No. 20-315

In the Supreme Court of the United States

JOSE SANTOS SANCHEZ AND SONIA GONZALEZ,
PETITIONERS,

v.

ALEJANDRO N. MAYORKAS, SECRETARY, UNITED STATES DEPARTMENT OF HOMELAND SECURITY, ET AL.,
RESPONDENTS.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether, under 8 U.S.C. § 1254a(f)(4), a grant of Temporary Protected Status authorizes eligible noncitizens to obtain lawful-permanent-resident status under 8 U.S.C. § 1255.

PARTIES TO THE PROCEEDINGS

Petitioners are Jose Santos Sanchez and Sonia Gonzalez. Respondents are Alejandro N. Mayorkas, Secretary, United States Department of Homeland Security; Director, United States Citizenship & Immigration Services; Director, United States Citizenship & Immigration Services Nebraska Service Center; and District Director, United States Citizenship & Immigration Services Newark.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 967 F.3d 242. Pet. App. 1a-20a. The opinion of the district court is unreported and available at 2018 WL 6427894 (D.N.J. Dec. 7, 2018). Pet. App. 21a-38a. The decisions of United States Citizenship and Immigration Services (USCIS) denying petitioners' applications to become lawful permanent residents are unreported. Pet. App. 39a-51a.

JURISDICTION

The judgment of the court of appeals was entered on July 22, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 244 and 245 of the INA, 8 U.S.C. §§ 1254a, 1255, and other relevant provisions of the INA and accompanying regulations are set forth in the appendix.

STATEMENT

Under the Immigration and Nationality Act (INA), lawful permanent residents, or "green card" holders, are foreign nationals authorized to live in the country permanently. Nonimmigrants, by contrast, are persons authorized to reside in the United States temporarily, for example as tourists, students, or temporary workers. Nonimmigrants may become lawful permanent residents if they have a basis for that status, such as a sponsoring spouse or employer. 8 U.S.C. § 1255. The process of obtaining lawful-permanent-resident status is called "adjustment of status."

Section 1255, titled "Adjustment of status of nonimmigrant to that of person admitted for permanent residence," governs adjustment of status. The statute provides in relevant part that individuals who are "inspected and admitted or paroled" are eligible to adjust status. 8 U.S.C. § 1255(a). All nonimmigrants are necessarily inspected and admitted because inspection and admission is how a person obtains nonimmigrant status under the INA.

This case presents the question of which recipients of temporary protected status (TPS) are eligible to adjust to lawful-permanent-resident status. Congress created TPS

to protect foreign nationals residing in the United States during humanitarian crises in their home countries. Although TPS recipients may live and work in the United States while their TPS remains in effect, they do not have nonimmigrant status by virtue of receiving TPS. The INA instructs, however, that "for purposes of adjustment of status," TPS recipients "shall be considered as being in, and maintaining, lawful status as a nonimmigrant." 8 U.S.C. § 1254a(f)(4).

Petitioners Jose Sanchez and Sonia Gonzalez, natives of El Salvador, entered the country unlawfully in the 1990s. They have held TPS for nearly two decades. Mr. Sanchez developed skills in short supply in the U.S. economy. His employer successfully petitioned for him to obtain a visa, and Mr. Sanchez applied for lawful-permanent-resident status. The government denied Mr. Sanchez's application. Notwithstanding section 1254a(f)(4)'s command to consider TPS recipients as "being in, and maintaining, lawful status as a nonimmigrant," the government determined that petitioners could not adjust status because they were not "inspected and admitted" when they initially entered the country.

That position seriously misinterprets section 1254a(f)(4). Under that section, TPS recipients are considered to have "lawful status as a nonimmigrant" for purposes of adjusting status under section 1255. A person with "lawful status as a nonimmigrant" is "inspected and admitted" because inspection and admission is how an individual obtains nonimmigrant status. Therefore, TPS recipients are considered inspected and admitted for purposes of section 1255.

The government claims that section 1254a(f)(4) serves the limited purpose of "maintaining" nonimmigrant status for individuals *already* in nonimmigrant status when they

received TPS. Under that interpretation, section 1254a(f)(4) has only one function: to allow people who already had nonimmigrant status when they received TPS to overcome a prohibition on adjustment of status for individuals who fail "to maintain continuously a lawful status since entry into the United States." 8 U.S.C. § 1255(c)(2). But section 1254a(f)(4) by its terms applies to *all* TPS recipients—not only those who entered legally—and for purposes of the *entirety* of section 1255—not only subsection (c)(2). Had Congress intended only to maintain nonimmigrant status for individuals who already had nonimmigrant status, Congress would have used only the word "maintaining." In fact, Congress wrote provisions in contemporaneous legislation to allow individuals who already had nonimmigrant status to "maintain" that status for purposes of adjusting status. In section 1254a(f)(4), by contrast, Congress wrote that TPS recipients are considered as "*being in*, and maintaining," lawful nonimmigrant status, and it did not limit the benefit of section 1254a(f)(4) to persons who already have nonimmigrant status.

The government's position cannot be reconciled with the statutory text. Its position renders section 1254a(f)(4) a nullity for many TPS recipients. And the government's position would thwart the statute's purpose by requiring TPS recipients to return to their still-unsafe countries to seek lawful-permanent-resident status.

A. Statutory Background

This case involves three kinds of immigration status: (1) lawful-permanent-resident, or "green card," status; (2) nonimmigrant status; and (3) temporary protected status. Lawful-permanent-resident status, as its name indicates, is permanent. Nonimmigrant status and TPS are both temporary. Eligible nonimmigrants and TPS recipients

can switch to lawful-permanent-resident status through a process called "adjustment of status." The question presented is whether TPS recipients who initially entered the country unlawfully may adjust status if otherwise eligible.

1. **Lawful-Permanent-Resident Status and Adjustment of Status.** Lawful permanent residents are people authorized to live permanently in the United States. *See* 8 U.S.C. § 1101(a)(20). They may live and work here, and may apply to become citizens after satisfying certain requirements.

Lawful-permanent-resident status is available only to limited groups of individuals. *See* 8 U.S.C. § 1151(a). Often, individuals obtain lawful-permanent-resident status through a sponsoring family member; a subset of family members (for example, the spouses of U.S. citizens) receive special treatment as "immediate relatives." DHS, *Annual Flow Report, U.S. Lawful Permanent Residents: 2019* 1 (2020). Others obtain lawful-permanent-resident status through a sponsoring employer. *Id.* at 2. Most employment-based immigration requires an advance certification from the Department of Labor that there are insufficient American workers to do the job and that the employment will not adversely affect wages and working conditions of similarly employed Americans. *Id.*; 20 C.F.R. § 656.1(a).

Except for people who obtain status through an immediate family member and other categories exempted by statute, all people seeking lawful-permanent-resident status are subject to annual numerical and per-country caps. *See* 8 U.S.C. §§ 1151(a)-(e), 1152(a)(2). For example, the INA generally caps employment-based immigration at 140,000 persons annually. 8 U.S.C. § 1151(d).

There are two paths to lawful-permanent-resident status. People living outside the United States may apply for an immigrant visa at an overseas consular office. *See* USCIS Policy Manual, Vol. 7, Pt. A, Ch. 1 (Feb. 10, 2021). People already inside the United States as nonimmigrants (for example, students) may apply directly to USCIS to "adjust" to lawful-permanent-resident status. 8 U.S.C. § 1255. Nonimmigrant status, therefore, is a stepping stone to lawful-permanent-resident status, but only when a nonimmigrant has a valid basis for a status change, satisfies all eligibility requirements, and is not subject to a statutory bar. The numerical caps apply collectively to both paths. 8 U.S.C. § 1151(a).

Section 1255, titled "Adjustment of status of nonimmigrant to that of person admitted for permanent residence," governs adjustment of status. The statute provides that persons "inspected and admitted or paroled"[1] are eligible to adjust status on three conditions: (1) the applicant must "make[] an application for such adjustment," (2) he must be "eligible to receive an immigrant visa and . . . admissible to the United States for permanent residence," and (3) "an immigrant visa [must be] immediately available to him at the time his application is filed." 8 U.S.C. § 1255(a).

For applicants seeking lawful-permanent-resident status through employer sponsorship, as here, an applicant's employer first files an immigrant-visa petition with USCIS. 8 U.S.C. § 1154(a)(1)(F); 8 C.F.R. § 204.5. If

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[1] Parole, not at issue here, is conditional permission to enter the United States temporarily, granted on "a case-by-case basis for urgent humanitarian reasons or significant public benefit." 8 U.S.C. § 1182(d)(5)(A).

USCIS approves the petition, the applicant can then apply to adjust to lawful-permanent-resident status when a visa becomes available. 8 C.F.R. §§ 204.5(n), 245.2.

Section 1255(c)(2) imposes additional limitations on many categories of applicants (including employment-based applicants). Under that section, applicants cannot adjust status if they (1) "accept[] unauthorized employment prior to filing an application for adjustment of status," (2) are "in unlawful immigration status on the date of filing the application for adjustment of status," or (3) have "failed (other than through no fault of [their] own or for technical reasons) to maintain continuously a lawful status since entry into the United States." 8 U.S.C. § 1255(c)(2). Section 1255(c)(2) does not apply to people seeking to adjust status based on immediate family relationships. *Id.*; 8 U.S.C. § 1151(b)(2).

Section 1255(k) provides an important exception to section 1255(c)(2)'s prohibition for employment-based applicants (like petitioners) who are, "on the date of filing an application for adjustment of status," "present in the United States pursuant to a lawful admission" and "subsequent to such lawful admission [have] not, for an aggregate period exceeding 180 days," "failed to maintain, continuously, a lawful status," "engaged in unauthorized employment," or "otherwise violated the terms and conditions" of their admission. 8 U.S.C. § 1255(k). Section 1255(k) is not available to other categories of individuals subject to section 1255(c)(2), such as those seeking to adjust status based on non-immediate family relationships.

In sum, applicants for adjustment of status must satisfy the three enumerated requirements in section 1255(a). Persons other than those applying based on an immediate family relationship must additionally satisfy

section 1255(c)(2). Employment-based applicants like petitioners, however, can overcome section 1255(c)(2) by satisfying the exception in section 1255(k).

2. **Nonimmigrant status.** Nonimmigrants are individuals admitted temporarily to the United States within specific classes of admission defined in the INA. *See* 8 U.S.C. § 1101(a)(15). Tourists, business travelers, students, and temporary workers all are nonimmigrants. *Id.* The class of admission determines how long nonimmigrants can stay in the United States and what they can do here. *See* 8 U.S.C. § 1184(a).[2]

Obtaining nonimmigrant status entails two steps. First, before traveling to the United States, a person must acquire a visa or other form of authorization from a consular office overseas (unless his country participates in the U.S. Visa Waiver Program). DHS, *Annual Flow Report, U.S. Nonimmigrant Admissions: 2019* 2 (2020). Second, the person must then be *admitted* into the country by an immigration officer. *Id.* A person obtains nonimmigrant status upon admission. *See* 8 U.S.C. § 1184(a)(1), (b).

3. **Temporary Protected Status.** TPS provides humanitarian relief to foreign nationals present in the United States who cannot safely return to their native countries because of armed conflict, natural disaster, or similar extraordinary conditions. 8 U.S.C. § 1254a. Individuals are eligible for TPS whether or not they entered the country lawfully. Before 1990, the Executive Branch used ad hoc policies to permit such individuals to remain here temporarily. *See* H.R. Rep. No. 101-244, at 7-8 (1989). Congress established the statutory TPS program

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[2] *See also* https://www.dhs.gov/immigration-statistics/nonimmigrant/NonimmigrantCOA.

in the Immigration Act of 1990 (the "Act"). Pub L. No. 101-649, § 302, 104 Stat. 4978, 5030-36.

a. Before individuals can obtain TPS, the Secretary of Homeland Security must designate a foreign country for the TPS program. 8 U.S.C. § 1254a(b). An initial TPS designation lasts between six and eighteen months. 8 U.S.C. § 1254a(b)(2). The Secretary then reviews the designation and either extends it for another term or terminates it if conditions in the country are no longer unsafe. 8 U.S.C. § 1254a(b)(3). The law imposes no limits on successive extensions.

