on TPS and Authorized Travel*, USCIS (Aug. 31, 2020), <https://www.uscis.gov/news/news-releases/uscis-adopts-aao-decision-on-tps-and-authorized-travel>.

⁷ *Matter of Z-R-Z-C-*, *supra* note 2 at 3 (citing Immigration Act of 1990, Pub. L. 101-649, 104 Stat. 4978 (1990)).

⁸ See INA § 244(b); *Temporary Protected Status*, USCIS (Sept. 8, 2020), <https://www.uscis.gov/humanitarian/temporary-protected-status>.

authorization, a stay of deportation, and the ability to travel and return to the United States upon advance authorization by USCIS.⁹ USCIS (and previously INS) has always provided this advance authorization in the form of advance parole.¹⁰

Generally, a foreign national who is paroled into the United States satisfies the threshold eligibility requirement for adjusting to lawful permanent resident status, found at 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

- (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).¹¹ 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). Section 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, defined at INA § 201(b); special immigrants, defined at INA §§ 101(a)(27)(H), (I), (J) and (K); and employment-based adjustment applicants eligible for a waiver under INA § 245(k)¹² are exempted from this bar.¹³ 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 were able to adjust following a subsequent entry on parole under USCIS’ prior policy.

⁹ INA § 244(a).

¹⁰ See 8 C.F.R. § 244.15(a) (“Permission to travel may be granted by the director pursuant to the Service’s advance parole provisions.”); see also 8 C.F.R. § 212.5(f) (addressing advance parole); *Instructions for Application for Travel Document, Form I-131*, USCIS 3, <https://www.uscis.gov/sites/default/files/document/forms/i-131instr.pdf>.

¹¹ Legal Opinion from Paul W. Virtue, Acting Gen. 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).

¹² INA § 245(k) creates an exception to the § 245(c)(2) bar for employment-based adjustment applicants provided that they demonstrate that they have not failed to maintain lawful status for more than 180 days subsequent to their last “lawful admission.” Parole is not an admission and thus an advance parole entry has never been considered a “lawful admission” for the purpose of counting these 180 days. To be eligible for this waiver, a TPS recipient who was never lawfully admitted must argue that the grant of TPS is deemed a lawful admission. To date, three courts of appeals have accepted this argument and three have rejected it. See *infra* pp. 8–9 and accompanying text.

¹³ INA § 245(c)(2).

Notwithstanding *Matter of Z-R-Z-C-*, as of the publication of this Practice Advisory, this General Counsel Opinion has not yet been rescinded.¹⁴ However, on October 6, 2020, USCIS updated its policy manual to reflect the policy changes outlined in *Matter of Z-R-Z-C-*.¹⁵ In updating its policy manual, USCIS deleted prior language which had stated:

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.¹⁶

2) USCIS Reversed its Longstanding Interpretation in *Matter of Z-R-Z-C-*

In reversing USCIS' decades-long policy that rendered TPS recipients eligible to adjust status as immediate relatives of U.S. citizens if they were paroled into the United States following TPS-authorized travel, the AAO in *Matter of Z-R-Z-C-* primarily relies on § 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-

- (A) the [noncitizen] shall be *inspected and admitted* in the same immigration status [he or she] had at the time of departure if-
 - (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
- (B) the alien shall not be considered, by reason of such authorized departure, to have failed to maintain continuous physical presence in the United States for purposes of section 244(a) of the Immigration and Nationality Act if the absence meets the requirements of section 244(b)(2) of such Act....

MTINA § 304(c), Pub. L. No. 102-232, 105 Stat. at 1749 (emphasis added).¹⁷

¹⁴ *Matter of Z-R-Z-C-* recognizes the 1991 General Counsel's Opinion but does not rescind it, instead noting that it "do[es] not speak to the matter at hand because [it was] issued prior to the enactment of MTINA." *Matter of Z-R-Z-C-*, *supra* note 2 at 4 n.6.

¹⁵ See USCIS, *Policy Alert: Temporary Protected Status and Eligibility for Adjustment of Status under Section 245(a) of the Immigration and Nationality Act*, PA-2020-17 (Oct. 6, 2020), <https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20201006-TPSAndAOS.pdf> (advising of updates to USCIS Policy Manual, vol. 7, pt. B, ch. 2).

