

APPENDIX A

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**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 18-20341

OSCAR ERNESTO MELENDEZ,
Plaintiff - Appellant

v.

KEVIN K. McALEENAN, ACTING SECRETARY,
U.S. DEPARTMENT OF HOMELAND SECURITY;
LEE CISSNA, United States Citizenship and
Immigration Services Director; MARK SIEGL,
Field Office Director,

Defendants - Appellees

Appeal from the United States District Court
for the Southern District of Texas

(Filed Jun. 27, 2019)

Before BARKSDALE, SOUTHWICK, and HAYNES,
Circuit Judges.

LESLIE H. SOUTHWICK, Circuit Judge:

Oscar Ernesto Melendez filed suit seeking a declaratory judgment that the Department of Homeland Security had improperly denied his application to adjust his status to that of a legal permanent resident. The district court dismissed his complaint for lack of jurisdiction. The government now concedes there was

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jurisdiction but urges we deny relief. Though there is jurisdiction, Melendez benefits little because we also conclude he did not state a legally cognizable claim. The district court's ruling is VACATED, and the complaint is DISMISSED.

FACTS AND PROCEDURAL HISTORY

Melendez, a native and citizen of El Salvador, entered the United States in February 2000 on a one-month nonimmigrant visitor visa. Melendez did not leave the United States after one month or at any later time either. In March 2001, the Attorney General designated El Salvador for Temporary Protected Status ("TPS"). As long as El Salvador is so designated, the special status for Melendez continues. *See United States v. Orellana*, 405 F.3d 360, 366 (5th Cir. 2005). Melendez filed for TPS in August 2001 and had it granted, but the record does not show the date of its grant. From the expiration of his visa in March 2000 to the award of TPS sometime in late 2001, Melendez was an alien unlawfully present in the United States.

We do not have the documentation, but Melendez states (and the government does not dispute) that he has an approved I-130 Petition for Alien Relative filed by his United States citizen brother, and that his visa priority date is in 2003. In July 2016, Melendez filed a Form I-485 with the United States Citizenship and Immigration Services ("USCIS") seeking adjustment of his status to that of a lawful permanent resident and stated that an immigrant visa was immediately

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available. *See* 8 U.S.C. § 1255(a). USCIS denied his application in September 2017. It determined he could not adjust his status because from the date his visitor visa expired, March 2000, until his filing for TPS, August 2001, Melendez was not lawfully present in the United States.

In November 2017, Melendez filed suit in the United States District Court for the Southern District of Texas against the Secretary of the Department of Homeland Security (“DHS”) and two individuals in their official capacities with USCIS. To be clear, this suit does not concern Melendez’s imminent removal from the United States. He seeks a declaratory judgment that USCIS erred in its denial of his adjustment application. Melendez claimed both general federal question jurisdiction under 28 U.S.C. § 1331 and a right to sue under the Administrative Procedure Act, 5 U.S.C. §§ 701-706. The district court granted the government’s motion to dismiss for lack of jurisdiction. Melendez timely appealed.

DISCUSSION

I. Absence of Jurisdiction and Failure to State a Claim

The government moved for dismissal based on an absence of jurisdiction under Federal Rule of Civil Procedure 12(b)(1) and alternatively for failure to state a claim under Rule 12(b)(6). The district court held it lacked jurisdiction due to 8 U.S.C. § 1252(a)(2)(B)(i) and did not reach the merits question. Section

1252(a)(2)(B)(i) strips federal courts of jurisdiction to review “any judgment regarding the granting of relief under,” among others, Section 1255, which is the statute applicable to an adjustment of status. On appeal, the government abandons the argument that there is no jurisdiction, acknowledging one of our decisions in which we held the bar to reviewing a “judgment regarding the granting of relief” applies only to *discretionary* decisions. *Mireles-Valdez v. Ashcroft*, 349 F.3d 213, 215-16 (5th Cir. 2003). A decision as to “whether an alien satisfies the continuous presence requirement is a nondiscretionary determination.” *Id.* at 217. We hold, then, that the denial of Melendez’s adjustment application was a nondiscretionary decision based on the finding he was statutorily ineligible, making Section 1252(a)(2)(B)(i)’s jurisdictional bar inapplicable.