Ten countries currently have TPS designations: El Salvador, Haiti, Honduras, Nepal, Nicaragua, Somalia, South Sudan, Sudan, Syria, and Yemen.[3] The Secretary designated these countries for different reasons and at different times. Syria, for example, received a designation in 2012 based on "the Syrian military's violent suppression of opposition to President Bashar al-Assad's regime." 84 Fed. Reg. 49,751, 49,752 (Sept. 23, 2019). The Secretary designated Haiti in 2010 after an earthquake devastated the country. 75 Fed. Reg. 3476, 3477 (Jan. 21, 2010).

The government has terminated TPS designations for twelve countries.[4] For example, Ebola-related designations for Liberia, Sierra Leone, and Guinea terminated in 2017. 81 Fed. Reg. 66,054, 66,059, 66,064 (Sept. 26, 2016).

El Salvador was the first country designated for TPS and the only country designated directly by Congress. *See* Act, § 303, 104 Stat. 5036-38. Throughout the 1980s, El Salvador's U.S.-backed government fought a civil war

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[3] https://www.uscis.gov/humanitarian/temporary-protected-status.

[4] https://www.justice.gov/eoir/temporary-protected-status.

against communist insurgents. Cong. Rsch. Serv., RL43616, *El Salvador: Background and U.S. Relations* (July 1, 2020). Many Salvadorans fled to the United States and entered the country unlawfully. By 1989, "approximately 500,000 undocumented Salvadorans" resided in this country. H.R. Rep. No. 101-244, at 11 (1989).

El Salvador's initial designation lapsed in 1992. In early 2001, earthquakes in El Salvador killed more than 1,100 people and left 1.2 million homeless. Dep't of State, *El Salvador: Country Reports on Human Rights Practices – 2001* (Mar. 4, 2002). As a result, El Salvador received a new TPS designation in 2001. 66 Fed. Reg. 14,214, 14,214-16 (Mar. 9, 2001). The government has repeatedly extended that designation, in part due to high levels of "criminal gang activity," "[m]urder, extortion, and robbery." 81 Fed. Reg. 44,645, 44,647 (July 8, 2016); *see also, e.g.*, 75 Fed. Reg. 39,556, 39,558 (July 9, 2010). The designation remains in force today.[5]

b. To qualify for TPS, an individual must reside in the United States on the effective date of his country's designation. 8 U.S.C. § 1254a(c)(1)(A)(i); 8 C.F.R. § 244.2(b), (c). For Salvadorans like petitioners, that means being "continuously physically present" in the United States since March 9, 2001, and having "continuously resided"

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[5] In 2018, the then-Secretary announced the termination of TPS for El Salvador, effective September 2019. 83 Fed. Reg. 2654, 2655-56 (Jan. 18, 2018). A federal district court enjoined the termination. *Ramos v. Nielsen*, 336 F. Supp. 3d 1075 (N.D. Cal. 2018). The Ninth Circuit reversed, *Ramos v. Wolf*, 975 F.3d 872 (9th Cir. 2020), but a rehearing petition is pending. On February 16, 2021, the Ninth Circuit stayed the case for sixty days in light of the change of administration. Order, *Ramos v. Wolf*, No. 18-16981 (Feb. 16, 2021). Meanwhile, Salvadorans retain TPS through at least October 4, 2021, and for as long as the injunction remains in effect. 85 Fed. Reg. 79,208 (Dec. 9, 2020).

here since February 13, 2001. 66 Fed. Reg. at 14,214. TPS is not available to persons who arrive in the United States from designated countries after the designation occurs, and Congress specified that the Act does not authorize individuals to travel to the United States to seek TPS. 8 U.S.C. § 1254a(c)(1), (5).

Even for qualifying individuals, TPS is not automatic. One must apply for TPS within a specified timeframe. 8 U.S.C. § 1254a(c)(1)(A)(iv); 8 C.F.R. § 244.2(f). Applicants must establish that, subject to certain exceptions, they satisfy the eligibility criteria for admission as immigrants. 8 U.S.C. § 1254a(c)(1)(A)(iii), (c)(2)(A); 8 C.F.R. §§ 244.2(d), 244.3. The TPS statute also imposes additional eligibility criteria, above and beyond the generally applicable criteria; for example, any felony conviction or two misdemeanor convictions disqualify a person from obtaining TPS. 8 U.S.C. § 1254a(c)(2)(B). The Secretary also can deny TPS on national-security, among other, grounds. 8 U.S.C. § 1254a(c)(2)(B)(ii) (referencing 8 U.S.C. § 1158(b)(2)(A)).

An applicant may obtain TPS no matter how he entered the United States. The Act authorizes the Secretary to waive unlawful entry into the United States in order to grant TPS. 8 U.S.C. § 1254a(c)(2)(A); 8 C.F.R. § 244.3.

The application process is rigorous. The application, Form I-821, spans thirteen pages and requires the applicant to answer over 100 questions.[6] The Form requires the applicant to disclose whether he had a lawful immigration status when he entered the country. USCIS may require the applicant to appear for an interview before an

[6] USCIS, Application for Temporary Protected Status (July 3, 2019), https://www.uscis.gov/sites/default/files/document/forms/i-821.pdf.

immigration officer. 8 C.F.R. § 244.8. The agency also may require documentary support of eligibility. *Id.*

An individual granted TPS must periodically re-register and attest to his continuing eligibility for TPS. 8 C.F.R. § 244.17. USCIS may request additional supporting documents. *Id.* If the individual fails to re-register, USCIS will withdraw TPS. *Id.*

c. TPS is not itself a form of nonimmigrant status; accordingly, unlike many classes of nonimmigrants, TPS recipients cannot leave and re-enter the United States without the government's advance permission. *See* 8 U.S.C. § 1254a(f)(3). But they cannot be removed from the United States and are authorized to work here during their country's TPS designation. 8 U.S.C. § 1254a(a)(1), (2). The Act also specifies the "[b]enefits and status during period of temporary protected status." 8 U.S.C. § 1254a(f). One benefit is that, "for purposes of adjustment of status under section 1255," TPS recipients "shall be considered as being in, and maintaining, lawful status as a nonimmigrant." 8 U.S.C. § 1254a(f)(4). The Act thus directs the government to treat TPS recipients like nonimmigrants when they apply to adjust status. The same provision also applies "for purposes of . . . change of status under section 1258," which is a process by which someone with one class of nonimmigrant status can switch to a different class of nonimmigrant status.

B. Factual Background

1. Petitioners Jose Santos Sanchez and Sonia Gonzalez are a married couple living in New Jersey. C.A. App. 62, 134, 278. They are natives of El Salvador but have lived in the United States for more than twenty years. C.A. App. 278. They have four sons; the youngest was born in the United States and is a U.S. citizen. C.A. App.

66. Petitioners initially entered the United States in the late 1990s unlawfully, without inspection. C.A. App. 278.[7]

Following El Salvador's TPS designation in 2001, petitioners applied for and were granted TPS. They have maintained that status ever since. C.A. App. 278.

In 2006, Viking Yachts filed an employment-based immigration petition for Mr. Sanchez based on his position as a skilled worker. C.A. App. 71. USCIS approved the petition. *Id.* In 2014, Mr. Sanchez applied to adjust to lawful-permanent-resident status. C.A. App. 65-71. Ms. Gonzalez applied for adjustment as a derivative. C.A. App. 138-42. USCIS denied petitioners' applications. C.A. App. 52-54, 124-26. It determined that Mr. Sanchez was ineligible for adjustment of status because he had "never been admitted into the United States" and thus did not meet section 1255(a)'s requirement that an applicant be "inspected and admitted or paroled." C.A. App. 53. USCIS also denied Ms. Gonzalez's derivative application. C.A. App. 124-26.

2. Petitioners filed suit in federal district court in 2015. C.A. App. 163-73. They claimed that USCIS's decision was "not in accordance with law" under the Administrative Procedure Act. C.A. App. 171-72. In response, USCIS reopened petitioners' applications. C.A. App. 50, 122. USCIS issued final decisions again denying petitioners' applications in 2017. Pet. App. 39a-51a.

The parties returned to the district court. The district court granted summary judgment to petitioners. Pet. App. 21a-38a. The court held that, under section

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[7] Following their receipt of TPS, the government authorized petitioners to travel abroad and paroled them back into the United States. C.A. App. 278. Petitioners' prior entries by parole are not relevant to the question presented in the circumstances of this case.

1254a(f)(4), TPS recipients are inspected and admitted for purposes of adjustment of status under section 1255(a).

3. The Third Circuit reversed. Pet. App. 1a-20a. The court reasoned that admission and status are "distinct" concepts in immigration law. Pet. App. 6a. The court asserted that status "is not the same" as admission, which, according to the court, refers to "the physical event of entering the country." Pet. App. 7a (internal quotation marks omitted). On that basis, the Third Circuit held that an individual "considered as being in . . . lawful status as a nonimmigrant" is not considered admitted for purposes of adjusting status under section 1255(a). Pet. App. 6a-7a. The Third Circuit also concluded that, because petitioners were not "admitted," they likewise did not satisfy section 1255(k), which, as discussed above, excepts employment-based applicants from the statutory bar in section 1255(c)(2). Pet. App. 20a n.7; *see* p.7, *supra*.

The court believed that the statutory structure supported its reading. Pet. App. 9a-11a. And, as to the statutory purpose, the court stated that TPS was meant to be temporary and that considering a grant of TPS as an admission would "open the door to more permanent status adjustments that Congress did not intend." Pet. App. 11a.[8]

SUMMARY OF ARGUMENT

TPS recipients are considered "inspected and admitted" for purposes of adjusting to lawful-permanent-resident status.

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[8] Since the decision below, the Eighth Circuit has adopted petitioners' position. *Velasquez v. Barr*, 979 F.3d 572 (8th Cir. 2020). The Fifth Circuit recently agreed with the government's. *Solorzano v. Mayorkas*, --- F.3d ---, 2021 WL 365830, at *5 (5th Cir. Feb. 3, 2021).

I. Section 1255 provides that a person "who was inspected and admitted or paroled" may adjust to lawful-permanent-resident status if he meets certain criteria. 8 U.S.C. § 1255(a). All nonimmigrants are eligible to adjust status under section 1255 because they necessarily are inspected and admitted. Section 1254a(f)(4) mandates that TPS recipients "shall be considered as being in, and maintaining, lawful status as a nonimmigrant" "for purposes of adjustment of status under section 1255." That language unambiguously puts TPS recipients on the same footing as nonimmigrants when adjusting status. Because persons with "lawful status as a nonimmigrant" are inspected and admitted, the Act treats TPS recipients like petitioners as inspected and admitted for purposes of adjusting status. Petitioners accordingly are eligible to adjust status under section 1255(a), and they likewise satisfy section 1255(k)'s requirement that they be "present in the United States pursuant to a lawful admission" and maintained lawful status since "lawful admission."

In reaching a contrary conclusion, the Third Circuit reasoned that, because admission and status are distinct concepts, an individual considered as being in lawful nonimmigrant status is not admitted. That analysis is incorrect. All persons with lawful nonimmigrant status are, by definition, admitted. Neither the statutory definition of "admission" nor any of the other provisions of section 1255 on which the Third Circuit relied supports its conclusion that TPS recipients are not considered admitted for purposes of section 1255.

For its part, the government argues that section 1254a(f)(4) serves only one limited purpose: *maintaining* lawful nonimmigrant status for the limited group of TPS recipients who initially entered the country lawfully, as nonimmigrants, before receiving TPS. The only reason

section 1254a(f)(4) exists, the government argues, is to avoid the bar in section 1255(c)(2), which prevents certain individuals who failed "to maintain continuously a lawful status since entry into the United States" from adjusting status. But section 1254a(f)(4) by its terms applies to *all* TPS recipients (not only those who entered legally) and for purposes of the *entirety* of section 1255 (not only subsection (c)(2)). Had Congress intended that section 1254a(f)(4) serve only the narrow purpose of avoiding the section 1255(c)(2) bar, Congress would have used only the word "maintaining," instead of "being in, and maintaining," and would have limited the provision to persons already in nonimmigrant status. In fact, in other contemporaneous legislation, Congress wrote provisions that maintained the nonimmigrant status of persons who already had that status, using only the word "maintaining." The government's reading flouts Congress' deliberate decision to confer a more expansive benefit on all TPS recipients in section 1254a(f)(4).