¹⁶ USCIS Policy Manual, vol. 7, pt. B, ch. 2, § A.5 (Oct. 2, 2020), <https://web.archive.org/web/20201004021757/https://www.uscis.gov/policy-manual/volume-7-part-b-chapter-2>; see also *Matter of Z-R-Z-C-*, *supra* note 2 at 9 n.11 (quoting USCIS' policy manual prior to the October 6, 2020 update).

¹⁷ Note that the reference to grounds of exclusion under INA § 244(c)(2)(A) is to the grounds of inadmissibility that either are or may be waived for TPS applicants.

The AAO concluded that Congress' intent in passing MTINA § 304(c) was “to mandate that, subject to certain exceptions, authorized travel by a TPS recipient would have no impact on the immigration status the alien held at the time of departure,” and, therefore, travel and return to the United States pursuant to § 304(c) does not satisfy the inspected and admitted or paroled language of INA § 245(a).¹⁸ The AAO relied upon two INS General Counsel Opinions:

- A 1992 Opinion of the INS General Counsel, which opined that “Congress did not intend TPS-authorized travel to ‘be treated the same way as the grant of advance parole’”—due to Congress’ use of the term “travel abroad temporarily” in MTINA § 304(c) rather than the term “parole.” The General Counsel concluded that this statutory language “clearly indicates that the [noncitizen] alien must be given the same status and the same incidents of status as those possessed before departure, if he or she is inspected and admitted. Deportation rights cannot be extinguished by the travel authorization provisions, contrary to the situation where advance parole is granted.”¹⁹
- A 1993 INS General Counsel Opinion, which opined that it was not necessary for an Order to Show Cause to be cancelled for INS to grant a TPS recipient travel authorization because, under MTINA, the TPS recipient would return to the same immigration status. The General Counsel further opined that this status would be that of a TPS recipient subject to an Order to Show Cause.²⁰

The AAO made the following additional points:

- It dismissed the “inspected and admitted” phrase in MTINA § 304(c) as different in meaning from the same language in INA § 245(a) on the basis that the phrase “cannot be interpreted to put TPS recipients in a better position than they had upon their physical departure from the United States pursuant to TPS-authorized travel.”²¹
- It also distinguished the subsequently enacted definition of admission at INA § 101(A)(13)—that is, “the lawful entry of the alien into the United States after inspection and authorization by an immigration officer”—by citing a statutory construction rule which states that a specific provision applying to a very specific situation, such as MTINA § 309(c), “will not be controlled or nullified by a general [statute], regardless of the priority of enactment.”²²

¹⁸ *Matter of Z-R-Z-C-*, *supra* note 2 at 6. The AAO further notes their prior holding that “the grant of TPS does not constitute an admission to the United States.” *Id.* (citing *Matter of H-G-G-*, 27 I. & N. Dec. 617, 641 (AAO 2019)).

¹⁹ Legal Opinion: Travel Authorization for Aliens Granted TPS, from Grover Joseph Rees III, Gen. Counsel, INS, to James A. Puleo, Assoc. Comm’r, Examinations, INS, Genco Op. No. 92-10, 1992 WL 1369349, at 1 (Feb. 27, 1992)

²⁰ Legal Opinion Your CO 1810.6-C Memorandum of September 15, 1992: Travel Permission for Temporary Protected Status (TPS) Registrants, from Paul W. Virtue, Acting Gen. Counsel, INS, to Lawrence J. Weinig, Acting Assoc. Comm’r, Examinations, Genco Op. No. 93-51, 1993 WL 1503998, at *1 (Aug. 4, 1993).

²¹ *Matter of Z-R-Z-C-*, *supra* note 2 at 6.

²² *Id.* at 7 (quoting *Morton v. Mancari*, 417 U.S. 535, 550–51 (1974)).

In sum, the AAO contends that the “immigration status” that the foreign national returns to is that of a TPS recipient who entered without inspection. For a TPS holder outside of the jurisdictions of the Sixth, Eighth and Ninth Circuit Courts of Appeals, this would place the applicant back in lawful status due to TPS, but once again without having been “inspected and admitted or paroled” as required for adjustment under INA § 245(a).²³ Under the AAO’s faulty reasoning, the TPS holder’s subsequent return with advance parole does not override his or her initial entry without inspection.