On appeal, the government again argues Melendez fails to state a claim and that we should affirm the dismissal of his complaint. Though the only ruling by the district court was based on jurisdiction, “[w]e are free to uphold the . . . judgment on any basis that is supported by the record.” *Zuspann v. Brown*, 60 F.3d 1156, 1160 (5th Cir. 1995). We now turn to whether Melendez has stated a claim.

Had the district court relied on this basis to dismiss, we would review *de novo*. *Mowbray v. Cameron Cnty.*, 274 F.3d 269, 276 (5th Cir. 2001). That necessarily also is our standard when, as here, the district court did not reach the issue and dismissed on a ground we do not accept. Melendez must have alleged “enough facts to state a claim to relief that is plausible

on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *see also* FED. R. CIV. P. 12(b)(6). In evaluating claims, we accept all well-pled facts as true and view all facts in the light most favorable to the plaintiff. *Doe ex rel. Magee v. Covington Cnty. Sch. Dist. ex rel. Keys*, 675 F.3d 849, 854 (5th Cir. 2012) (en banc). We do not give any weight to either party’s legal conclusions. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). We are not concerned with whether a plaintiff will succeed but only with whether the complaint states a plausible, legally cognizable claim. *Doe ex rel. Magee*, 675 F.3d at 854.

Melendez’s claim is that he is entitled to adjust status despite undisputed facts that the government argues make him ineligible. Thus, the issue under Rule 12(b)(6) is one of law. To adjust status, an alien must (1) have been “inspected and admitted or paroled into the United States;” (2) “ma[de] an application for . . . adjustment [of status];” (3) be “eligible to receive an immigrant visa and [be] admissible to the United States for permanent residence;” and (4) have “an immigrant visa . . . immediately available to him at the time [the] application is filed.” 8 U.S.C. § 1255(a).

Section 1255(c) lists those who are barred from eligibility for adjustment of status, including “an alien (other than an immediate relative as defined in section 1151(b) . . .) . . . who has failed (other than through no fault of his own or for technical reasons) to maintain continuously a lawful status since entry into the United States.” 8 U.S.C. § 1255(c)(2). It is clear that between the date Melendez began his visa overstay and

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at least the date he filed for TPS, he was not in lawful status. Also clear is that the two caveats in Section 1255(c) that we just quoted are inapplicable. The first applies to an alien who is “an immediate relative,” defined as “the children, spouses, and parents of a citizen of the United States.” 8 U.S.C. § 1151(b)(2)(A)(i). Melendez’s brother is the relative. The second applies if a failure to maintain continuous lawful status after entry was not the petitioner’s fault. *See* 8 C.F.R. § 1245.1(d)(2). No facts for that here.

Therefore, Melendez’s suit can survive a motion to dismiss for failure to state a claim only if the grant of TPS itself removed the ineligibility based on his earlier unlawful status. That is his argument, which we now review.

II. Temporary Protected Status

Melendez first recognizes that he is a beneficiary of the rights that flow from the Attorney General’s designating El Salvador as a foreign state “unable, temporarily, to handle adequately the return” of its nationals after a series of earthquakes in early 2001. *See* 8 U.S.C. 1254a(b)(1)(B); Designation of El Salvador Under Temporary Protected Status Program, 66 Fed. Reg. 14,214, 14,214 (Mar. 9, 2001); Termination of the Designation of El Salvador for Temporary Protected Status, 83 Fed. Reg. 2,654, 2,655 (Jan. 18, 2018). Second, he acknowledges that generally, in order to receive an adjustment of status, an alien must “maintain continuously a lawful status since entry into the United States.” 8 U.S.C.

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§ 1255(c)(2). Melendez has not done so, as he overstayed the visa that permitted his entry in 2000. Nonetheless, he argues that Congress has eliminated that requirement for those who have been granted TPS.