II. The larger statutory context confirms the plain-text interpretation. Congress knew that the initial beneficiaries of the TPS program included many persons who entered the country unlawfully, and it conferred the benefit of section 1254a(f)(4) on all TPS recipients. Allowing qualifying TPS recipients to adjust status without leaving the United States furthers the statutory purpose of protecting people like petitioners whose native countries are unsafe. And, contrary to the Third Circuit's suggestion, petitioners' interpretation does not put *all* TPS recipients on a path to permanent residence. Like all other people with nonimmigrant status, a TPS recipient must have a valid, independent basis for adjusting status and satisfy detailed eligibility criteria.

The Act's history confirms petitioners' interpretation of section 1254a(f)(4). The Senate draft bill contained the language Congress could have written, but did not write, in section 1254a(f)(4): certain nonimmigrants were considered to have *maintained* their prior lawful status when it came time to adjust. The House rejected that language in favor of the current, broader language: "being in, and maintaining." The Third Circuit's interpretation would effectively resurrect the provision Congress rejected.

III. The Court should not defer under *Chevron, U.S.A., Inc. v. Natural Resource Defense Council, Inc.*, 467 U.S. 837 (1984), to two recent agency adjudications. As an initial matter, the statute is unambiguous, foreclosing any deference. Even were the statute ambiguous, the agency adjudications do not exercise congressionally delegated authority to make rules carrying the force of law; one resulted from informal adjudication and does not carry the force of law, and the other does not even present the question at issue here. The decisions, moreover, are so riddled with flaws that they have no power to persuade under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

ARGUMENT

I. Sections 1254a and 1255 Allow Eligible TPS Recipients To Adjust Status

Statutory interpretation begins and ends with the text. *Culbertson v. Berryhill*, 139 S. Ct. 517, 521 (2019). TPS recipients unambiguously are considered "inspected and admitted" for purposes of adjusting status under section 1255. The Third Circuit's contrary reasoning misunderstands what it means for TPS recipients to "be[] in" "lawful status as a nonimmigrant" for purposes of adjusting status. The government's illogically narrow interpretation of section 1254a(f)(4), moreover, violates fundamental canons of construction.

A. TPS Recipients Are "Inspected and Admitted" for Purposes of Adjusting Status

Two statutory provisions control this case. The first, section 1255, is titled "Adjustment of status of nonimmigrant to that of person admitted for permanent residence." Section 1255(a) allows a person "who was inspected and admitted or paroled" to adjust to lawful-permanent-resident status if he meets three criteria. 8 U.S.C. § 1255(a). All nonimmigrants are eligible to adjust status under section 1255(a) if they meet the statutory requirements because nonimmigrants are "inspected and admitted."

The second provision is section 1254a(f)(4). Under that provision, TPS recipients "shall be considered as being in, and maintaining, lawful status as a nonimmigrant" "for purposes of adjustment of status under section 1255." Because an individual must be inspected and admitted to be in nonimmigrant status, *see, e.g.*, 8 U.S.C. § 1184(a)(1), (b), section 1254a(f)(4) gives rise to a simple syllogism that resolves this case in petitioners' favor: (1) for purposes of adjustment of status, TPS recipients are considered to be lawful nonimmigrants; (2) lawful nonimmigrants are inspected and admitted; therefore (3) for purposes of adjustment of status, TPS recipients are considered inspected and admitted, and may adjust status under section 1255.

1. Section 1255(a) authorizes individuals who are "inspected and admitted" to adjust status if they meet three enumerated criteria. Nonimmigrants are necessarily "inspected and admitted" because a person cannot be in lawful nonimmigrant status without inspection and admission.

Throughout the INA, Congress referred to nonimmigrants as "admitted" and to the grant of nonimmigrant

status as "admission." Section 1184 governs the "[a]dmission of nonimmigrants." The first sentence of that provision states that "*admission* to the United States of any alien as a *nonimmigrant* shall be for such time and under such conditions as the Attorney General may by regulations prescribe." 8 U.S.C. § 1184(a)(1) (emphases added). Elsewhere in section 1184, Congress confirmed that the grant of nonimmigrant status is an admission: an "alien . . . shall be presumed to be an immigrant until he establishes . . . *at the time of application for admission*, that he is entitled to a nonimmigrant *status*." 8 U.S.C. § 1184(b) (emphases added); *see also* 8 U.S.C. § 1184(g)(4) (defining "the period of authorized admission as such a nonimmigrant").

Other sections are similar. Section 1187, for instance, institutes a visa-waiver program for nonimmigrant visitors and provides that individuals "previously . . . admitted without a visa under this section . . . must not have failed to comply with the conditions of any previous *admission* as such a *nonimmigrant*." 8 U.S.C. § 1187(a)(7) (emphases added); *see also* 8 U.S.C. § 1258(a) (permitting "any alien lawfully admitted to the United States as a nonimmigrant" to change to another nonimmigrant classification).

The DHS regulation defining the phrase "lawful status" in section 1255(c)(2), *see* p.7, *supra*, reinforces the Act's treatment of nonimmigrants as "admitted." The regulation defines six categories of "lawful immigration status." One of those categories is individuals "*admitted* to the United States in *nonimmigrant* status." 8 C.F.R. § 245.1(d)(1)(ii) (emphases added). Nonimmigrant status is the *only* enumerated status category to use the word "admitted." It is no surprise, then, that other regulations

refer to nonimmigrants as "admitted." *See, e.g.*, 8 C.F.R. § 103.6(c)(2); 8 C.F.R. § 212.23(c)(2); 20 C.F.R. § 655.700.

Finally, the government has repeatedly acknowledged that nonimmigrants are "admitted." The USCIS Policy Manual, which "contains the official policies of USCIS and assists immigration officers in rendering decisions," explains that "[a] nonimmigrant is an alien who is admitted to the United States for a specific temporary period of time." USCIS, Policy Manual, Vol. 7, Pt. A, Ch. 1; *id.*, Vol. 2, Pt. A, Ch. 1 (Purpose and Background). DHS's Annual Flow Report—which catalogs statistics regarding various classes of entry to the United States—likewise explains that "[n]onimmigrants are foreign nationals granted temporary admission to the United States." *Annual Flow Report, U.S. Nonimmigrant Admissions: 2019* 1; *see also* U.S. CA3 Br. 29.

Admission and nonimmigrant status, in sum, go hand-in-glove. An individual obtains status as a nonimmigrant by being admitted. *See* 8 U.S.C. § 1184(a)(1), (b). The government never has identified any category of individuals who are lawful nonimmigrants but are not admitted—because no such category exists. To "be[] in" any of the lawful nonimmigrant statuses recognized in the INA, 8 U.S.C. § 1254a(f)(4), an individual must be admitted into that status.

The same is true for "inspection," which is a necessary condition of "admission." All "applicants for admission . . . shall be inspected by immigration officers." 8 U.S.C. § 1225(a)(3); *see also* 8 U.S.C. § 1101(a)(13)(A) (defining "admission" as lawful entry "after inspection").

2. Section 1254a(f)(4) provides that TPS recipients "shall be considered as being in, and maintaining," lawful nonimmigrant status for purposes of section 1255. The

statutory phrase "considered as" puts individuals with TPS "on an equal footing" with other nonimmigrants when it comes to adjusting status. *S. Pac. Co. v. Gileo*, 351 U.S. 493, 499 (1956).

That use of "considered as" is as old as American immigration law. The Act of March 27, 1790, 1 Stat. 103, provided that "the children of citizens of the United States, that may be born beyond sea, or out of the limits of the United States, shall be considered as natural born citizens." *Id.* § 1, 1 Stat. at 104. Nearly two and a half centuries later, Congress continues to use "considered" the same way in the INA. *See* 8 U.S.C. § 1151(b)(2)(A)(i) (certain spouses and children of deceased U.S. citizens "shall be considered . . . to remain" immediate relatives for purposes of obtaining immigrant status); 8 U.S.C. § 1182(a)(5)(B) (certain persons "shall be considered to have passed" exams to practice medicine if they were previously licensed); 8 U.S.C. § 1101(g) (persons "shall be considered to have been deported or removed in pursuance of law" if they departed the country after an order of deportation or removal, even if they left voluntarily).

When one thing is "considered as" or "deemed to be" another, it is treated "as if it were really something else." *Sturgeon v. Frost*, 139 S. Ct. 1066, 1081 (2019) (alteration and citation omitted). Thus, for example, under a statute providing that Coast Guard officers shall "be deemed to be acting as" agents of the executive department whose laws they were enforcing, Coast Guard officers "*are* customs officers when they enforce customs laws." *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 227 n.6 (2008) (emphasis in original).

By using the phrase "considered as" in section 1254a(f)(4), therefore, Congress indicated that TPS recipients must be treated as "being in, and maintaining, lawful

status as a nonimmigrant" for purposes of adjusting status during the period of their TPS. The phrase "be[] in" specifies that TPS recipients are considered to have nonimmigrant status, for purposes of adjusting status, at the time of adjustment. And the word "maintain[]," specifies that they are considered to continue to have that status so long as they have TPS. 8 U.S.C. § 1254a(f).

3. a. Because persons with lawful nonimmigrant status are "inspected and admitted," and TPS recipients are considered to be in lawful nonimmigrant status for purposes of adjusting status, TPS recipients are considered "inspected and admitted" for purposes of adjusting status.

This Court's decision in *Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652 (2017), illustrates the point. That case involved the definition of "church plan" under the Employee Retirement Income Security Act of 1974 (ERISA). "Church plans" are exempt from ERISA's comprehensive regime. The statute initially defined a "church plan" as "a plan established and maintained . . . by a church." *Id.* at 1656-58. Congress later amended the definition to provide that a "church plan" also "includes a plan maintained" by an organization whose principal purpose is to fund or manage a benefit plan for church employees or affiliates (a "principal-purpose organization"), but that amended provision was silent about which entity had to *establish* the plan. *Id.* The question presented was whether a plan had to be established by a church to qualify as a "church plan." *Id.* at 1658.

The Court answered in the negative. The word "include," the Court explained, indicated that one thing (a plan maintained by a principal-purpose organization) "should receive the same treatment" as another (a plan "established and maintained by a church"). *Id.* From that

framing, the Court constructed a simple syllogism: "Premise 1: A plan established and maintained by a church is an exempt church plan. Premise 2: A plan established and maintained by a church includes a plan maintained by a principal-purpose organization. Deduction: A plan maintained by a principal-purpose organization is an exempt church plan." *Id.* at 1658-59. In even simpler terms: "[I]f A is exempt, and A includes C, then C is exempt." *Id.* at 1659.

Respondents contended that establishing and maintaining a health plan are distinct concepts. *Id.* at 1659-60. Because the revised definition only mentioned health plans *maintained* by principal-purpose organizations, respondents argued, Congress must not have meant to include plans *established* by principal-purpose organizations. *Id.* The Court rejected that argument. It observed that "establishment and maintenance . . . are not unrelated." *Id.* at 1661. Rather, "[t]he former serves as a necessary precondition of the latter." *Id.*

So too here. A TPS recipient who is "considered as being in, and maintaining, lawful status as a nonimmigrant," 8 U.S.C. § 1254a(f)(4), "should receive the same treatment" as other nonimmigrants for purposes of adjusting status. *Advocate Health Care*, 137 S. Ct. 1658. Add the fact that admission is a "necessary precondition" to lawful nonimmigrant status, *id.* at 1661, and an identical syllogism follows: (1) TPS recipients are "on an equal footing" with other lawful nonimmigrants, *Gileo*, 351 U.S. at 499, because they are "considered as being in, and maintaining," lawful nonimmigrant status for purposes of adjusting status under section 1255; (2) persons with lawful nonimmigrant status are inspected and admitted; therefore (3) TPS recipients are considered inspected and admitted for purposes of adjusting status under section

1255. *See Advocate Health Care*, 137 S. Ct. at 1658-59. Just as establishment was a "necessary precondition" to maintenance of a "church plan" in *Advocate Health Care*, admission is a "necessary precondition" to lawful nonimmigrant status. *Id.* at 1661; *see also* pp. 18-20, *supra*.