3) What is the Impact of Matter of Z-R-Z-C-?

a. Which TPS recipients are affected by *Matter of Z-R-Z-C-*?

Matter of Z-R-Z-C impacts only TPS recipients who initially entered the United States without inspection. Any TPS recipient who was admitted into the United States, including those who can demonstrate that they were admitted under *Matter of Quilantan*, 25 I. & N. Dec. 285 (BIA 2010), do not need to rely on a TPS-related advance parole entry to satisfy INA § 245, as their admission satisfies this section. Anyone filing an adjustment application within the jurisdiction of the Sixth, Eighth, or Ninth Circuits also would not need to rely on the parole entry, as the grant of TPS is considered an admission in those circuits.²⁴ Similarly, any TPS recipient who was paroled into the United States on any basis other than INA § 244(f)(3), the TPS travel provision, would independently satisfy § 245(a).

b. Will TPS recipients be denied adjustment of status under *Matter of Z-R-Z-C-* if they traveled and returned on advance parole prior to August 20, 2020?

No, the Policy Memorandum specifically states that *Matter of Z-R-Z-C-* “will only apply *prospectively* to TPS recipients who departed and returned to the United States pursuant to section 244(f)(3) of the Act *after* the date of this Adopted Decision,” that is, August 20, 2020. Policy Memorandum at 2 (emphasis added). Because the policy memo specifies *both* a departure and a return after August 20, 2020, USCIS should not apply the policy to anyone who departed before that date and only returned after it. Thus, if USCIS denies an application for adjustment of status under *Matter of Z-R-Z-C-* for a TPS recipient who departed on advance parole prior to August 20, 2020, he or she can challenge the denial, as discussed next. Of course, this does not preclude USCIS from denying the application on some other ground unrelated to § 245(a).

²³ The AAO’s erroneous interpretation of MTINA should not affect TPS-based adjustment of status applicants within the jurisdictions of the Sixth, Eighth, 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 these circuits satisfy § 245(a), including those who initially entered without inspection, irrespective of whether they travel and return on advance parole. See *Velasquez v. Barr*, Nos. 19-1148, 19-2130, -- F.3d --, 2020 U.S. App. LEXIS 33754 (8th Cir. Oct. 27, 2020); *Ramirez v. Brown*, 852 F.3d 954 (9th Cir. 2017); *Flores v. USCIS*, 718 F.3d 548 (6th Cir. 2013); see also Practice Advisory, Court Decisions Ensure TPS Holders in the Sixth and Ninth Circuits May Become Permanent Residents, Am. Imm. Council (2017), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/court_decisions_ensure_tps_holders_in_sixth_and_ninth_circuits_may_become_permanent_residents.pdf.

²⁴ See *supra* note 23; *infra* pp.8–9 and accompanying notes.

c. What can a TPS holder whose adjustment application is erroneously denied under *Matter of Z-R-Z-C-* for travel before August 20, 2020 do?

There are several avenues to challenge an erroneous denial of adjustment based on *Matter of Z-R-Z-C-*:

- First, the TPS holder can seek reconsideration of the adverse determination on the basis that the denial was an incorrect application of USCIS policy. Under 8 C.F.R. § 103.5, an applicant can file a Motion to Reconsider an adverse decision when it is based on an incorrect application of law or USCIS policy. 8 C.F.R. §§ 103.5(a)(2) & (3). Such motions are filed using Form I-290B, Notice of Appeal or Motion, and generally must be accompanied by a brief and filed within 30 days of the “date of service” of the adverse decision.²⁵ The motion would argue that the denial was an incorrect application of USCIS policy because the Policy Memorandum explicitly states that the new policy only applies to travel that has taken place after August 20, 2020. If more than 30 days have passed, a TPS recipient may still file a motion if the delay in filing “was reasonable and was beyond the control of the applicant.” 8 C.F.R. § 103.5(a)(1)(i). This motion should be styled as a Motion to Reopen and Reconsider using Form I-290B and should explain why the delay in filing is reasonable and argue that the denial was based on an incorrect application of the USCIS Policy Memorandum.
- Second, and particularly in situations in which the TPS recipient missed the deadline for filing a Motion to Reconsider, an applicant also could try to file a new adjustment of status application. The benefit in doing so is that this would place the TPS recipient in a period of stay authorized by the Attorney General (independent of their TPS status) and the applicant would be eligible for an employment authorization document (EAD). In addition, a decision on a new I-485 application is likely to be quicker than a Motion to Reconsider and is more likely to be successful, assuming the TPS recipient is eligible.
- Third, if the applicant is placed in removal proceedings, he or she will have the chance to renew their application for adjustment of status before an immigration judge. While an immigration judge is not bound by USCIS policy, and therefore not required to apply the former USCIS policy because the person traveled prior to August 20, 2020, the TPS recipient can argue that this former policy should be followed, particularly since immigration judges have, for years, routinely treated a TPS recipient’s entry on advance parole as a parole for purposes of INA § 245(a).
- Finally, a TPS recipient who is not in removal proceedings could file a civil complaint in federal district court under the Administrative Procedure Act, arguing that 1) the reversal of USCIS’ longstanding policy in *Matter of Z-R-Z-C-* was wrongly decided; and 2) alternatively, regardless of the validity of the new policy, the denial was arbitrary, capricious, and an abuse of discretion because the new policy does not apply to individuals who have traveled and returned prior to August 20, 2020. 5 U.S.C. § 706.