This contention is based on the following statutory subsection, entitled “Benefits and status during period of temporary protected status;”

During a period in which an alien is granted temporary protected status under this section –

(1) the alien shall not be considered to be permanently residing in the United States under color of law;

(2) the alien may be deemed ineligible for public assistance by a State . . . or any political subdivision thereof which furnishes such assistance;

(3) the alien may travel abroad with the prior consent of the Attorney General; and

(4) for purposes of adjustment of status under section 1255 of this title and change of status under section 1258 of this title, the alien shall be considered as being in, and maintaining, lawful status as a nonimmigrant.

8 U.S.C. § 1254a(f).

Melendez’s focus is on subpart (4), for what it says and for what it does not. It says that an alien granted TPS, when seeking an adjustment of status under Section 1255, is “considered” to be in “lawful status.” It

does not mention Section 1255(c)(2) or its requirement of continuous lawful status after entry. Thus, Melendez argues, because he had been granted TPS, he is in lawful status notwithstanding Section 1255(c).

This circuit has not previously had to address this issue. The Eleventh Circuit analyzed a closely related issue in *Serrano v. United States Attorney General*, 655 F.3d 1260 (11th Cir. 2011). Even though Serrano had received TPS, he was not entitled to adjust his status because he had entered the United States without inspection. *Id.* at 1263, 1265. The denial of adjustment of status to someone who had entered without inspection comes from Section 1255(a). The court held that even though an alien in TPS has “lawful status as a nonimmigrant” under the provision Melendez also relies on, the requirement under Section 1255(a) that the alien have been inspected and admitted or paroled still applied. *Id.* at 1265.

The Eleventh Circuit recently relied on *Serrano* in an appeal presenting the same legal argument Melendez brings to us. *Duron v. Stul*, 724 F. App’x 791, 795 (11th Cir. 2018). We agree with that court’s careful parsing of Section 1254a(f). As the court explained, the prefatory phrase for the four subparts of that statute limits their applicability to the “period in which an alien is granted temporary protected status under this section.” *Id.* at 794 (quoting § 1254a). We interpret that preface to mean that the statute does not alter the legal effect of other periods of an alien’s presence. Therefore, for the period the alien is in TPS, the alien is not “permanently residing in the United States under

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color of law;” “may be deemed ineligible for public assistance by a State;” “may travel abroad with the prior consent of the Attorney General;” and “shall be considered as being in, and maintaining, lawful status as a nonimmigrant” for purposes of adjustment of status. *Id.* Only for the period of the TPS—a temporal limit on its effect—an alien is “in, and maintaining, lawful status.” The statute does not read that aliens who now hold TPS should be regarded as “having been in and maintained” lawful status. What rights and status the alien had prior to the TPS period are the creatures of other statutes or rules.¹

Melendez recognizes that the difficulty with his challenge is the reality that for a period of time after his 2000 entry on a temporary visa, he was not in lawful status. What he needs is for the TPS to eliminate the relevance of that period of unlawful status. With that goal, he argues in essence that for purposes of adjustment of status, Section 1254a(f)(4) makes the date

¹ DHS interprets Section 1254a(f)(4) in this same way. *See* U.S. Dep’t of Justice, Immigration and Naturalization Service, General Counsel’s Office, Legal Opinion No. 91-27, 1991 WL 1185138 (March 4, 1991) (“Section 244A(f)(4) does not make lawful the alien’s unlawful presence in the United States prior to the granting of TPS.”); *see also* *Employer Sols. Staffing Grp. II, L.L.C. v. Office of Chief Admin. Hearing Officer*, 833 F.3d 480, 484 (5th Cir. 2016) (noting that the Department of Justice, Immigration and Naturalization Service is the “predecessor agency” to DHS).

Throughout his briefing, Melendez principally relies on one case, *Medina v. Beers*, 65 F. Supp. 3d 419 (E.D. Pa. 2014). There, the district judge analyzed these statutes in the manner Melendez urges. For the reasons we explain, though, we respectfully disagree.

of the grant of TPS a new entry. Such an argument has no statutory support. To the contrary, the fact that Section 1254a(f) identifies a finite period in which the benefits of TPS will operate makes unreasonable any argument that such status eliminates the effect of any prior disqualifying acts.