Congress' decision to treat TPS recipients as having lawful *nonimmigrant* status confirms that the *Advocate Health Care* syllogism is apt. Congress could have provided only that TPS recipients should be considered to be in and maintain "lawful status" for purposes of adjusting status. As the regulations implementing section 1255 recognize, the INA recognizes multiple forms of "lawful immigration status," some of which (such as asylum) do not involve admission. *See* 8 C.F.R. § 245.1(d)(1). Instead, Congress specifically provided that TPS recipients are considered to be in and maintain "lawful status as a nonimmigrant," which—as the implementing regulations make clear—is a status that involves admission. *See* 8 C.F.R. § 245.1(d)(1)(ii) (status of "[a]n alien admitted to the United States in nonimmigrant status").

b. The same logic disposes of any argument that section 1255(c)(2) bars petitioners from adjusting status. As discussed above, section 1255(c)(2) makes certain classes of applicants who have "failed . . . to maintain continuously a lawful status since entry into the United States" ineligible for an adjustment of status. 8 U.S.C. § 1255(c)(2). But section 1255(k) exempts employment-based adjustment applicants—like petitioners—from (c)(2)'s bar if they are "present in the United States pursuant to a lawful admission" and have not, for a total of 180 days, "failed to maintain, continuously, a lawful status," "engaged in unauthorized employment," or otherwise violated the terms of their admission. *See* p.7, *supra*.

A TPS recipient is "considered as being in, and maintaining, lawful status as a nonimmigrant" for all purposes under section 1255—not just for a particular subsection. And nonimmigrants are present in the United States "pursuant to a lawful admission." Section 1254a(f)(4), therefore, indicates that a TPS recipient is in the United States "pursuant to a lawful admission" for the duration of their TPS for purposes of section 1255(k). Section 1255(k), in turn, makes the (c)(2) bar inapplicable to petitioners.

B. The Third Circuit's Contrary Reasoning Is Flawed

The Third Circuit's contrary conclusion improperly puts TPS recipients on unequal "footing" with persons with lawful nonimmigrant status, *Gileo*, 351 U.S. at 499, all of whom have been admitted and thus may adjust status if they satisfy the enumerated statutory criteria.

1. The Third Circuit reasoned that because "status" and "admission" are separate concepts, section 1254a(f)(4)'s reference to "status" does not mean that petitioners are considered "admitted" under section 1255(a). Pet. App. 6a-7a; *see also* U.S. Cert. Br. 10-11. That argument is misplaced. To be sure, *some* forms of status, such as asylum, do not require admission. Pet. App. 8a. But section 1254a(f)(4) provides that TPS recipients have lawful *nonimmigrant* status for purposes of adjusting status. And persons with lawful nonimmigrant status are, by definition, admitted. *See* pp.18-20, *supra*.

An admitted nonimmigrant may lose lawful status—for example, by overstaying his tourist visa or failing to maintain the university enrollment her student visa requires. In that situation, the former nonimmigrant has an "admission" but not "status." But no nonimmigrant fits the opposite profile.

Good reason existed, moreover, for Congress to use the words "inspected and admitted" in section 1255(a) to refer to persons with nonimmigrant status. The prior version of section 1255(a) provided that a person "admitted" as a "bona fide nonimmigrant" could adjust status. Pub. L. No. 85-700, 72 Stat. 699, 699 (1958). When Congress broadened the statute in 1960 to allow parolees (who do not have nonimmigrant status) to adjust status, it logically dropped the "bona fide nonimmigrant" language and replaced it with the current "inspected and admitted or paroled" language. Pub L. No. 86-648, § 10, 74 Stat. 504, 505 (1960). For the reasons set forth above, Congress was well aware that persons with nonimmigrant status are "inspected and admitted." *See* pp.18-20, *supra*. Indeed, the title of section 1255 is "Adjustment of status of *nonimmigrant* to that of person admitted for permanent residence" (emphasis added). *See Merit Mgmt. Grp., LP v. FTI Consulting, Inc.*, 138 S. Ct. 883, 893 (2018) (statutory titles may "supply cues" to the meaning of statutory language (citation omitted)).

2. The Third Circuit also erred in holding that the INA's definition of "admission" defeats petitioners' interpretation. Pet. App. 7a. The INA defines "admission" as "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." 8 U.S.C. § 1101(a)(13)(A). From this, the Third Circuit concluded that an "admission" refers *only* to a lawful physical entry. Pet. App. 7a, 17a. Because petitioners were not "admitted" when they entered the United States unlawfully, the court held that petitioners could not adjust status under section 1255. That reasoning simply ignores the effect of section 1254a(f)(4), which "considers" TPS recipients to be nonimmigrants and thus admitted.

In any event, the INA does not confine "admission" to physical entry. When Congress wanted to refer exclusively to physical entry, it knew how to do so. *See, e.g.*, 8 U.S.C. § 1101(a)(15)(T)(i)(II) (referring to individuals "physically present in the United States . . . or at a port of entry thereto").

Indeed, section 1255 itself uses "admission" to refer to a change in legal status, not physical entry: "the Attorney General shall record the alien's lawful admission for permanent residence" as the date the adjustment application is approved, rather than the date of "lawful entry . . . into the United States." 8 U.S.C. § 1255(b). The title of section 1255, which refers to a "person *admitted for* permanent residence," is similar. 8 U.S.C. § 1255 (emphasis added). Admission thus encompasses legal entry for purposes of section 1255, the relevant provision here. *See Yates v. United States*, 574 U.S. 528, 537 (2015) ("[I]dentical language may convey varying content when used in different statutes, sometimes even in different provisions of the same statute."). The government, in fact, conceded below that "[a]djustment of status is ordinarily treated as an admission" to "avoid the absurdity that would result" otherwise. U.S. CA3 Br. 21 n.3.

Other provisions of the INA and its implementing regulations also use admission to mean something other than physical entry. Certain crime victims are eligible to obtain a "U" nonimmigrant visa. 8 U.S.C. § 1101(a)(15)(U). The grant of "U" visa status is an "admission" even when it occurs within the United States. *Matter of Garnica Silva*, 2017 Immig. Rptr. LEXIS 21813, *12-13, *22 (BIA June 29, 2017). Similarly, persons who obtain "S" nonimmigrant status from within the United States receive "[a]dmission." 8 C.F.R. § 214.2(t)(5)(ii); *see also* 8 C.F.R.

§ 1.4(d) (defining the Form I-94 Arrival-Departure Record as a record of a person's "admission *or* arrival/departure" (emphasis added)).

There is, therefore, nothing unusual about Congress' considering TPS recipients admitted in lawful nonimmigrant status for purposes of adjusting status. In fact, the TPS application process shares many attributes with, and is even more rigorous than, the admission process for nonimmigrant visas. TPS applicants must satisfy demanding requirements, including maintaining continuous presence in the United States since their country's designation, avoiding a laundry list of statutory exclusions, completing an exhaustive application, and potentially interviewing with an immigration officer. And they must re-register periodically for TPS. *See* pp.11-12, *supra*.

3. The Third Circuit also observed that Congress provided express exceptions in sections 1255(h) and (i) to what the court called section 1255(a)'s "admission requirement." Pet. App. 9a; *see also* U.S. Cert. Br. 11-12 (arguing the same with respect to section 1255(g)). Therefore, the court inferred that "[u]nlike [the individuals in those sections], TPS recipients were not excepted from the admission requirement." Pet. App. 9a.

The provisions the government and the Third Circuit cite, all of which post-date the Act, do not cast doubt on the plain-text interpretation of section 1254a(f)(4). Sections 1255(g) and (h) provide that certain "special immigrants" are deemed "paroled" for purposes of section 1255(a). Subsection (g) applies to immigrants who served honorably in the U.S. armed forces. 8 U.S.C. § 1101(a)(27)(K). Subsection (h) covers juvenile immigrants present in the United States who have been abused, neglected, or abandoned by their parents. 8

U.S.C. § 1101(a)(27)(J). Those provisions are only necessary because these "special immigrants" are *not* nonimmigrants or, like TPS recipients, considered as nonimmigrants. Section 1255(g) and (h) allow individuals to skip the usual stepping stone of nonimmigrant status before applying to become lawful permanent residents. Because they are not *already* considered to have lawful nonimmigrant status, these individuals need separate provisions rendering them "paroled" to satisfy section 1255(a).

Nor does 8 U.S.C. § 1255(i), which the government cites (U.S. Cert. Br. 12), undermine petitioners' interpretation of section 1254a(f)(4). Section 1255(i) provides that certain categories of individuals who filed petitions before 2001 may adjust status "notwithstanding" subsections 1255(a) and (c). 8 U.S.C. § 1255(i). As it did in subsections (g) and (h), Congress permitted certain eligible persons who do not have nonimmigrant status to become lawful permanent residents. And it did so by excepting these individuals from the requirements of both subsections 1255(a) and (c). Congress' decision to grant this relief to this distinct class of individuals does not bear on its intent in enacting section 1254a(f)(4).

4. The government similarly invokes (U.S. Cert. Br. 9) section 1254a(c)(5) as evidence that Congress did not understand TPS recipients to be admitted. That section provides: "Nothing in [section 1254a] shall be construed as authorizing an alien to apply for admission to, or to be admitted to, the United States in order to apply for [TPS]." But section 1254a(c)(5) merely reinforces the principle that a person must already be present in the United States on the effective date of his country's TPS designation to receive TPS. 8 U.S.C. § 1254a(c)(1)(A)(i); 8 C.F.R. § 244.2(b). Foreign nationals thus cannot be admitted to the country "*in order to* apply for [TPS]." 8

U.S.C. § 1254a(c)(5) (emphasis added). The provision says nothing about whether, *after* a grant of TPS, TPS recipients are considered admitted in "lawful nonimmigrant status" for purposes of adjusting status.

C. The Government's Alternative Interpretation of Section 1254a(f)(4) Is Incorrect

Although the Third Circuit rejected petitioners' interpretation of section 1254a(f)(4), the court did not articulate any alternative interpretation of that provision. The government claims that section 1254a(f)(4) has the limited effect of ensuring that TPS recipients who legally entered the country as nonimmigrants (for example, students), but then fell out of nonimmigrant status after receiving TPS (for example, because their studies ended), can overcome the bar in section 1255(c)(2), which prevents certain individuals who failed "to maintain continuously a lawful status since entry into the United States" from adjusting status. 8 U.S.C. § 1255(c)(2); *see also* Pet. App. 10a-11a; U.S. Cert. Br. 9-10. That interpretation, too, is seriously flawed.

1. The government's interpretation is irreconcilable with the statutory text.

a. Section 1254a(f)(4) does not say that it applies only for purposes of section 1255(c)(2). Rather, section 1254a(f)(4) applies "for purposes of adjustment of status under section 1255 of this title"—the entire adjustment-of-status statute. And the language of section 1254a(f)(4) mirrors the title of section 1255, which reads: "Adjustment of status of *nonimmigrant* to that of person admitted for permanent residence." 8 U.S.C. § 1255 (emphasis added); *see Merit Mgmt. Grp.*, 138 S. Ct. at 893.

"When Congress want[s] to refer only to a particular subsection or paragraph, it sa[ys] so." *NLRB v. SW Gen.*,

Inc., 137 S. Ct. 929, 938-39 (2017). That rule applies squarely here. "If Congress had intended to refer" only to section 1255(c)(2), "it presumably would have done so—just by adding a letter, a number, and a few parentheticals." *Cyan, Inc. v. Beaver Cnty. Emps. Ret. Fund*, 138 S. Ct. 1061, 1070 (2018). Because Congress did not limit section 1254a(f)(4)'s coverage to one subsection of section 1255, the Court should not "cherry pick from the material" that section 1254a(f)(4) covers. *Id.*

b. Nor does section 1254a(f)(4) say that it confers a benefit only on the limited class of TPS recipients who initially were admitted to the country with nonimmigrant status. The absence of such language is noteworthy, because Congress knew when it enacted the Act that its first beneficiaries would include large numbers of Salvadorans living unlawfully in the country. *See* p.10, *supra*. Section 1254a(f) outlines the "[b]enefits and status" that apply to *all* individuals "granted temporary protected status under this section." Each subsection of section 1254a(f) sets out, in parallel structure, a benefit or status that applies to individuals "granted temporary protected status," regardless of how they entered the country. It would be bizarre to conclude that section 1254a(f)(4) alone—which uses the same structure as its neighboring subsections—applies to only a subset of TPS recipients. *See United States v. Atl. Rsch. Corp.*, 551 U.S. 128, 135-36 (2007) (rejecting interpretation that would "destroy the symmetry" of subsections that are "adjacent and have remarkably similar structures").

c. The government's interpretation also renders the words "being in" surplusage. Section 1255(c)(2) requires an applicant for adjustment of status to "maintain continuously a lawful status since entry." Section 1254a(f)(4),

however, provides that a TPS recipient "shall be considered as" both "being in, and maintaining, lawful status as a nonimmigrant." 8 U.S.C. § 1254a(f)(4). In other words, section 1254a(f)(4) does more than simply "maintain" the status of TPS recipients who already possessed lawful status. It instructs the government to treat *all* TPS recipients as if they are in, *and* have maintained, lawful status as a nonimmigrant.