²⁵ 8 C.F.R. § 103.5(a)(1)(iii) lays out the filing requirements for these motions.

d. Can a TPS recipient still travel on advance parole after August 20, 2020?

Yes, the policy change has no effect on the ability of TPS holders to travel, provided they receive advance authorization from USCIS. Moreover, USCIS has not changed its practice of authorizing such travel through the advance parole process. The policy change announced in *Matter of Z-R-Z-C-* only addresses the effect of that travel on a prospective application for adjustment within the United States.

e. What happens if a TPS recipient travels on TPS-related advance parole after August 20, 2020?

TPS holders who travel *after* August 20, 2020, are directly impacted by this Policy Memorandum. Attorneys whose clients' adjustment applications are denied under *Matter of Z-R-Z-C-* and who wish to discuss possible litigation can contact mary@immigrationlitigation.org.

f. Should practitioners advise TPS recipients not to travel?

There is no reason why a TPS recipient should refrain from travel. However, practitioners may wish to inform clients that, under the *current* policy, travel on TPS-related advance parole will not provide any benefit as to status and the clients should set their expectations accordingly. Practitioners also can advise clients of the possibility that *Matter of Z-R-Z-C-* and USCIS' adoption of it as policy may be challenged in federal court, but that there is no way of predicting the outcome of any such litigation at this point.

g. Does *Matter of Z-R-Z-C-* impact individuals living within the Sixth, Eighth, or Ninth Circuits?

Matter of Z-R-Z-C- does not impact the eligibility of TPS holders in the Sixth, Eighth, or Ninth Circuits to adjust their status. The Sixth, Eighth, and Ninth Circuits all have held that, under the plain language of the TPS statute, INA § 244(f)(4), a grant of TPS is *itself* deemed to be an admission to the United States for purposes of § 245(a).²⁶ This is at odds with USCIS' current interpretation of INA § 244(f)(4) in *Matter of H-G-G-*, 27 I. & N. Dec. 617, 641 (AAO 2019), which concludes that TPS does not confer an admission. USCIS is bound by the holdings of the Sixth, Eighth, and Ninth Circuits in all cases which arise in those jurisdictions. Thus, USCIS explicitly stated that *Matter of H-G-G-*'s holding that TPS is not deemed to be an admission would be applied universally *except* in the Sixth and Ninth circuits in light of *Ramirez* and *Flores*.²⁷

²⁶ *Velasquez v. Barr*, Nos. 19-1148, 19-2130, -- F.3d --, 2020 U.S. App. LEXIS 33754, at *17-18 (8th Cir. Oct. 27, 2020); *Ramirez v. Brown*, 852 F.3d 954, 964 (9th Cir. 2017); *Flores v. USCIS*, 718 F.3d 548, 551-53 (6th Cir. 2013).

²⁷ See USCIS, *Policy Memorandum, Matter of H-G-G-, Adopted Decision 2019-01 (AAO July 31, 2019)*, PM-602-0172 (July 31, 2019), https://www.uscis.gov/sites/default/files/document/memos/Matter_of_H-G-G-_Adopted_Decision_2019-01_AAO_July_31_2019.pdf. Note that *Matter of H-G-G-* was decided prior to the Eighth Circuit's decision in *Velasquez* and thus does not reference it; however, the same result applies to cases arising in that Circuit.

