U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 8356861

Certification of Mount Laurel, New Jersey Field Office Decision

Form I-485 Application to Adjust Status

The Applicant, a native and citizen of El Salvador, has applied to adjust her status to that of a lawful permanent resident pursuant to section 245(a) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1255(a), by filing a Form I-485, Application to Register Permanent Residence or Adjust Status (Form I-485). The Director of the USCIS Mount Laurel, New Jersey Field Office denied the Form I-485, concluding that the Applicant had never been inspected and admitted or paroled into the United States and was thus ineligible to adjust status. The Director certified the matter for our review. See 8 C.F.R. § 103.4(a)(1).

It is the Applicant's burden to establish her eligibility to adjust status. Section 291 of the Act, 8 U.S.C. § 1361; Patel v. Lynch, 830 F.3d 353, 356 (6th Cir. 2016) ("The alien bears the burden of proving statutory eligibility for adjustment of status."); Singh v. Holder, 749 F.3d 622, 628 (7th Cir. 2014) (explaining that to be eligible for adjustment of status "[t]he alien has the burden of establishing inspection and admission"); Matter of Hashmi, 24 I&N Dec. 785, 789 (BIA 2009) ("The burden is on the [applicant] to establish his adjustment eligibility. . . . To establish eligibility for adjustment of status under section 245(a) of the Act, the [applicant] must demonstrate that he has been inspected and admitted or paroled into the United States; is eligible to receive an immigrant visa and has a visa immediately available to him; is not statutorily barred from adjustment; and is admissible to the United States within the meaning of section 212(a) of the Act or, if inadmissible, is eligible for a waiver of inadmissibility." (internal citation omitted)).

Upon review, and for the reasons stated below, we will approve the application for adjustment of status.

## I. FACTS AND PROCEDURAL HISTORY

The facts regarding the Applicant's 24-year presence in the United States are undisputed. The Applicant entered the United States without inspection and admission or parole in November 1995 and the former Immigration and Naturalization Service (INS) granted her Temporary Protected Status (TPS) in 2002. USCIS authorized the Applicant to travel abroad temporarily in April 2011 by issuing her an Authorization for Parole of an Alien into the United States (Form I-512). The Applicant

subsequently departed the United States and, upon returning, presented her Form I-512 to a U.S. Customs and Border Protection (CBP) official, who placed a parole stamp on the document.

The Applicant subsequently married a U.S. citizen. Her spouse filed a Form I-130, Petition for Alien Relative (Form I-130), on her behalf and the Applicant filed an accompanying Form I-485, seeking to adjust her status. The Director approved the Form I-130 but denied the Form I-485 because the Applicant had not been inspected and admitted or paroled into the United States as required by section 245(a) of the Act. According to the Director, a TPS recipient who returns to the United States pursuant to TPS travel authorization, specifically a valid Form I-512 issued pursuant to section 244(f)(3) of the Act, 8 U.S.C. § 1254a(f)(3), resumes the same immigration status the alien had at the time of departure.

Here, because the Applicant had initially entered the United States without inspection and admission or parole in 1995, her return to the United States in 2011 with a valid Form I-512, pursuant to TPS travel authorization, placed her in the same immigration status as she held at the time of her departure—that of a TPS recipient who was not inspected and admitted or paroled into the United States. The Director thus concluded that the Applicant did not satisfy section 245(a) of the Act regarding inspection and admission or parole.

On certification, the Applicant acknowledges that she was not inspected and admitted or paroled into the United States when she entered in 1995. However, she asserts that she has satisfied the statutory requirement of having been paroled for the purpose of adjusting her status because, as a TPS recipient, she was authorized to travel abroad through the issuance of a Form I-512 and was paroled into the United States by presenting her Form I-512 to CBP upon her return.

## II. LEGAL AUTHORITIES

Because one eligibility criterion under section 245(a) of the Act is that an alien must have been inspected and admitted or paroled into the United States, we must review what authorization to travel abroad signifies for TPS recipients.[1] To do so, we start with the Immigration Act of 1990 (IMMACT90), wherein Congress established TPS, which is codified at section 244 of the Act. See Pub. L. No. 101-649, § 302, 104 Stat. 4978 (1990).