If the only purpose of section 1254a(f)(4) were to insulate persons who had nonimmigrant status when they received TPS from the bar in section 1255(c)(2), Congress need only have used the word "maintaining" in section 1254a(f)(4). The Third Circuit's decision thus renders the words "being in" surplusage. *Advocate Health Care*, 137 S. Ct. at 1659; *see also Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 236 (2011) ("[L]inking independent ideas is the job of a coordinating junction like 'and' . . . .").

The government's argument also makes "being in" surplusage as it relates to a TPS recipient's ability to change to nonimmigrant status. Section 1254a(f)(4) refers to not only "adjustment of status under section 1255" but also "change of status under section 1258." Section 1258 authorizes USCIS to change the status of "any nonimmigrant classification to any other nonimmigrant classification in the case of any alien lawfully admitted to the United States as a nonimmigrant who is continuing to maintain that status and who is not inadmissible." 8 U.S.C. § 1258(a). By providing that TPS recipients are considered as "being in and maintaining" lawful status as a nonimmigrant for purposes of section 1258, section 1254a(f)(4) treats TPS recipients as both (1) *being* an "alien lawfully admitted to the United States as a nonimmigrant" and (2) "continuing to *maintain* that status." 8

U.S.C. § 1258(a) (emphasis added). The government's reading would give effect only to the word "maintaining."

d. Finally, the government's interpretation overlooks another key textual difference between the two provisions. Section 1255(c)(2) requires maintaining "lawful status." Nonimmigrant status is one "lawful status," but other immigration statuses also satisfy section 1255(c)(2)'s requirement. *See* 8 C.F.R. § 245.1(d)(1). If the only purpose of section 1254a(f)(4) were to overcome section 1255(c)(2), Congress need only have said that TPS recipients would be considered as maintaining "lawful status." Instead, Congress provided that TPS recipients would be considered as being in and maintaining lawful status *as nonimmigrants*, a status that (unlike some other forms of lawful status) presupposes inspection and admission. *See* pp.18-20, *supra*.

2. It is beyond "doubtful . . . that Congress sought to accomplish in a 'surpassingly strange manner' what it could have accomplished in a much more straightforward way." *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1813 (2019) (quoting *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 647 (2012)). In fact, other contemporaneous legislation demonstrates that, if Congress intended to adopt a provision effecting the government's narrow interpretation of section 1254a(f)(4), it knew how to do so in a far more straightforward way. The distinction between section 1254a(f)(4) and this other legislation is yet another reason to reject the government's position. *See Carcieri v. Salazar*, 555 U.S. 379, 389-90 (2009).

a. In the Emergency Chinese Immigration Relief Act of 1989, Congress sought to protect Chinese nationals who already had nonimmigrant status by providing that, "[f]or purposes of any adjustment of status under" 8 U.S.C. 1255, "in the case of an alien who is a national of China and

who, *as of June 5, 1989, was present in the United States in the lawful status of a nonimmigrant* . . . such an alien shall be considered as having *continued to maintain lawful status as such a nonimmigrant* (and to have maintained continuously a lawful status) for the period" during which the Attorney General deferred enforced departure for Chinese nationals. H.R. 2712, 101st Cong. § 2(b) (1989) (emphases added).

President Bush vetoed that Act, instead signing an Executive Order granting deferred departure to Chinese nationals who were in the United States. The Executive Order, signed just months before Congress enacted section 1254a(f)(4), similarly provided for "maintenance of lawful status for purposes of adjustment of status or change of nonimmigrant status" for Chinese nationals "*who were in lawful status* at any time on or after June 5, 1989, up to and including the date of this order." Exec. Order 12,711, § 3(b), 55 Fed. Reg. 13,897 (1990) (emphasis added).

These contemporaneous provisions differ from section 1254a(f)(4) in two key respects. First, they require that the person applying to adjust status already possess lawful status as a nonimmigrant as of a particular date. Congress did not so limit the adjustment-of-status benefit in the TPS statute. Second, they provided only for *maintenance* of status. In section 1254a(f)(4), Congress used more expansive language, writing that TPS recipients "shall be considered as *being in, and* maintaining, lawful status as a nonimmigrant." 8 U.S.C. § 1254a(f)(4) (emphasis added). If the government's reading were correct and section 1254a(f)(4) only benefitted those who already were in lawful nonimmigrant status, Congress need only have written "maintaining," as it did in other, contemporaneous legislation.

b. The draft Chinese Temporary Protected Status Act (CTPSA) of 1989 confirms this point. Despite its title, the CTPSA would have created a comprehensive TPS program extending beyond Chinese nationals. The CTPSA was the first legislation to include the language of what is now section 1254a(f)(4), which applied to all individuals receiving TPS. *See* H.R. 2929, 101st Cong., 1st Sess. (1989). The CTPSA also contained a separate "transition" provision, applicable only to Chinese nationals that read:

> For purposes of adjustment of status under . . . [8 U.S.C. 1255] . . . in the case of an alien who is a national of the People's Republic of China, who, as of June 5, 1989, was present in the United States in the lawful status of a nonimmigrant, . . . such an alien shall be considered as having continued to maintain lawful status as such a nonimmigrant (and to have maintained continuously a lawful status) during the period of such deferral of the enforcement of departure.

Id. The side-by-side existence of this language and the language of section 1254a(f)(4) demonstrates that Congress understood section 1254a(f)(4)'s language to do more than just maintain lawful status.

c. Similarly, if all Congress intended to do in section 1254a(f)(4) was to waive the application of section 1255(c)(2) to TPS recipients who already had lawful status, Congress could simply have said that section 1255(c)(2) did not apply in those circumstances. Congress took that straightforward path in the Chinese Student Protection Act of 1992. In relevant part, that statute states that section 1255(c) "shall not apply" to Chinese nationals who were protected by Executive Order 12,711 and continuously resided in the United States since April 11, 1990. Pub. L. No. 102-404, § 2(a)(5), 106 Stat. 1969,

1969 (1992). Section 1254a(f)(4), by contrast, is not limited to section 1255(c) but instead reaches the whole of section 1255.

3. Finally, the government's reading renders section 1254a(f)(4) inexplicably narrow. Section 1255(c)(2)'s bar does not apply to individuals seeking to adjust status on the basis of an immediate family relationship. *See* 8 U.S.C. § 1255(c). If section 1254a(f)(4) applied only to section 1255(c)(2), it would benefit only individuals seeking to adjust status on other grounds (such as non-immediate family relationships or employment), because those are the only individuals subject to section 1255(c)(2) in the first place. But section 1254a(f) lays out the "[b]enefits and status" for *all* TPS recipients "[d]uring [the] period of temporary protected status."

II. The Overall Statutory Scheme Confirms the Plain-Text Interpretation

A. The Act's Purpose Confirms That TPS Recipients May Adjust Status

Petitioners' reading of section 1254a(f)(4) avoids arbitrary results and "advance[s], in a manner consistent with the statute's language, the statutory purposes that Congress sought to achieve." *Cnty. of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462, 1476 (2020). Allowing eligible TPS recipients to adjust status, regardless of their manner of entry, is consistent with Congress' desire to allow TPS recipients to live and work in the United States, and to be treated as lawful nonimmigrants for purposes of adjusting status.

1. The Third Circuit's interpretation leads to arbitrary results. It makes little sense that Congress would have intended section 1254a(f)(4) to permit TPS recipients who fell out of lawful nonimmigrant status, but not other

TPS recipients, to adjust status. Congress knew when it passed the Act that many (and likely most) TPS beneficiaries entered the country unlawfully. *See* p.10, *supra*. Had Congress intended to permit only those TPS recipients who already possessed lawful status to adjust status, it would and could have easily have said so. Instead, Congress drafted a broad provision that instructs the government to treat TPS recipients as nonimmigrants for purposes of adjustment of status. The Third Circuit's interpretation would render the benefit of section 1254a(f)(4) a nullity for many TPS recipients.

Nor does it make sense that Congress intended to treat TPS recipients who violated the immigration laws by entering unlawfully differently than nonimmigrants who violated the terms of their admission. By registering for TPS, TPS recipients submit themselves to regular inspection by the government and to the government's ongoing authority. They risk losing TPS if they fail to comply with the stringent eligibility criteria. They work lawfully and pay taxes, in some cases (as here) for two decades. Yet the government's position would treat TPS recipients worse, for purposes of adjusting status, than someone who was "admitted" when she crossed the border, overstayed her visa, and worked unlawfully for two decades before adjusting status.

2. Petitioners' interpretation also advances the statute's purpose: to protect TPS recipients from unsafe conditions in their home countries. The Third Circuit's reading of the statute would force many TPS recipients to put their lives in danger to obtain lawful-permanent-resident status. Under the Third Circuit's position, TPS recipients who entered the country without authorization would have to leave the United States, travel to their native country, apply for an immigrant visa at a U.S. consulate,

and return to the United States as an immigrant. Many TPS recipients would be subject to mandatory multi-year time bars before re-entering the country; discretionary waivers of the time bars are available only in cases of "extreme hardship" to a spouse or parent who is a U.S. citizen or permanent resident. 8 U.S.C. § 1182(a)(9)(B)(i), (v). Nothing in section 1254a(f)(4) suggests that Congress intended this "Rube Goldberg-like" task. *Ramirez v. Brown*, 852 F.3d 954, 964 (9th Cir. 2017).

By definition, a TPS designation means that returning to one's native country would "pose a serious threat to their personal safety," that a disaster has resulted in a "substantial" disruption and the state is "unable" to "handle adequately" the return of its citizens, or that other "extraordinary" circumstances exist that prevent nationals "from returning to the state in safety." 8 U.S.C. § 1254a(b). El Salvador, for example, is one of the world's most dangerous countries. *See* United Nations Off. on Drugs & Crime, *Global Study on Homicide 2019*. Between 2013 and 2020, 138 people deported from the United States were killed after returning there. Human Rights Watch, *Deported to Danger: United States Deportation Policies Expose Salvadorans to Death and Abuse* (Feb. 5, 2020). Requiring a TPS beneficiary to return to such unsafe conditions to obtain lawful-permanent-resident status frustrates the statute's purpose.

3. The Third Circuit posited that Congress did not intend TPS to confer permanent status or a path to citizenship. As proof, the court invoked section 1254a(h), which requires a supermajority of the Senate to pass future legislation adjusting the status of TPS recipients to temporary or permanent resident status. Pet. App. 10a. But section 1254a(h) says nothing about TPS recipients' eligibility to adjust status if they qualify under section 1255.

Section 1254a(h) simply restricts Congress' ability to grant adjustment of status *legislatively*, by creating a special regime for all TPS recipients to adjust status. Section 1254a(h) does not speak to whether TPS recipients may *administratively* adjust status under the normal regime when they have a basis for doing so, such as a sponsoring employer. Section 1254a(f)(4) evinces Congress' intent that *some* TPS recipients would be eligible to adjust status under 1255. The question here is simply which ones.

Petitioners' reading of the statute permits only a limited number of TPS recipients to adjust status. TPS recipients, like nonimmigrants, require a statutory basis to become permanent residents, like employment qualification or an eligible family member. And they still have to satisfy the enumerated requirements of section 1255(a), including having an immigrant visa "immediately available . . . at the time [their] application is filed." 8 U.S.C. § 1255(a). As discussed above, most such visas are capped annually. 8 U.S.C. § 1151; *see* p.5, *supra*.

B. The Act's History Confirms That TPS Recipients May Adjust Status

The history of the Act also belies the government's interpretation of section 1254a(f)(4). The Senate version of the Act included a provision that merely maintained lawful nonimmigrant status (as the government claims section 1254a(f)(4) does), but the House replaced that provision with the TPS program, including the broader version of section 1254a(f)(4). The government's interpretation would resurrect the provision Congress rejected. Congress, moreover, knew that many Salvadorans were in the United States unlawfully. *See* p.10, *supra*. El Salvador was, nevertheless, the only country Congress designated

for the TPS program in the Act. It is, therefore, no accident that TPS and the benefits it affords are available to persons who entered the country unlawfully.