Because a grant of TPS is deemed an admission under *Velasquez, Flores, and Ramirez*, TPS recipients applying to adjust to lawful permanent resident status within those jurisdictions do not need to rely on travel on advance parole to satisfy INA § 245(a)—their grant of TPS provides the necessary admission even though they were never otherwise admitted or paroled. If otherwise eligible for adjustment, anyone living within these jurisdictions will be able to adjust. For that reason, some TPS recipients have moved to states within these jurisdictions and successfully adjusted as a result. The TPS application must be decided by a USCIS office within the jurisdiction of these circuits for the individual to be eligible, however.²⁸

Note that the Third, Fifth, and Eleventh Circuits have held that TPS is not an admission for purposes of 245(a),²⁹ and litigation on this issue is pending on government appeal in the First Circuit, where a district court recently found that TPS must be deemed an admission under INA 244(f)(4).³⁰ The majority of federal district courts to have considered the issue agree that a grant of TPS status satisfies the “inspected and admitted” requirement for adjustment.³¹

h. What if the TPS recipient is in removal proceedings or under a final order of removal at the time he or she travels and returns on advance parole?

1. Matter of Z-R-Z-C-’s Effect on Jurisdiction

Removal proceedings add an additional level of complexity for TPS recipients seeking to adjust their status because of the question of whether USCIS or the Executive Office of Immigration Review (EOIR or the immigration court) has jurisdiction to adjudicate the adjustment of status application. 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).³²

²⁸ The question of TPS as lawful admission is particularly relevant to employment-based adjustment applicants. These applicants are not only seeking eligibility under INA § 245(a) but an exemption from the INA § 245(c)(2) bar for their failure to maintain status after entry. Where they can demonstrate that the grant of TPS is deemed an admission under INA § 244(f)(4), as is the case in the Sixth, Eighth, and Ninth Circuits, they become eligible for a waiver of § 245(c)(2) under § 245(k). The latter requires that the applicant have not been out of status for more than 180 days following a “lawful admission.” Neither *Velasquez, Ramirez, nor Flores* directly addresses the term “lawful admission” for purposes of § 245(k), but their holdings provide strong support for the argument. Moreover, the district court in *Bhujel v. Wolf*, 444 F. Supp. 3d 268, 275 (D. Mass 2020), found that the applicant’s TPS grant was a “lawful admission” for purposes of § 245(k).

²⁹ *Nolasco v. Crockett*, No. 19-30646, _ F.3d _, 2020 U.S. App. LEXIS 33578 (5th Cir. Oct. 23, 2020); *Sanchez v. Sec’y U.S. DHS*, 967 F.3d 242 (3rd Cir. 2020); *Serrano v. U.S. Att’y Gen.*, 655 F.3d 1260 (11th Cir. 2011).

³⁰ *Bhujel v. Wolf*, 444 F. Supp. 3d 268 (D. Mass 2020), *appeal filed* 20-510 (1st Cir. May 12, 2020).

³¹ *See, e.g., Hernandez de Gutierrez v. Barr*, No. 19-2495-JRT-KMM, 2020 U.S. Dist. LEXIS 178009 (D. Minn. Sept. 28, 2020); *Bhujel, supra* note 30; *Solorzano v. Nielsen*, No. MO-17-cv-00249-DC, 2019 U.S. Dist. LEXIS 177573 (W.D. Tex. Jan 15, 2019), *appeal docketed*, No. 19-50220 (5th Cir.); *Bonilla v. Johnson*, 149 F. Supp. 3d 1135 (D. Minn. 2016).

³² *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

USCIS recently amended its Policy Manual to state that the immigration court has jurisdiction in all cases in which the TPS recipient either was in removal proceedings or was under a final order of removal at the time of departure on advance parole.³³ For individuals under a final order, USCIS takes the position that they remain in removal proceedings because the removal order is not executed upon their departure.³⁴ Previously, USCIS would sometimes adjudicate such applications on the logic that they are “arriving aliens.” This result varied by field office, however, and sometimes even by officer.