In establishing TPS, Congress provided for certain benefits and protections for covered aliens. For example, aliens may be granted TPS even if they entered without inspection or lack lawful immigration status at the time of application. See sections 244(c)(1) and (2) of the Act (describing eligibility criteria); Matter of H-G-G-, 27 I&N Dec. 617, 619–20 (AAO 2019). Further, a TPS recipient "may travel abroad with the prior consent" of the Department of Homeland Security (DHS). Section 244(f)(3) of the Act. However, by name and definition, TPS is temporary in nature and merely defers removal from the United States during the period in which a country or area is designated under the statute. See sections 244(a)(1) and 244(f)(1) of the Act. In the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 (MTINA), Congress enacted a provision specifically addressing travel abroad for TPS recipients at section 304(c), which provides:

[1] In line with this statutory requirement, the former INS amended the regulation at 8 C.F.R. § 245.1(b)(3) to provide that "[a]ny alien who was not admitted or paroled following inspection by an immigration officer" is ineligible to apply for adjustment of status. Aliens and Nationality; Immigration and Nationality Act Amendments of 1981, 47 Fed. Reg. 44,233 (Oct. 7, 1982).

(1) In the case of an alien described in paragraph (2) whom the [Secretary of Homeland Security] authorizes to travel abroad temporarily and who returns to the United States in accordance with such authorization—

(A) the alien shall be inspected and admitted in the same immigration status the alien had at the time of departure if—

(i) in the case of an alien described in paragraph (2)(A), the alien is found not to be excludable on a ground of exclusion referred to in section 301(a)(l) of the Immigration Act of 1990, or

(ii) in the case of an alien described in paragraph (2)(B), the alien 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; and

(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.

(2) Aliens described in this paragraph are the following:

(A) * * *

(B) Aliens provided temporary protected status under section 244A of the Immigration and Nationality Act . . . .

Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, § 304(c), Pub. L. No. 102-232, 105 Stat. 1733 (amending section 244 of the Act, Note 3).

In addition, the regulation at 8 C.F.R. § 244.15 provide the mechanism by which a TPS recipient may travel:

(a) After the grant of Temporary Protected Status, the alien must remain continuously physically present in the United States under the provisions of section 244(c)(3)(B) of the Act. The grant of Temporary Protected Status shall not constitute permission to travel abroad. Permission to travel may be granted by the director pursuant to the Service's advance parole provisions. There is no appeal from a denial of advance parole.

(b) Failure to obtain advance parole prior to the alien's departure from the United States may result in the withdrawal of Temporary Protected Status and/or the institution or recalendering of deportation or exclusion proceedings against the alien.

Prior to MTINA's enactment, the former INS issued regulations in the first half of 1991 to implement the TPS travel provision at section 244(f)(3) of the Act.[2] These regulations authorized the district

[2] Temporary Protected Status, 56 Fed. Reg. 23491, 23498 (May 22, 1991) (final rule); 56 Fed. Reg. 618, 622 (Jan. 7, 1991) (interim rule).

director to grant permission to travel "pursuant to the Service's advance parole provisions."[3] Under these regulations and implementing form, TPS recipients granted permission to travel were issued an advance parole document on Form I-512. However, despite the passage of MTINA, the TPS travel regulations were not updated apart from minor technical revisions.[4] Also, TPS recipients granted permission to travel continued to be issued a Form I-512.