In crafting the Act, Congress considered and rejected an adjustment-of-status provision consistent with the government's interpretation of section 1254a(f)(4)—much like the provision Congress included in the Emergency Chinese Immigration Relief Act of 1989, discussed above. *See* pp.33-34, *supra*. In the wake of the Tiananmen Square protests, the Senate proposed a provision to protect Chinese students "present in the United States *in the lawful status of a nonimmigrant*." S. 358, 101st Cong. § 302 (1989) (as passed Senate, July 13, 1989) (emphasis added). That provision considered qualifying individuals "as having continued to maintain lawful status as such a nonimmigrant (and to have maintained continuously a lawful status)" "for purposes of adjustment of status." *Id.*

The House version of the bill proposed a broader TPS program. It eliminated the Senate's proposed requirement that individuals *already* be in lawful status in order to adjust status. And it proposed the language that became section 1254a(f)(4): TPS recipients "shall be considered as *being in*, and maintaining, lawful status as a nonimmigrant" for purposes of adjusting status. 136 Cong. Rec. H8721, H8736 (1990) (emphasis added) (reciting section 324(f)(5) of H.R. 4300). The House proposal also designated nationals of Lebanon, Liberia, El Salvador, and Kuwait for three years of protection. *Id.* at H8735.

Congress ultimately struck a compromise between the House and Senate bills. It enacted the House's TPS program, including the more expansive adjustment-of-status provision, but provided TPS only to Salvadorans, and only

for 18 months. *See* H.R. Rep. No. 955 (1990), at 127 (Conf. Rep.).

"Given these conflicting proposals, the Act's present language has all the earmarks of a compromise." *Obduskey v. McCarthy & Holthus LLP*, 139 S. Ct. 1029, 1038 (2019). The government's interpretation would effectively undo that compromise and revert to the Senate bill Congress rejected. "Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987). That principle is "particularly appropriate" here because the at-issue provision "is the result of a series of carefully crafted compromises." *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 748 n.14 (1989).

This history debunks the government's suggestion that Congress was primarily focused on protecting Chinese students following the Tiananmen Square incident. U.S. C.A.3 Br. 24-25 n.4. As discussed, Congress rejected a version of the Act that would have accomplished exactly that, and specifically expressed its intent to protect Salvadorans fleeing civil war. If Congress meant only to allow TPS recipients who already had nonimmigrant status (like Chinese students) to adjust status, it would have said so. Instead, knowing that Salvadorans were residing here unlawfully, Congress stated that TPS recipients should be considered as "being in" (and not just "maintaining") lawful status as nonimmigrants.

III. The Court Should Not Defer to the Agency Adjudications Invoked by the Government

The government argues that two recent agency adjudications merit *Chevron* deference. U.S. Cert. Br. 16. But no deference is warranted where, as here, Congress has

unambiguously "spoken to the precise question at issue." *Id.* at 842. Anyhow, *Chevron* does not apply because the agency adjudications here are not exercises of congressionally delegated authority to make rules carrying the force of law. *United States v. Mead Corp.*, 533 U.S. 218, 227-28 (2001). And even if *Chevron* applied, the government's position exceeds the "bounds of reasonable interpretation." *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 321 (2014) (citation omitted).

The Court can resolve this case in favor of petitioners under existing precedent. However, if the Court is not persuaded, it should take this opportunity to "face the behemoth," *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring), and overrule *Chevron*.

A. The Statute Is Unambiguous

This Court will defer to an agency's interpretation only if, "after 'employing traditional tools of statutory construction,'" it finds itself "unable to discern Congress's meaning." *SAS Inst. v. Iancu*, 138 S. Ct. 1348, 1358 (2018). For the reasons set forth above, the statute supplies "a clear and unambiguous answer" to the question presented. *Pereira v. Sessions*, 138 S. Ct. 2105, 2113 (2018). The Court thus need not consider whether to defer.

B. The Agency Adjudications Do Not Warrant Deference

While this litigation was pending, the government attempted to position two agency adjudications for heightened deference. Neither deserves it.

1. An agency's interpretation is entitled to *Chevron* deference only "when it appears that Congress delegated authority to the agency generally to make rules carrying

the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *Mead*, 533 U.S. at 227-28; *see Gonzales v. Oregon*, 546 U.S. 243, 255-56 (2006). Congress is presumed to have delegated such authority "when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force." *Mead*, 533 U.S. at 230.

Accordingly, *Chevron* deference applies when an agency complies with "applicable (*e.g.*, procedural) requirements," *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 165 (2007), and promulgates an interpretation pursuant to notice-and-comment rulemaking or formal adjudication, *Mead*, 533 U.S. at 230 & n.12. Formal procedure signals to courts and the public that the agency "focused fully upon the matter in question," *Long Island Care at Home*, 551 U.S. at 165, considered the competing interests of affected parties, and leveraged its subject-matter expertise, *see Chevron*, 467 U.S. at 865.

Less formal agency interpretations typically do not receive *Chevron* deference and are owed respect "only to the extent that those interpretations have the 'power to persuade.'" *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000) (quoting *Skidmore*, 323 U.S. at 140). A lack of formal process, though highly relevant, is not dispositive. *Mead*, 533 U.S. at 231. Other relevant considerations include the scope of congressional authorization and agency practice, *id.* at 232-33, and "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time," *Barnhart v. Walton*, 535 U.S. 212, 222 (2002).

Congress delegated interpretive authority over the INA to the Attorney General. *Negusie v. Holder*, 555 U.S. 511, 516-17 (2009) (citing 8 U.S.C. § 1103(a)(1)). The Board of Immigration Appeals (BIA) exercises that interpretative authority as the Attorney General's delegate. *Id.*; *see also* 8 C.F.R. § 1003.1(a)(1). Accordingly, BIA decisions having the force of law (*i.e.*, precedential decisions) and resulting from formal adjudicatory procedures receive *Chevron* deference. *Mead*, 533 U.S. at 230 & n.12.

2. Under these principles, the relevant agency decisions do not warrant *Chevron* deference.

a. *Matter of H-G-G-*, 27 I. & N. Dec. 617 (AAO 2019), *vacated by Hernandez de Gutierrez v. Barr*, --- F. Supp. 3d ---, 2020 WL 5764281 (D. Minn. Sept. 28, 2020), held that a TPS recipient who entered the country without inspection and admission was ineligible to adjust status on the basis of a non-immediate family relationship because TPS was not an "admission" for purposes of section 1255(a) and did not cure his prior unlawful status for purposes of section 1255(c)(2).[9] *H-G-G-* is a decision of the AAO, an adjudicatory body within USCIS operating pursuant to a narrow delegation of authority from the Secretary, not codified in regulation, to "exercise appellate jurisdiction" over limited matters. DHS Delegation Number 0150.1(U) (effective Mar. 1, 2003).

AAO decisions are nonprecedential in the first instance. USCIS, AAO Practice Manual, Ch. 3.15(a) (Mar. 11, 2019). USCIS, however, "occasionally 'adopts'" a non-

[9] Because the applicant in *H-G-G-* was subject to the bar in section 1255(c)(2) and could not invoke the exception in section 1255(k) (as petitioners can), much of the decision rejected an argument not advanced here: that section 1254a(f)(4) cures unlawful status that occurred *before* the grant of TPS. *See* 27 I. & N. Dec. at 618-19 & n.4.

precedent decision "to provide policy guidance to USCIS employees." *Id.* In addition, the Secretary or his designees may "file with the Attorney General decisions relating to the administration of the immigration laws of the United States for publication as precedent in future proceedings." 8 C.F.R. § 1003.1(i); *see* 8 C.F.R. § 103.3(c). Upon "approval" by the Attorney General "as to the lawfulness of such decision," the AAO decision becomes precedential. 8 C.F.R. § 1003.1(i).

That is what occurred in *H-G-G-*. USCIS initially "adopted" the decision as internal guidance in a policy memorandum. *Matter of H-G-G-*, Adopted Decision 2019-01 (AAO July 31, 2019). The Secretary then designated the decision for publication, and the Attorney General approved it, without adding any analysis of his own, rendering it precedential. 27 I. & N. Dec. 617. Since then, the U.S. District Court for the District of Minnesota vacated the decision as inconsistent with the unambiguous statutory text. *Hernandez de Gutierrez*, 2020 WL 5764281, at *4.

The now-vacated *H-G-G-* decision does not deserve *Chevron* deference. The AAO's decision on its own does not carry the force of law. No statute or regulation authorizes the AAO to issue decisions having the force of law, or delegates such authority to the AAO. And, as discussed above, adopted AAO decisions are merely "internal guidance memoranda" that "do[] not qualify" for *Chevron* deference. *Alaska Dep't of Envt'l Conservation v. EPA*, 540 U.S. 461, 487-88 (2004).

Nor did *H-G-G-* result from "formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement [carrying the force and effect of law]." *Mead*, 533 U.S. at 230; *Christensen*, 529 U.S. at 587. Unlike removal proceedings, which this

Court has compared to formal APA adjudication, *Ardestani v. INS*, 502 U.S. 129, 134 (1991), a person seeking to adjust status is entitled only to an informal adjudication before a USCIS officer and need not even receive a hearing. 8 U.S.C. § 1255(a); *see* 8 C.F.R. §§ 245.1-245.6. If the officer denies the application, the applicant is generally not entitled to appeal. 8 C.F.R. § 245.2(a)(5)(ii).

Indeed, the AAO had jurisdiction over *H-G-G-* only because a regulation allows USCIS to certify decisions to the AAO. 8 C.F.R. § 103.4(a). A proceeding before the AAO is thus not an "appeal" at all, but just informal adjudication by a different body that reviews the record and in which parties may (but need not) file briefs. *See generally* 8 C.F.R. § 103.3; USCIS, AAO Practice Manual, Ch. 3.4, 3.8. The lack of formal procedure accompanying AAO decisions confirms the decisions are not the type of agency action that Congress intended to carry the force of law. *Mead*, 533 U.S. at 230.

Nothing about the Attorney General's "approval" of the AAO's decision changes the equation. The INA gives the Attorney General authority to interpret the INA. *Negusie*, 555 U.S. at 516-17. But the Attorney General did not issue any such interpretation here; he simply rubber-stamped another agency's informal adjudication. AAO decisions referred to the Attorney General for approval are *not* decisions of the Attorney General himself. *See* 8 C.F.R. § 1003.1(h). No evidence suggests that the Attorney General "focused fully" on the proper interpretation of the relevant statutes or adequately considered the interests of relevant stakeholders. *Long Island Care at Home*, 551 U.S. at 165. Nor did the Attorney General accord any procedural safeguards to the applicant or the public.

Moreover, "precedential value alone does not add up to *Chevron* entitlement." *Mead*, 533 U.S. at 232. In any event, the precedential value of approved AAO decisions is limited at best. AAO decisions apparently do not bind immigration judges. *See* 8 C.F.R. § 1003.1(g)(1). And it is unclear whether they bind the BIA. *See Matter of Ortega*, 28 I. & N. Dec. 9, 15 n.4 (BIA 2020).

No other factor counsels in favor of *Chevron* deference. Nothing about the informal "agency practice" suggests that Congress would expect *H-G-G-* to obtain *Chevron* deference. *Mead*, 533 U.S. at 233. The interpretive issue does not involve an "interstitial" question or complex administrative scheme, *Barnhart*, 535 U.S. at 222, but instead a classic question of statutory interpretation, *see Cardoza-Fonseca*, 480 U.S. at 446. And, although the agency's interpretation has been consistent, its earlier, informal analyses of the issue were unexplained and cursory, as the AAO admitted.[10] *See H-G-G-*, 27 I. & N. Dec. at 621.

b. The second decision the government cites, *Matter of Padilla Rodriguez*, 28 I. & N. Dec. 164 (BIA 2020), which the BIA decided while this petition was pending, likewise does not warrant deference.

Mr. Padilla Rodriguez was facing removal after losing TPS. *Id.* at 164. The issue in *Padilla Rodriguez* was

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[10] INS General Counsel Op. No. 91-27, *Temporary protected status and eligibility for adjustment of status under Section 245*, 1991 WL 1185138, *1 (Mar. 4, 1991). Although *H-G-G-* did not meaningfully engage with the 1993 opinion of the INS general counsel, that opinion similarly ignored the statutory text and relied instead on the same misunderstanding of the legislative history the government now endorses. *See* INS General Counsel Op. No. 93-59, *Temporary Protected Status and eligibility for adjustment of status under Section 245*, 1993 WL 1504006, *2-4 (Aug. 17, 1993); Parts I.C, II.B, *supra*.

whether a TPS recipient is admitted under the INA for purposes of removability—not whether a TPS recipient is "considered" admitted for the limited purpose of adjusting status. The BIA acknowledged the point, observing that "eligibility for discretionary relief"—such as adjustment of status—was "clearly separate and distinct from the issue of removability" before it. *See id.* at 168.