Under the reasoning of *Matter of Z-R-Z-C-*, TPS holders cannot become “arriving aliens” through travel; thus, and in accord with the amendment to the USCIS policy manual, USCIS’ position is that jurisdiction for all cases in which the TPS recipient is in proceedings or under a final order at the time of travel will always lie with the immigration court. USCIS can now be expected to universally deny these cases for lack of jurisdiction.

Some practitioners have argued that in departing the United States, a TPS holder has executed their final removal order, relying on INA § 101(g). Under this theory, the TPS holder returns to the United States with an executed final removal and is newly inadmissible under INA § 212(a)(9)(A), which can be waived via Form I-212 before USCIS. They argue that jurisdiction vests with USCIS, rather than the immigration court, because the order has been executed and the proceedings are complete. The authors are not aware of any courts that have ruled on this issue. *Matter of Z-R-Z-C-* creates an additional hurdle for applicants making this argument. It holds that TPS travel does not constitute a traditional “entry,” which implies that there was not a “departure.” USCIS’ current position is that the travel has no impact whatsoever on the existence of the removal order. The individual circumstances of the TPS holder will dictate whether it is advisable to engage on this path of litigation.

2. *What options are available for a TPS recipient who returns on advance parole while under a final order of removal or deportation?*

Under *Matter of Z-R-Z-C-*, a TPS holder with a removal order will continue to have a removal order after return from travel on advance parole. This means that a TPS holder in this situation would need to file a motion to reopen their proceedings before the immigration court to apply for adjustment of status. If successful, they would be in the same situation as those applicants in removal proceedings, described below.

In most, if not all, cases, the deadline for filing a motion to reopen will be long past. However, a TPS recipient can argue that the deadline should be equitably tolled. Such an argument will be strongest if made within 90 days of USCIS rejecting the TPS recipient’s adjustment application for lack of jurisdiction. For more information about making this argument, contact mary@immigrationlitigation.org. As an alternative argument, the TPS recipient can ask the

context); *In re Oseiwusu*, 22 I. & N. Dec. 19, at *19–20 (BIA 1998) (holding that a noncitizen who enters the United States under a grant of advance parole is an “arriving alien”).

³³ See USCIS Policy Manual, Vol. 7, Part A, Chap. 3 n. 19 (Oct. 15, 2020), <https://www.uscis.gov/policy-manual/volume-7-part-a-chapter-3>.

³⁴ The Central American Resource Center and seven TPS recipients have sued USCIS over its policy that it has no jurisdiction over the adjustment applications of TPS recipients under a final order of removal. Complaint, *Cent. Am. Res. Ctr. v. Cuccinelli*, No. 20-02363 (D.D.C. Aug. 26, 2020).

immigration judge or the BIA (whichever last heard the removal case) to reopen the proceedings under their sua sponte authority.³⁵

3. *Matter of Z-R-Z-C-’s effect on eligibility for adjustment of status under INA § 245(a) for those in removal proceedings*

Neither the AAO decision nor USCIS’ Policy Memorandum is binding on EOIR.³⁶ Practitioners should continue to argue in removal proceedings that TPS holders who have traveled have been “inspected and . . . paroled” for purposes of INA § 245(a), based on a plain reading of the statute.

4) Arguments That *Matter of Z-R-Z-C-* is an Incorrect Interpretation of the Law

Depending on their circumstances, TPS recipients generally have three potential forums in which to challenge USCIS’ policy that travel on TPS-related advance parole does not constitute parole for purposes of INA § 245(a). For those who are not in removal proceedings, any challenge will have to be in a federal district court lawsuit, as USCIS adjudicators are bound to follow the policy and thus the TPS recipient will lose at the agency level. TPS recipients in removal proceedings first can challenge the interpretation of the law behind the policy before an immigration judge and the BIA, as neither are bound by the AAO decision. If unsuccessful before EOIR, the TPS recipient can raise the same challenge in a Petition for Review in a federal court of appeals.

In all such cases, practitioners will need to argue that *Matter of Z-R-Z-C-* was incorrectly decided, arguing that the AAO decision is flawed in several ways.

- First, the decision incorrectly assumes that TPS holders who entered without inspection resume that same “status” upon return. In so doing, the decision conflates two distinct concepts: status and entry. The AAO attempts to characterize “entry without inspection” as a form of “status” that follows TPS holders both before and after they make a new entry into the country. However, TPS is itself a lawful 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). It is the only status that these individuals hold and to which they can return after their travel. It is not tied to any particular manner of entry.