Indeed, we have concluded that should the Attorney General remove a country's special designation, an alien in TPS "reverts to any immigration status that he maintained or was granted while registered for TPS." *Orellana*, 405 F.3d at 365. It is entirely consistent with that contingent consequence that TPS does not absolve an alien of all prior unlawful conduct.

* * *

Melendez overstayed his nonimmigrant visitor visa, accruing time as an alien in unlawful status. That period made him ineligible for an adjustment of status. Consequently, as a matter of law, Melendez failed to state a claim upon which relief can be granted.

The judgment of the district court concluding there was no jurisdiction is VACATED. We enter judgment that the complaint be DISMISSED with prejudice.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

OSCAR ERNESTO	§	
MELLENDEZ,	§	
Plaintiff,	§	
v.	§	CIVIL ACTION NO.
KIRSTJEN M. NIELSEN,	§	H-17-3463
Secretary of Homeland	§	
Security, <i>et al.</i> ,	§	
Defendants.	§	

MEMORANDUM AND ORDER

(Filed May 9, 2018)

This case is before the Court on the Motion to Dismiss [Doc. # 10] filed by Defendants Kirstjen M. Nielsen, Secretary of the United States Department of Homeland Security, Lee F. Cissna, Director of the United States Citizenship and Immigration Services (“USCIS”), and Mark Seigl, Houston Field Office Director, USCIS. Defendants argue that the case should be dismissed pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure for lack of subject matter jurisdiction.¹ Plaintiff Oscar Ernesto Melendez filed an Opposition [Doc. # 11], and Defendants filed a Reply

¹ Defendants moved in the alternative for dismissal pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted. Because the Court lacks subject matter jurisdiction, it need not address the Rule 12(b)(6) aspect of Defendants’ motion.

[Doc. # 12]. Having reviewed the record, the applicable statutes, and the governing legal authorities, the Court **grants** the Motion to Dismiss.

I. BACKGROUND

Plaintiff is a citizen of El Salvador. He entered the United States on February 7, 2000, with a B1/B2 nonimmigrant visa. Plaintiff's visa expired on March 6, 2000, after which he remained in the United States without lawful status.

On March 9, 2001, the Attorney General of the United States designated El Salvador under the Temporary Protected Status ("TPS") program. TPS status prevents removal of an alien from the United States during the period of time the alien's home country is designated under the TPS program. *See* 8 U.S.C. § 1254a(a)(1)(A), (b)(1). Upon receiving TPS status, Plaintiff was deemed to be in lawful status. *See* 8 U.S.C. § 125440(4).

On July 11, 2016, Plaintiff submitted a Form I-485 seeking to adjust his status to lawful permanent resident pursuant to 8 U.S.C. § 1255. On September 26, 2017, Plaintiff's application was denied because he had not maintained continuous lawful status since his entry into the United States.² *See* Decision, Exh. to

² Plaintiff asserts that the "only basis" for the USCIS Decision was that "the agency did not consider TPS as an admission or inspection" for status adjustment under § 1255(a). *See* Complaint, ¶ 33. The Decision, however, is based on Plaintiff's failure

Motion to Dismiss. Under certain conditions, an alien's status may be adjusted by the Attorney General, "in his discretion and under such regulations as he may prescribe," to that of an alien lawfully admitted for permanent residence. *See* 8 U.S.C. § 1255(a). Under regulations governing adjustments to status pursuant to § 1255(a), certain categories of aliens are ineligible for adjustment of status to that of a lawful permanent resident alien. *See* 8 C.F.R. § 245.1. One such category includes, with certain exceptions:

Any alien who files an application for adjustment of status on or after November 6, 1986, *who has failed (other than through no fault of his or her own or for technical reasons) to maintain continuously a lawful status since entry into the United States. . . .*

8 C.F.R. § 245.1(b)(6) (emphasis added). Plaintiff's entry into the United States in February 2000 was lawful, but his lawful status ended in March 2000 when his visa expired. His status became lawful again in March 2001 when he was granted TPS status.