The INS General Counsel issued an opinion in February 1992, shortly after MTINA was enacted,[5] addressing MTINA's travel provisions with respect to TPS recipients. Memorandum from Grover Joseph Rees III, General Counsel, INS to James A. Puleo, Assoc. Comm'r, Examinations, INS, Travel Authorization for Aliens Granted TPS, INS Gen. Counsel Op. No. 92-10, 1992 WL 1369349, at 1 (Feb. 27, 1992). The INS General Counsel noted that instead of the term "parole" for TPS recipients who return from TPS-authorized travel, section 304(c) of MTINA uses the term "travel abroad temporarily" and concludes that in doing so, Congress did not intend TPS-authorized travel to "be treated the same way as the grant of advance parole." Id. Rather, TPS recipients granted authorization to travel must return to the United States "in the same immigration status they had at the time of departure. They should not be given advance parole, or be paroled upon return, unless they are already in parole status." Id.

In August 1993, the INS General Counsel again addressed the impact of section 304(c) of MTINA, specifically on whether travel authorization could be granted to a TPS recipient who had been issued an order to show cause without first cancelling said order.[6] Memorandum from Paul W. Virtue, Acting General Counsel, INS to Lawrence J. Weinig, Acting Assoc. Comm'r, Examinations, Travel Permission for Temporary Protected Status (TPS) Registrants, INS Gen. Counsel Op. No. 93-51, 1993 WL 1503998, at 1 (Aug. 4, 1993). In this 1993 Opinion, the INS General Counsel determined that cancellation of the order was not necessary, because under MTINA, a TPS recipient "who travels abroad and then returns is to be 'inspected and admitted in the same immigration status the alien had at the time of departure.'" Id. Accordingly, a TPS recipient who is also the "subject of an order to show cause, will upon return to the United States remain subject to deportation for the same reasons as existed prior to his or her departure." Id.

## III. ANALYSIS

To meet her burden of proving eligibility to adjust status, the Applicant must establish, among other requirements, that she was inspected and admitted or paroled into the United States. Section 245(a) of the Act; 8 C.F.R. §§ 245.1, 245.2(a)(2). Thus, the issue for us to decide is whether an applicant

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[3] The "advance parole provisions" referenced in the regulations are found in 8 CFR § 212.5. At the time of MTINA's passage, these regulations provided that "[w]hen parole is authorized for an alien who will travel to the United States without a visa, the alien shall be issued Form I-512." 47 Fed. Reg. 30044, 30045 (July 9, 1982) (interim final rule adding an advance parole provision at new 8 CFR § 212.5(e)). In 2011, "Form I-512" was replaced with "appropriate document authorizing travel." 76 Fed. Reg. 53764, 53787 (Aug. 29, 2011) (final rule removing form numbers from several provisions, including 8 C.F.R. § 212.5).

[4] For example, removing the word "district" from "district director." 64 Fed. Reg. 4781, 4782 (Feb. 1, 1999).

[5] We recognize that in March and June 1991, INS General Counsel issued opinions relating to TPS recipients and the effects of traveling abroad. However, these opinions do not speak to the matter at hand because they were issued prior to the enactment of MTINA.

[6] The former INS issued orders to show cause to commence proceedings with the Office of the Immigration Judge for the purpose of determining an alien's deportability. 8 C.F.R. § 242.1 (1993).

should be considered paroled into the United States for purposes of adjustment of status under section 245(a) of the Act when the applicant: (1) initially entered the United States without being inspected and admitted or paroled; (2) was granted TPS; (3) thereafter filed with USCIS a Form I-131, Application for Travel Document pursuant to section 244(f)(3) of the Act, requesting TPS travel authorization; (4) received a Form I-512 as evidence of the approved Form I-131; and (5) subsequently returned to the United States pursuant to the Form I-512.

In embarking on the task of statutory construction, "[w]here Congress has . . . spoken to the precise question at issue and its intent is clear, effect must be given to congressional intent." Matter of Punu, 22 I&N Dec. 224, 226 (BIA 1998) (citing Chevron, U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984)). "Our first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997). In making such a determination, we "must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988). We are required to implement Congress' clear intent, avoiding the creation of ambiguity where none exists. Id. ("If the statute is clear and unambiguous 'that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" (internal citations omitted)).