By contrast, being present without inspection is not an immigration status, but rather is a description of a manner of entry. As one court 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

³⁵ See 8 C.F.R. §§ 1003.23(b)(1) and 1003.2(a), respectively.

³⁶ See INA § 103(a) (granting the Attorney General the authority to determine all questions of law); 8 C.F.R. § 1103(g) (granting the BIA the authority to interpret the law through precedent decisions); *see also* BIA Practice Manual, Section 1.2(g) “The AAO is not a component of EOIR and should not be confused with EOIR or the Board.” (updated September 23, 2019).

inadmissibility—such as present without admission—are not the same as an immigration status). Congress clearly intended to address two different issues in the adjustment of status statute: status and entry. While § 245(c) imposes restrictions on adjustment of status based on a foreign national’s *status* history, § 245(a) bars applicants based on the last *manner of entry* into the country.³⁷ The AAO cites to no basis in MTINA or elsewhere in the statute for merging these two dramatically distinct concepts. Thus, when a TPS holder returns to the United States on advanced parole, they resume the status of TPS and their reentry constitutes an inspection and admission or parole for the purposes of adjustment.

- Second, the AAO erroneously holds that TPS travel authorization is not “parole” but instead is a unique and previously undefined travel permission that results in no change to the individual’s eligibility for adjustment of status. This interpretation contradicts the regulations and practice. The AAO bases this theory on MTINA’s use of the phrase “travel abroad temporarily” instead of “parole.” Yet parole is just that: permission to travel abroad temporarily. TPS travel is indistinguishable from “parole” in other contexts. Even the AAO concedes that the “regulations authorized the district director to grant permission to travel ‘pursuant to the Service’s advance parole provisions.’”³⁸ TPS holders must apply for advance permission to depart the United States on a form that explicitly states that their purpose is to obtain advance parole in order to be “paroled” into the United States upon return.³⁹ Similarly, for those with paper versions of Form I-94, the Arrival-Departure Record, Custom and Border Protection (CBP) 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.” Applicants request travel authorization on Form I-131, which is an application for parole. They receive an advance parole card and they are stamped as paroled when they reenter the country. Parole in TPS cases functions the same as it does in Deferred Action for Childhood Arrivals, adjustment of status, and asylum cases, all of which similarly return an individual to the status they held prior to departure.
- Third, *Matter of Z-R-Z-C* ignores the plain language of the INA. MTINA mandates that a TPS holder is to be “inspected and admitted” upon return from authorized travel abroad. MTINA § 304(c)(1)(A). Notably, the phrase “inspected and admitted” is the very language of the adjustment of status statute. INA § 245(a). Congress’ use of the same phrase in these related statutes should be found to be deliberate and to indicate Congress’ intent that the TPS holder satisfies § 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).

³⁷ MTINA § 304(c)(1)(A) similarly distinguishes between these two concepts, first by identifying the type of entry that a TPS recipient’s return from authorized travel is to be accorded (the TPS recipient “will be inspected and admitted”) and then addressing what status the individual will have following this entry (“the same immigration status [he or she] had at the time of departure”).

³⁸ *Matter of Z-R-Z-C*, *supra* note 2 at 4.

³⁹ *Matter of Z-R-Z-C* refers to these as “MTINA-related travel documents” issued “pursuant to the Service’s advance parole provisions.” *Matter of Z-R-Z-C*, *supra* note 2 at 8.

The AAO cites to *Environmental Defense v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007) for the premise that “[a] given term in the same statute may take on distinct characters from association with distinct statutory objects calling for different implementation strategies.” The AAO’s reliance on *Duke Energy* is misplaced. *Duke Energy* affirms the “natural presumption that identical words used in different parts of the same act are intended to have the same meaning,” but notes that the presumption yields when “there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent.”⁴⁰ There is no reason to believe that the presumption does not apply here. MTINA and § 245(a) both state “inspected and admitted.” Compare INA § 245(a) (“The status of an [individual] who was *inspected and admitted* or paroled into the United States . . . may be adjusted.”) (emphasis added), with MTINA § 304(c)(1)(A) (“[T]he [individual] shall be *inspected and admitted* in the same immigration status”) (emphases added). There is no variation in the statutory language as contemplated in *Duke* to warrant the conclusion that Congress intended the term “inspected and admitted” to carry a different meaning. Nor is there anything to suggest that in implementing MTINA or the TPS statute generally, Congress intended to permanently deprive a TPS applicant from ever becoming eligible to adjust status. MTINA simply does not contemplate § 245(a) at all. There is no reason to assume Congress intended the words “inspected and admitted” to have any meaning other than their ordinary meaning. Pursuant to MTINA, practitioners can argue that the TPS holder was inspected and admitted upon return for purposes of § 245(a).⁴¹