Nevertheless, after explaining that the case did not present the question presented here, the Board purported to decide it, "agree[ing] with the circuits holding that a grant of TPS is not an admission" and declaring that their reasoning "should be applied in any circuit that has not addressed that issue." *Id.* at 168.

This Court has deferred to precedential decisions of the BIA when it acts as the Attorney General's delegate "in the course of considering and determining cases before it." *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) (internal quotation marks omitted). But the case "before" the BIA presented no question regarding a TPS recipient's ability to adjust status. The BIA's discussion of the question presented here was not an exercise of its authority to "give[] ambiguous statutory terms 'concrete meaning through a process of case-by-case adjudication.'" *Negusie*, 555 U.S. at 517 (quoting *Aguirre-Aguirre*, 526 U.S. at 425). The BIA cannot use dicta to create policy for the agency.

3. Because *Chevron* does not apply, the agencies' interpretation is only "entitled to respect" if it has the "power to persuade." *Christensen*, 529 U.S. at 587 (quoting *Skidmore*, 323 U.S. at 140). *H-G-G* adopted the same atextual reading of section 1254a(f)(4) as the government, without addressing the numerous problems with that interpretation. *See* 27 I. & N. Dec. at 627; pp.30-36, *supra*. It drew the same unreliable inferences from subsequent

legislation and the restriction on future *legislative* grants of adjustment of status. *See* 27 I. & N. Dec. at 628-29, 632; pp.28-29, *supra*. And it flubbed the history of section 1254a(f)(4), suggesting, incorrectly, that section 1254a(f)(4) was primarily motivated by congressional concern for Chinese students and ignoring the textual differences between the rejected Senate provision that would have protected Chinese students and the broader, enacted TPS program. *See* 27 I. & N. Dec. at 624-25; Parts I.C, II.B, *supra*. The BIA provided no additional analysis of its own in *Padilla-Rodriguez*. The only thing going for the agency interpretation is that it is consistent with prior informal (and cursory) interpretations. *See* p.47 n.10, *supra*. But "[b]eing consistently wrong does not afford the agency more deference than having valid reasoning." *Flores v. USCIS*, 718 F.3d 548, 555 (6th Cir. 2013).

For these same reasons, the agencies' interpretation is unreasonable and does not warrant *Chevron* deference even if the Court concluded that the *Chevron* framework otherwise applied. *See Util. Air Regul. Grp.*, 573 U.S. at 321.

CONCLUSION

The Court should reverse the decision below.

Respectfully submitted,

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FEBRUARY 22, 2021

APPENDIX

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8 U.S.C. § 1101. Definitions

(a) As used in this chapter—

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(13)(A) The terms "admission" and "admitted" mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.

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(15) The term "immigrant" means every alien except an alien who is within one of the following classes of nonimmigrant aliens—

(A)(i) an ambassador, public minister, or career diplomatic or consular officer who has been accredited by a foreign government, recognized de jure by the United States and who is accepted by the President or by the Secretary of State, and the members of the alien's immediate family;

(ii) upon a basis of reciprocity, other officials and employees who have been accredited by a foreign government recognized de jure by the United States, who are accepted by the Secretary of State, and the members of their immediate families; and

(iii) upon a basis of reciprocity, attendants, servants, personal employees, and members of their immediate families, of the officials and employees who have a nonimmigrant status under (i) and (ii) above;

(B) an alien (other than one coming for the purpose of study or of performing skilled or

unskilled labor or as a representative of foreign press, radio, film, or other foreign information media coming to engage in such vocation) having a residence in a foreign country which he has no intention of abandoning and who is visiting the United States temporarily for business or temporarily for pleasure;

(C) an alien in immediate and continuous transit through the United States, or an alien who qualifies as a person entitled to pass in transit to and from the United Nations Headquarters District and foreign countries, under the provisions of paragraphs (3), (4), and (5) of section 11 of the Headquarters Agreement with the United Nations (61 Stat. 758);

(D)(i) an alien crewman serving in good faith as such in a capacity required for normal operation and service on board a vessel, as defined in section 1288(a) of this title (other than a fishing vessel having its home port or an operating base in the United States), or aircraft, who intends to land temporarily and solely in pursuit of his calling as a crewman and to depart from the United States with the vessel or aircraft on which he arrived or some other vessel or aircraft;

(ii) an alien crewman serving in good faith as such in any capacity required for normal operations and service aboard a fishing vessel having its home port or an operating base in the United States who intends to land temporarily in Guam or the Commonwealth of the Northern Mariana Islands and solely in pursuit of his

calling as a crewman and to depart from Guam or the Commonwealth of the Northern Mariana Islands with the vessel on which he arrived;

(E) an alien entitled to enter the United States under and in pursuance of the provisions of a treaty of commerce and navigation between the United States and the foreign state of which he is a national, and the spouse and children of any such alien if accompanying or following to join him; (i) solely to carry on substantial trade, including trade in services or trade in technology, principally between the United States and the foreign state of which he is a national; (ii) solely to develop and direct the operations of an enterprise in which he has invested, or of an enterprise in which he is actively in the process of investing, a substantial amount of capital; or (iii) solely to perform services in a specialty occupation in the United States if the alien is a national of the Commonwealth of Australia and with respect to whom the Secretary of Labor determines and certifies to the Secretary of Homeland Security and the Secretary of State that the intending employer has filed with the Secretary of Labor an attestation under section 1182(t)(1) of this title;

(F)(i) an alien having a residence in a foreign country which he has no intention of abandoning, who is a bona fide student qualified to pursue a full course of study and who seeks to enter the United States temporarily and solely for the purpose of pursuing such a course of study consistent with

section 1184(*l*)[1] of this title at an established college, university, seminary, conservatory, academic high school, elementary school, or other academic institution or in an accredited language training program in the United States, particularly designated by him and approved by the Attorney General after consultation with the Secretary of Education, which institution or place of study shall have agreed to report to the Attorney General the termination of attendance of each nonimmigrant student, and if any such institution of learning or place of study fails to make reports promptly the approval shall be withdrawn, (ii) the alien spouse and minor children of any alien described in clause (i) if accompanying or following to join such an alien, and (iii) an alien who is a national of Canada or Mexico, who maintains actual residence and place of abode in the country of nationality, who is described in clause (i) except that the alien's qualifications for and actual course of study may be full or part-time, and who commutes to the United States institution or place of study from Canada or Mexico;

(G)(i) a designated principal resident representative of a foreign government recognized de jure by the United States, which foreign government is a member of an international organization entitled to enjoy privileges, exemptions, and immunities as an international organization under the International Organizations Immunities Act (59 Stat. 669) [22

[1] See References in Text note below.

U.S.C. 288 et seq.], accredited resident members of the staff of such representatives, and members of his or their immediate family;

(ii) other accredited representatives of such a foreign government to such international organizations, and the members of their immediate families;

(iii) an alien able to qualify under (i) or (ii) above except for the fact that the government of which such alien is an accredited representative is not recognized de jure by the United States, or that the government of which he is an accredited representative is not a member of such international organization; and the members of his immediate family;

(iv) officers, or employees of such international organizations, and the members of their immediate families;

(v) attendants, servants, and personal employees of any such representative, officer, or employee, and the members of the immediate families of such attendants, servants, and personal employees;

(H) an alien (i) [(a) Repealed. Pub. L. 106-95, § 2(c), Nov. 12, 1999, 113 Stat. 1316] (b) subject to section 1182(j)(2) of this title, who is coming temporarily to the United States to perform services (other than services described in subclause (a) during the period in which such subclause applies and other than services described in subclause (ii)(a) or in subparagraph

(O) or (P)) in a specialty occupation described in section 1184(i)(1) of this title or as a fashion model, who meets the requirements for the occupation specified in section 1184(i)(2) of this title or, in the case of a fashion model, is of distinguished merit and ability, and with respect to whom the Secretary of Labor determines and certifies to the Attorney General that the intending employer has filed with the Secretary an application under section 1182(n)(1) of this title, or (b1) who is entitled to enter the United States under and in pursuance of the provisions of an agreement listed in section 1184(g)(8)(A) of this title, who is engaged in a specialty occupation described in section 1184(i)(3) of this title, and with respect to whom the Secretary of Labor determines and certifies to the Secretary of Homeland Security and the Secretary of State that the intending employer has filed with the Secretary of Labor an attestation under section 1182(t)(1) of this title, or (c) who is coming temporarily to the United States to perform services as a registered nurse, who meets the qualifications described in section 1182(m)(1) of this title, and with respect to whom the Secretary of Labor determines and certifies to the Attorney General that an unexpired attestation is on file and in effect under section 1182(m)(2) of this title for the facility (as defined in section 1182(m)(6) of this title) for which the alien will perform the services; or (ii)(a) having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform agricultural labor or services, as defined

by the Secretary of Labor in regulations and including agricultural labor defined in section 3121(g) of title 26, agriculture as defined in section 203(f) of title 29, and the pressing of apples for cider on a farm, of a temporary or seasonal nature, or (b) having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform other temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in this country, but this clause shall not apply to graduates of medical schools coming to the United States to perform services as members of the medical profession; or (iii) having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States as a trainee, other than to receive graduate medical education or training, in a training program that is not designed primarily to provide productive employment; and the alien spouse and minor children of any such alien specified in this paragraph if accompanying him or following to join him;

(I) upon a basis of reciprocity, an alien who is a bona fide representative of foreign press, radio, film, or other foreign information media, who seeks to enter the United States solely to engage in such vocation, and the spouse and children of such a representative, if accompanying or following to join him;

(J) an alien having a residence in a foreign country which he has no intention of abandoning who is a bona fide student, scholar, trainee,

teacher, professor, research assistant, specialist, or leader in a field of specialized knowledge or skill, or other person of similar description, who is coming temporarily to the United States as a participant in a program designated by the Director of the United States Information Agency, for the purpose of teaching, instructing or lecturing, studying, observing, conducting research, consulting, demonstrating special skills, or receiving training and who, if he is coming to the United States to participate in a program under which he will receive graduate medical education or training, also meets the requirements of section 1182(j) of this title, and the alien spouse and minor children of any such alien if accompanying him or following to join him;

(K) subject to subsections (d) and (p)[2] of section 1184 of this title, an alien who—

(i) is the fiancée or fiancé of a citizen of the United States (other than a citizen described in section 1154(a)(1)(A)(viii)(I) of this title) and who seeks to enter the United States solely to conclude a valid marriage with the petitioner within ninety days after admission;

(ii) has concluded a valid marriage with a citizen of the United States (other than a citizen described in section 1154(a)(1)(A)(viii)(I) of this title) who is the petitioner, is the beneficiary of a petition to accord a status under section 1151(b)(2)(A)(i) of this title that was filed under

[2] See References in Text note below.

section 1154 of this title by the petitioner, and seeks to enter the United States to await the approval of such petition and the availability to the alien of an immigrant visa; or

(iii) is the minor child of an alien described in clause (i) or (ii) and is accompanying, or following to join, the alien;

(L) subject to section 1184(c)(2) of this title, an alien who, within 3 years preceding the time of his application for admission into the United States, has been employed continuously for one year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States temporarily in order to continue to render his services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge, and the alien spouse and minor children of any such alien if accompanying him or following to join him;

(M)(i) an alien having a residence in a foreign country which he has no intention of abandoning who seeks to enter the United States temporarily and solely for the purpose of pursuing a full course of study at an established vocational or other recognized nonacademic institution (other than in a language training program) in the United States particularly designated by him and approved by the Attorney General, after consultation with the Secretary of Education, which institution shall have agreed to report to the Attorney General the termination of attendance of each nonimmigrant

nonacademic student and if any such institution fails to make reports promptly the approval shall be withdrawn, (ii) the alien spouse and minor children of any alien described in clause (i) if accompanying or following to join such an alien, and (iii) an alien who is a national of Canada or Mexico, who maintains actual residence and place of abode in the country of nationality, who is described in clause (i) except that the alien's course of study may be full or part-time, and who commutes to the United States institution or place of study from Canada or Mexico;

(N)(i) the parent of an alien accorded the status of special immigrant under paragraph (27)(I)(i) (or under analogous authority under paragraph (27)(L)), but only if and while the alien is a child, or