Although Plaintiff was given notice of his right to file a Form I-290B, Notice of Appeal or Motion, to challenge the denial of his Form I-485 application for adjusted status, Plaintiff failed to do so. As a result, the September 2017 Decision became final after thirty calendar days.

to maintain continuous lawful status since his entry into the United States.

On November 13, 2017, Plaintiff filed this Complaint for Declaratory and Injunctive Relief (“Complaint”) [Doc. # 1]. Plaintiff seeks a declaration that the final Decision to deny his Form I-485 application to adjust status pursuant to § 1255(a) was “arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with law.” See Complaint, ¶ 1. Plaintiff asks the Court to set aside the Decision and to order Defendants to reopen his Form I-485 application for adjusted status.

Defendants filed their Motion to Dismiss, asserting that the Court lacks subject matter jurisdiction to review the Decision. The Motion to Dismiss has been fully briefed, and it is now ripe for decision.

II. RULE 12(b)(1) MOTION TO DISMISS

“A case is properly dismissed for lack of subject matter jurisdiction when the court lacks the statutory or constitutional power to adjudicate the case.” *Smith v. Regional Transit Auth.*, 756 F.3d 340, 347 (5th Cir. 2014) (quoting *Krim v. pcOrder.com, Inc.*, 402 F.3d 489, 494 (5th Cir. 2005)). When the court’s subject matter jurisdiction is challenged, the party asserting jurisdiction bears the burden of establishing it. See *Alabama-Coushatta Tribe of Tex. v. U.S.*, 757 F.3d 484, 487 (5th Cir. 2014); *Gilbert v. Donahou*, 751 F.3d 303, 307 (5th Cir. 2014).

This Court lacks subject matter jurisdiction pursuant to 8 U.S.C. § 1252(a)(2)(B)(i), which provides:

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), . . . no court shall have jurisdiction to review – (i) any judgment regarding the granting of relief under section . . . 1255 of this title.

8 U.S.C. § 1252(a)(2)(B)(i); *see also Ayanbadejo v. Chertoff*, 517 F.3d 273, 277 (5th Cir. 2008). Indeed, the statute makes clear that this Court lacks “jurisdiction over determinations made with respect to an I-485 application for permanent resident status under § 1255.” *See id.* (citing *Hadwani v. Gonzales*, 445 F.3d 798, 800 (5th Cir. 2006)).

Plaintiff argues that the Court has jurisdiction under the Administrative Procedure Act (“APA”), asserting that the APA provides jurisdiction to review agency decisions “for which there is no other adequate remedy.” *See* Opposition, pp. 2-3. Initially, the Court notes that the reason there arguably is “no other adequate remedy” is that Plaintiff elected not to pursue his available remedy through a Form I-290B motion to reopen and reconsider the USCIS Decision. Moreover, the clear language of § 1252(a)(2)(B)(i) precludes judicial review “notwithstanding any other provision of law (statutory or nonstatutory).” Additionally, the APA does not provide a basis for federal question jurisdiction where the statute at issue “precludes judicial review.” *See* 5 U.S.C. § 701(a); *id.*, § 702 (“Nothing herein . . . affects other limitations on judicial review”);

Webster v. Doe, 486 U.S. 592, 599 (1988) (“Section 701(a), however, limits application of the entire APA to situations in which judicial review is not precluded by statute”); *Lundeen v. Mineta*, 291 F.3d 300, 304 (5th Cir. 2002) (“The APA expresses a broad exception, however, to its general rule: courts may not review an agency action when the “(1) statutes preclude judicial review”). Section 1252(a)(2)(B)(i) precludes judicial review of decisions made with respect to an I-485 application for permanent resident status under § 1255 and, therefore, the APA does not provide this Court with jurisdiction.

Plaintiff argues also that he is challenging the legal conclusions in the Decision, not any discretionary rulings. Indeed, “constitutional claims or questions of law” related to claims under § 1252(a)(2)(B) are excluded from the category of non-reviewable decisions left to the discretion of the Attorney General. *See* 8 U.S.C. § 1252(a)(2)(D); *Ayanbadejo*, 517 F.3d at 277 n.11. That provision, however, does not provide this Court with jurisdiction. Instead, the issues subject to the § 1252(a)(2)(D) exception must be presented “upon a petition for review filed with an appropriate **court of appeals** in accordance with this section.” *See* 8 U.S.C. § 1252(a)(2)(D) (emphasis added). Consequently, any jurisdiction to review the USCIS Decision based on “constitutional claims or questions of law” lies with the Court of Appeals and not with the district court.