- Fourth, the AAO also concludes that the regulation “cannot be interpreted to put TPS recipients in a better position than they had upon their physical departure from the United States.”⁴² This is again without merit. The act of traveling outside of the country has long had the potential to impact eligibility for immigration benefits, in both positive and negative ways, in a wide variety of contexts.⁴³ Courts have held that this different

⁴⁰ *Duke Energy Corp.*, 549 U.S. at 574 (citing *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U. S. 427, 433 (1932)).

⁴¹ Pursuant to the reasoning of *Matter of Arrabally and Yerrabally*, 25 I. & N. 771 (BIA 2012), 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.

⁴² *Matter of Z-R-Z-C-*, at 6.

⁴³ Under the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), lawful permanent residents returning from a sojourn abroad can be subjected to grounds of inadmissibility, rather than deportability; a brief period of travel could interrupt the accumulation of unlawful presence under INA § 212(a)(9)(B); lawful permanent residents who have sojourned abroad are eligible for a standalone 212(h) waiver that is not available to lawful permanent residents found deportable for the same reason in the United States.

treatment survives constitutional scrutiny because Congress could have a rational basis for treating travelers and non-travelers differently.⁴⁴

- Fifth, the AAO states that its conclusion is reinforced by the 1992 INS General Counsel Opinion’s statement that TPS holders would return to removal proceedings and “remain subject to deportation for the same reasons as existed prior to his or her departure.” The error behind this reasoning is its assumption that being in removal proceedings is a “status” to which the TPS recipient returns. Even the AAO appears to acknowledge that being in removal proceedings is not a status because it interprets MTINA as requiring both a return to the same status that the individual possessed prior to departure, “including all the incidents attached to that status.”⁴⁵ MTINA says nothing about “incidents of status,” however, and basic rules of statutory construction prohibit courts and agencies from imposing additional terms not included in a statute.⁴⁶
- Finally, outside of the Third, Fifth, and Eleventh circuits, practitioners can also make an argument that TPS itself should be considered an admission under § 245(a) or a lawful admission under § 245(k), as appropriate, following the holdings in the cases in the Sixth, Eighth, and Ninth circuits and the district courts in Massachusetts and Minnesota.⁴⁷ Practitioners should review these cases carefully in preparing their arguments.

5) Conclusion

The AAO’s holding in *Matter of Z-R-Z-C-* represents a dramatic policy change in the treatment of TPS holders who have traveled abroad. It also directly contradicts the plain language of the adjustment of status statute. The decision is disastrous for TPS holders who have not yet had the opportunity to travel on Advance Parole and who might have the opportunity to become a lawful permanent resident through a U.S. citizen spouse or child. Practitioners who are considering litigation should reach out to mary@immigrationlitigation.org, and all should be vigilant for legal updates on this topic.

⁴⁴ *Seepersad v. Sessions*, 892 F.3d 121, 125 (2d Cir. 2018) (joining sister circuits in holding that different treatment of sojourners and non-sojourners in the 212(h) waiver context survives constitutional scrutiny because Congress could have several rational bases for treating them differently, and citing *Klementanovsky v. Gonzales*, 501 F.3d 788, 792–93 (7th Cir. 2007), which lists a number of reasons why Congress may want to apply the law differently to a traveler).

⁴⁵ *Matter of Z-R-Z-C*, *supra* note 2 at 6; *see also id.* at 8 (“Consequently, the phrase ‘same immigration status,’ as provided in section 304(c) of MTINA, encompasses the legal incidents of status, such as an alien’s status in deportation, exclusion, or removal proceedings.”).

⁴⁶ *See, e.g., Lamie v. United States Tr.*, 540 U.S. 526, 538 (2004) (refusing to interpret a statute as including a word that Congress did not include).

⁴⁷ *See supra* pp. 8–9 and accompanying notes.