Thus, we first turn to section 244(f)(3) of the Act, which provides that a TPS recipient "may travel abroad with the prior consent of the [Secretary of Homeland Security]." Section 304(c)(1) of MTINA provides the mechanism by which a TPS recipient may be granted such authorization to travel abroad temporarily. Paragraph (A) of that section states that TPS recipients returning to the United States after authorized travel "shall be inspected and admitted in the same immigration status the alien had at the time of departure if" the alien "is found not to be excludable on a ground of exclusion referred to in section 301(a)(1) of the Immigration Act of 1990" or "244A(c)(2)(A)(iii) of [the Act]." Section 304(c)(1)(A)(i), (ii) of MTINA. Paragraph (B) of section 304(c)(1) states that a TPS recipient "shall not be considered, by reason of such authorized departure, to have failed to maintain continuous physical presence in the United States . . . ." Id. at section 304(c)(1)(B).

Reading these two paragraphs together, it is possible to discern Congress' intent in passing section 304(c) of MTINA, namely, to preserve a TPS recipient's immigration status despite travel abroad and, thus, restore the alien to the "same immigration status the alien had at the time of departure."[7] Therefore, MTINA travel authorization is a unique form of travel authorization and operates as a legal fiction that restores the alien to the status quo ante as if the alien had never left the United States.

Because section 244(f)(3) of the Act already provided travel authorization for TPS recipients, we conclude that the purpose of section 304(c) of MTINA is 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. Paragraphs (1)(A) and (1)(B) of section 304(c) intend to preserve the alien's immigration status exactly as it existed upon departure from the United States on TPS-authorized travel. Paragraph (1)(A) deals with immigration status, and paragraph (1)(B) deals with continuous

[7] "Immigration status" in this context includes being subject to a final order of deportation, exclusion, or removal. Congress enacted TPS so that "aliens who are nationals of designated foreign states . . . [would] not be forced to depart the United States during the period that TPS is effective." Matter of Sosa Ventura, 25 I&N Dec. 391, 394 (BIA 2010). Aliens ordinarily can be "forced to depart" only if subject to a final order of deportation, exclusion or removability.

physical presence. Considering Congress' focus on returning TPS recipients to their exact prior immigration status upon return to the United States, we must construe section 304(c) consistent with this Congressional intent. See Matter of Punu, 22 I&N Dec. at 226. Accordingly, travel and return to the United States pursuant to section 304(c) of MTINA does not satisfy the inspected and admitted or paroled language of section 245(a) of the Act.

We have previously held that the grant of TPS does not constitute an admission to the United States. Matter of H-G-G-, 27 I&N Dec. at 641 (AAO 2019).[8] In order to accomplish the statutory mandate of MTINA—i.e., that the TPS holder be returned to "same immigration status the alien had at the time of departure"— we must recognize that, in this context, the inspection and admission required under that statute is for the sole purpose of returning the TPS recipient to his or her temporary status (including all of the incidents attached to that status, e.g., a TPS recipient present in the United States without inspection and admission or inspection and parole) and for considering the grounds of inadmissibility applicable under section 244 of the Act.

For this reason, the phrase "inspected and admitted" as it is employed in section 304(c) of MTINA cannot be interpreted to put TPS recipients in a better position than they had been upon their physical departure from the United States pursuant to TPS-authorized travel. When aliens with TPS-authorized travel return to the United States, they return to the same immigration status they had prior to departure. The fact that TPS recipients are "inspected and admitted" pursuant to section 304(c) of MTINA does not alter their immigration status for purposes of adjustment of status under section 245(a) of the Act from that held at the time of departure, including any underlying immigration violations.

Similarly, notwithstanding the advance parole designation reflected on the travel document, such return from TPS-authorized travel does not result in a parole status for purposes of adjustment of status under section 245(a) of the Act, as again, that would contravene Congress' instruction to place TPS recipients in the exact same immigration status they were in at the time of departure. Parole is simply a mechanism used by the government to effectuate a physical return into the United States just as the "inspect[ion] and admi[ssion] in the same immigration status" under section 304(c) of MTINA operates to restore the alien's prior status in light of the fact that the alien physically departed the United States, such that for purposes of adjustment of status under section 245(a) of the Act, the alien never left the United States. In other words, upon return, it is as if the TPS recipient's immigration status never changed at all.