This Court lacks subject matter jurisdiction over Plaintiff’s Complaint seeking review of the USCIS decision denying his I-485 application for permanent

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resident status under § 1255. As a result, the case must be dismissed pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure.

III. CONCLUSION AND ORDER

Pursuant to 8 U.S.C. § 1252(a)(2)(B)(i), and the Fifth Circuit's holding in *Ayanbadejo*, this Court lacks subject matter jurisdiction to review the denial of Plaintiff's Form I-485 application seeking to adjust his immigration status to lawful permanent resident. As a result, it is hereby

ORDERED that the Motion to Dismiss [Doc. # 10] is **GRANTED** and this case is **DISMISSED** for lack of subject matter jurisdiction. The Court will issue a separate Final Order.

SIGNED at Houston, Texas, this **9th** day of **May**, **2018**.

/s/ Nancy F. Atlas
NANCY F. ATLAS
SENIOR UNITED STATES
DISTRICT JUDGE

APPENDIX C

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- Be admissible to the United States for permanent residence; and
- Have an immigrant visa immediately available at the time the application is filed.

**Statement of Facts and Analysis,
Including Ground(s) for Denial**

You filed Form I-485 based on being the beneficiary of an immigrant petition.

USCIS received your Form I-485 on July 11, 2016 and on September 15, 2017, you appeared for an interview to determine your eligibility for adjustment of status. During the interview and review of your application with an Immigration Services Officer, you testified that the information on your Form I-485, along with any amendments made during the adjustment interview, and supporting documents were true and correct.

You are ineligible for adjustment of status under INA 245. Documentary evidence establishes that you have failed to continuously maintain a lawful status since entry into the United States. Specifically [sic], from March 6, 2000 (the expiration of your B1/B2 visa until your original filing of TPS (Temporary Protected Status) on August 13, 2001 you did not maintain lawful status. INA 245(c)(2) and 8 CFR 245.1(b)(6) establish that any alien who files an application for adjustment of status on or after November 6, 1986, who has failed (other than through no fault of his or her own or for technical reasons) to maintain continuously [sic] a lawful status since entry into the United States, except

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an applicant who is an immediate relative as defined in section 201(b) of the Act or a special immigrant as defined in section 101(a)(27)(H), (I), or (J) of the Act is ineligible for adjustment of status under INA 245.

The evidence of record shows that currently, you were lawfully present in the United States in a Temporary Protected Status (TPS). Your period of authorized stay in this status depends on annual re-registration or renewal of temporary treatment benefits. You are authorized to remain in the United States until the conclusion of your TPS status. However, you must continue to comply with all the conditions that apply to your TPS status. You may not appeal this decision. However, if you believe that the denial of your Form I-485 is in error, you may file a motion to reopen or a motion to reconsider using Form I-290B, Notice of Appeal or Motion. You must submit Form I-290B within 30 calendar days of service of this decision (33 days if the decision was mailed). If USCIS does not receive the motion to reopen or reconsider within the required period, this decision will become final. See Title 8, Code of Federal Regulations (8 CFR), sections 103.5 and 103.8(b). Note: You must follow the most current filing instructions for Form I-290B, which can be found at www.uscis.gov.

To access Form I-290B or if you need additional information, please visit the USCIS Web site at www.uscis.gov or call our National Customer Service Center toll free at 1-800-375-5283. You may also contact the USCIS office having jurisdiction over your current place of residence.

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Please refer to "Attachment A," for information pertaining to the status of any employment authorization document and/or advance parole document issued to you based upon this Form I-485.

Sincerely,

/s/ Mark Siegl

Mark Siegl
Field Office Director

cc: Ricardo Tapia
Attorney
2200 Southwest Fwy, STE 550
Houston, TX 77098

[Attachments Omitted]