That this construction of "inspected and admitted" differs from that at section 245(a) of the Act does not result in an inconsistency, as "[a] given term in the same statute may take on distinct characters from association with distinct statutory objects calling for different ways of implementation." Environmental Def. v. Duke Energy Corp., 549 U.S. 561, 574 (2007). Nor does the subsequent enactment of the definition of "admission" at section 101(a)(13) of the Act alter the meaning of section 304(c) of MTINA. Section 304(c) "is a specific provision applying to a very specific situation. [Section 101(a)(13)], on the other hand, is of general application. Where there is no clear intention

[8] As we noted in Matter of H-G-G-, however, both the Sixth and Ninth U.S. Circuit Courts of Appeals have found that TPS is an admission for the purpose of adjustment of status under section 245(a) of the Act.

otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." Morton v. Mancari, 417 U.S. 535, 550–51 (1974); see also Radzanower v. Touche Ross & Co., 426 U.S. 148, 153 (1976) ("It is a basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum.").

Our conclusion is strengthened by the 1992 INS General Counsel Opinion, which was contemporaneous with the passage of MTINA. INS Gen. Counsel Op. 92-10. In that Opinion, the INS General Counsel concluded that Congress did not intend that authorized travel abroad for TPS recipients be treated the same way as the grant of advance parole; the use of the terms "authorized departure" and "travel" in section 304(c) of MTINA were specifically chosen. Id. at 1. The INS General Counsel further concluded that TPS recipients "must be given the same status and the same incidents of status as those possessed before departure, if they are inspected and admitted." Id. (emphasis added). Further, "[d]eportation rights cannot be extinguished by the travel authorization provisions, contrary to the situation where advance parole is granted." Id. Thus, TPS-authorized travel changes neither the underlying immigration status that the alien held prior to receipt of TPS, nor any incidents of such status.

Our conclusion is equally reinforced by the reasoning in the 1993 INS General Counsel Opinion discussing the travel provisions in MTINA wherein the INS General Counsel opined that the government could authorize a TPS recipient's travel without cancelling the order to show cause. The INS General Counsel explained that under MTINA, the TPS recipient, upon return from travel abroad, would "remain subject to deportation for the same reasons as existed prior to his or her departure." INS Gen. Counsel Op. 93-51 at 1. 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.

Both the former INS as well as USCIS have issued MTINA-related travel documents for TPS recipients "pursuant to the Service's advance parole provisions." 8 C.F.R. § 244.15(a). However, this authorization can afford no more, or less, than is provided for under the statutory mandate of MTINA, making TPS travel authorization a unique form of parole/travel authorization because the alien is restored to the same immigration status as the alien held prior to departure (status quo ante), with certain inadmissibility exceptions. Stated another way, although the TPS recipient is allowed to return to the United States in a procedurally regular fashion after foreign travel, because TPS-authorized travel generally treats the traveler as never having left the United States, the return does not alter the circumstances that existed prior to travel. A status quo ante return cannot create a condition needed to establish eligibility for a benefit for which the alien would not have been entitled at the time of departure.[9] To conclude otherwise would contravene the Congressional intent that the alien be returned to the same status the alien had at the time of departure.

[9] Consequently, Matter of Quilantan, 25 I&N Dec. 285 (BIA 2010), is inapplicable to this situation given the statutory mandate of MTINA. In Matter of Quilantan, procedural regularity on entry was found to satisfy the admission requirement under section 245(a) of the Act even though the alien had no substantively lawful ability to enter. Here, the Applicant had a substantively lawful ability to enter using a TPS-based Form I-512, but such entry was conditioned on resuming the status held at the time of departure.

Our conclusion is otherwise consistent with the intent of Congress in passing section 244 of the Act and implementing TPS. Section 244(h) of the Act provides that a supermajority vote in the Senate is required for Congress to provide TPS recipients with lawful permanent residence. See Matter of H-G-G-, 27 I&N Dec. at 632 n.18. Therefore, TPS travel authorization pursuant to section 244(f)(3) of the Act and section 304(c) of MTINA cannot be construed to circumvent Congress' intent that TPS not provide a direct path to lawful permanent residence. See Sanchez v. Secretary of Homeland Security, ___ F.3d ___, 2020 WL 4197523 at *7 (3d Cir. July 22, 2020) ("Absent a clear statutory directive, a program that provides 'limited, temporary' relief should not be read to facilitate permanent residence for aliens who entered the country illegally." (disagreeing with Ramirez v. Brown, 852 F.3d 954, 963 (9th Cir. 2017))). Congress clearly proscribed its own ability to confer lawful permanent residence on TPS recipients, and nothing in MTINA reflects a change of that intent. See section 244(h) of the Act.

Accordingly, a TPS recipient who is granted authorization to temporarily travel abroad and subsequently reenters the United States using a DHS-issued travel document resumes the same immigration status the alien had at the time of departure, unless the alien is inadmissible under certain criminal or national security grounds or obtains an immigrant or nonimmigrant visa and presents it for admission to the United States. This means that (1) the TPS recipient's immigration status does not change upon reentry, even if the DHS-issued, TPS-based travel document or the DHS-issued arrival document refers to parole; and (2) TPS-authorized travel will not satisfy the requirements of "inspected and admitted or paroled" into the United States for purposes of adjustment of status under section 245(a) of the Act.

## IV. CONCLUSION

The Director correctly determined that, as a matter of statutory construction, MTINA mandates that the Applicant be returned to the same immigration status she had at the time of her departure—that of a TPS recipient who is present in the United States without inspection and admission or parole. In this case, however, we recognize that the former INS as well as USCIS have inconsistently and historically misconstrued the statutory mandates of travel authorization as required by MTINA due to a mistake of law and therefore erroneously concluded that a TPS recipient who returned to the United States using a DHS-issued, TPS-based travel document is paroled for purposes of section 245(a) of the Act.[10] We acknowledge the Applicant's reasonable reliance on the agencies' erroneous past practice, and

[10] A review of the USCIS Policy Manual reflects the historical misapplication of the statutory mandate of MTINA to TPS-authorized travel. See, e.g., USCIS Policy Manual Vol. 7: Adjustment of Status, Part B, 245(a) Adjustment, Chapter 2, Eligibility Requirements, Section A.5, Temporary Protected Status [7 USCIS-PM B.3(A.5)], last visited August 4, 2020 ("For purposes of adjustment eligibility, it does not matter whether the TPS beneficiary was admitted or paroled. In either situation, once the alien is inspected at a port of entry and permitted to enter to the United States, the alien meets the inspected and admitted or inspected and paroled requirement."). 7 USCIS-PM B.3(A.5) is contrary to the correct application of the statutory mandate of MTINA, which is reflected in USCIS Policy Manual Volume 7: Adjustment of Status, Part A, Adjustment of Status Policies and Procedures, Chapter 3, Filing Instructions, Section D, Jurisdiction, Footnote 19 [7 USCIS-PM A.3(D)], last visited August 4, 2020 ("Therefore, unless those TPS bars apply, the TPS beneficiary, upon return to the United States, resumes the exact same immigration status and circumstances as when he or she left the United States.").

conclude that the statutory construction announced in this decision should not apply to her application based on such reliance. Accordingly, her application should be approved. However, absent a cognizable reasonable reliance interest, TPS-authorized travel does not satisfy the "inspected and admitted or paroled" provision of section 245(a) of the Act due to the specific language of section 304(c) of MTINA, which is a statutory mandate that TPS recipients return to their previous immigration status, status quo ante, after travel abroad pursuant to DHS consent.

ORDER: The application for adjustment of status is approved.