(ii) a child of such parent or of an alien accorded the status of a special immigrant under clause (ii), (iii), or (iv) of paragraph (27)(I) (or under analogous authority under paragraph (27)(L));

(O) an alien who—

(i) has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim or, with regard to motion picture and television productions a demonstrated record of extraordinary achievement, and whose achievements have been recognized in the field through extensive documentation, and seeks to enter the United States to continue work in the area of

extraordinary ability; or

(ii)(I) seeks to enter the United States temporarily and solely for the purpose of accompanying and assisting in the artistic or athletic performance by an alien who is admitted under clause (i) for a specific event or events,

(II) is an integral part of such actual performance,

(III) (a) has critical skills and experience with such alien which are not of a general nature and which cannot be performed by other individuals, or (b) in the case of a motion picture or television production, has skills and experience with such alien which are not of a general nature and which are critical either based on a pre-existing longstanding working relationship or, with respect to the specific production, because significant production (including pre- and post-production work) will take place both inside and outside the United States and the continuing participation of the alien is essential to the successful completion of the production, and

(IV) has a foreign residence which the alien has no intention of abandoning; or

(iii) is the alien spouse or child of an alien described in clause (i) or (ii) and is accompanying, or following to join, the alien;

(P) an alien having a foreign residence which the

alien has no intention of abandoning who—

(i)(a) is described in section 1184(c)(4)(A) of this title (relating to athletes), or (b) is described in section 1184(c)(4)(B) of this title (relating to entertainment groups);

(ii)(I) performs as an artist or entertainer, individually or as part of a group, or is an integral part of the performance of such a group, and

(II) seeks to enter the United States temporarily and solely for the purpose of performing as such an artist or entertainer or with such a group under a reciprocal exchange program which is between an organization or organizations in the United States and an organization or organizations in one or more foreign states and which provides for the temporary exchange of artists and entertainers, or groups of artists and entertainers;

(iii)(I) performs as an artist or entertainer, individually or as part of a group, or is an integral part of the performance of such a group, and

(II) seeks to enter the United States temporarily and solely to perform, teach, or coach as such an artist or entertainer or with such a group under a commercial or noncommercial program that is culturally unique; or

(iv) is the spouse or child of an alien described

in clause (i), (ii), or (iii) and is accompanying, or following to join, the alien;

(Q) an alien having a residence in a foreign country which he has no intention of abandoning who is coming temporarily (for a period not to exceed 15 months) to the United States as a participant in an international cultural exchange program approved by the Secretary of Homeland Security for the purpose of providing practical training, employment, and the sharing of the history, culture, and traditions of the country of the alien's nationality and who will be employed under the same wages and working conditions as domestic workers;

(R) an alien, and the spouse and children of the alien if accompanying or following to join the alien, who—

(i) for the 2 years immediately preceding the time of application for admission, has been a member of a religious denomination having a bona fide nonprofit, religious organization in the United States; and

(ii) seeks to enter the United States for a period not to exceed 5 years to perform the work described in subclause (I), (II), or (III) of paragraph (27)(C)(ii);

(S) subject to section 1184(k) of this title, an alien—

(i) who the Attorney General determines—

(I) is in possession of critical reliable

information concerning a criminal organization or enterprise;

(II) is willing to supply or has supplied such information to Federal or State law enforcement authorities or a Federal or State court; and

(III) whose presence in the United States the Attorney General determines is essential to the success of an authorized criminal investigation or the successful prosecution of an individual involved in the criminal organization or enterprise; or

(ii) who the Secretary of State and the Attorney General jointly determine—

(I) is in possession of critical reliable information concerning a terrorist organization, enterprise, or operation;

(II) is willing to supply or has supplied such information to Federal law enforcement authorities or a Federal court;

(III) will be or has been placed in danger as a result of providing such information; and

(IV) is eligible to receive a reward under section 2708(a) of Title 22,

and, if the Attorney General (or with respect to clause (ii), the Secretary of State and the Attorney General jointly) considers it to be appropriate, the spouse, married and unmarried sons and daughters, and parents of an alien described in

clause (i) or (ii) if accompanying, or following to join, the alien;

(T)(i) subject to section 1184(*o*) of this title, an alien who the Secretary of Homeland Security, or in the case of subclause (III)(aa) the Secretary of Homeland Security, in consultation with the Attorney General, determines—

(I) is or has been a victim of a severe form of trafficking in persons, as defined in section 7102 of title 22;

(II) is physically present in the United States, American Samoa, or the Commonwealth of the Northern Mariana Islands, or at a port of entry thereto, on account of such trafficking, including physical presence on account of the alien having been allowed entry into the United States for participation in investigative or judicial processes associated with an act or a perpetrator of trafficking;

(III)(aa) has complied with any reasonable request for assistance in the Federal, State, or local investigation or prosecution of acts of trafficking or the investigation of crime where acts of trafficking are at least one central reason for the commission of that crime;

(bb) in consultation with the Attorney General, as appropriate, is unable to cooperate with a request described in item (aa) due to physical or psychological

trauma; or

(cc) has not attained 18 years of age; and

(IV) the alien[3] would suffer extreme hardship involving unusual and severe harm upon removal; and

(ii) if accompanying, or following to join, the alien described in clause (i) —

(I) in the case of an alien described in clause (i) who is under 21 years of age, the spouse, children, unmarried siblings under 18 years of age on the date on which such alien applied for status under such clause, and parents of such alien;

(II) in the case of an alien described in clause (i) who is 21 years of age or older, the spouse and children of such alien; or

(III) any parent or unmarried sibling under 18 years of age, or any adult or minor children of a derivative beneficiary of the alien, as of an alien described in subclause (I) or (II) who the Secretary of Homeland Security, in consultation with the law enforcement officer investigating a severe form of trafficking, determines faces a present danger of retaliation as a result of the alien's escape from the severe form of trafficking or cooperation with law enforcement.

(U)(i) subject to section 1184(p) of this title, an

[3] So in original. The words "the alien" probably should not appear.

alien who files a petition for status under this subparagraph, if the Secretary of Homeland Security determines that—

(I) the alien has suffered substantial physical or mental abuse as a result of having been a victim of criminal activity described in clause (iii);

(II) the alien (or in the case of an alien child under the age of 16, the parent, guardian, or next friend of the alien) possesses information concerning criminal activity described in clause (iii);

(III) the alien (or in the case of an alien child under the age of 16, the parent, guardian, or next friend of the alien) has been helpful, is being helpful, or is likely to be helpful to a Federal, State, or local law enforcement official, to a Federal, State, or local prosecutor, to a Federal or State judge, to the Service, or to other Federal, State, or local authorities investigating or prosecuting criminal activity described in clause (iii); and

(IV) the criminal activity described in clause (iii) violated the laws of the United States or occurred in the United States (including in Indian country and military installations) or the territories and possessions of the United States;

(ii) if accompanying, or following to join, the alien described in clause (i) —

(I) in the case of an alien described in clause (i) who is under 21 years of age, the spouse, children, unmarried siblings under 18 years of age on the date on which such alien applied for status under such clause, and parents of such alien; or

(II) in the case of an alien described in clause (i) who is 21 years of age or older, the spouse and children of such alien; and

(iii) the criminal activity referred to in this clause is that involving one or more of the following or any similar activity in violation of Federal, State, or local criminal law: rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; stalking; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter; murder; felonious assault; witness tampering; obstruction of justice; perjury; fraud in foreign labor contracting (as defined in section 1351 of title 18); or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes; or

(V) subject to section 1184(q) of this title, an alien who is the beneficiary (including a child of the principal alien, if eligible to receive a visa under section 1153(d) of this title) of a petition to accord a status under section 1153(a)(2)(A) of this title that was filed with the Attorney General under section

1154 of this title on or before December 21, 2000, if—

(i) such petition has been pending for 3 years or more; or

(ii) such petition has been approved, 3 years or more have elapsed since such filing date, and—

(I) an immigrant visa is not immediately available to the alien because of a waiting list of applicants for visas under section 1153(a)(2)(A) of this title; or

(II) the alien's application for an immigrant visa, or the alien's application for adjustment of status under section 1255 of this title, pursuant to the approval of such petition, remains pending.

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(20) The term "lawfully admitted for permanent residence" means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed.

*****

8 U.S.C. § 1184. Admission of nonimmigrants

(a) Regulations

(1) The admission to the United States of any alien as a nonimmigrant shall be for such time and under such conditions as the Attorney General may by regulations prescribe, including when he deems necessary the giving of a bond with sufficient surety in such sum and containing such conditions as the Attorney General shall prescribe, to insure that at the expiration of such time or upon failure to maintain the status under which he was admitted, or to maintain any status subsequently acquired under section 1258 of this title, such alien will depart from the United States. No alien admitted to Guam or the Commonwealth of the Northern Mariana Islands without a visa pursuant to section 1182(*l*) of this title may be authorized to enter or stay in the United States other than in Guam or the Commonwealth of the Northern Mariana Islands or to remain in Guam or the Commonwealth of the Northern Mariana Islands for a period exceeding 45 days from date of admission to Guam or the Commonwealth of the Northern Mariana Islands. No alien admitted to the United States without a visa pursuant to section 1187 of this title may be authorized to remain in the United States as a nonimmigrant visitor for a period exceeding 90 days from the date of admission.

*****

(b) Presumption of status; written waiver

Every alien (other than a nonimmigrant described in subparagraph (L) or (V) of section 1101(a)(15) of this

title, and other than a nonimmigrant described in any provision of section 1101(a)(15)(H)(i) of this title except subclause (b1) of such section) shall be presumed to be an immigrant until he establishes to the satisfaction of the consular officer, at the time of application for a visa, and the immigration officers, at the time of application for admission, that he is entitled to a nonimmigrant status under section 1101(a)(15) of this title. An alien who is an officer or employee of any foreign government or of any international organization entitled to enjoy privileges, exemptions, and immunities under the International Organizations Immunities Act [22 U.S.C. 288 et seq.], or an alien who is the attendant, servant, employee, or member of the immediate family of any such alien shall not be entitled to apply for or receive an immigrant visa, or to enter the United States as an immigrant unless he executes a written waiver in the same form and substance as is prescribed by section 1257(b) of this title.

*****

8 U.S.C. § 1254a. Temporary protected status

(a) Granting of status

(1) In general

In the case of an alien who is a national of a foreign state designated under subsection (b) (or in the case of an alien having no nationality, is a person who last habitually resided in such designated state) and who meets the requirements of subsection (c), the Attorney General, in accordance with this section—

(A) may grant the alien temporary protected status in the United States and shall not remove the alien from the United States during the period in which such status is in effect, and

(B) shall authorize the alien to engage in employment in the United States and provide the alien with an "employment authorized" endorsement or other appropriate work permit.

(2) Duration of work authorization

Work authorization provided under this section shall be effective throughout the period the alien is in temporary protected status under this section.

(3) Notice

(A) Upon the granting of temporary protected status under this section, the Attorney General shall provide the alien with information concerning such status under this section.

(B) If, at the time of initiation of a removal proceeding against an alien, the foreign state (of which the alien is a national) is designated under

subsection (b), the Attorney General shall promptly notify the alien of the temporary protected status that may be available under this section.

(C) If, at the time of designation of a foreign state under subsection (b), an alien (who is a national of such state) is in a removal proceeding under this subchapter, the Attorney General shall promptly notify the alien of the temporary protected status that may be available under this section.

(D) Notices under this paragraph shall be provided in a form and language that the alien can understand.

(4) Temporary treatment for eligible aliens

(A) In the case of an alien who can establish a prima facie case of eligibility for benefits under paragraph (1), but for the fact that the period of registration under subsection (c)(1)(A)(iv) has not begun, until the alien has had a reasonable opportunity to register during the first 30 days of such period, the Attorney General shall provide for the benefits of paragraph (1).

(B) In the case of an alien who establishes a prima facie case of eligibility for benefits under paragraph (1), until a final determination with respect to the alien's eligibility for such benefits under paragraph (1) has been made, the alien shall be provided such benefits.

(5) Clarification

Nothing in this section shall be construed as authorizing the Attorney General to deny temporary protected status to an alien based on the alien's immigration status or to require any alien, as a condition of being granted such status, either to relinquish nonimmigrant or other status the alien may have or to execute any waiver of other rights under this chapter. The granting of temporary protected status under this section shall not be considered to be inconsistent with the granting of nonimmigrant status under this chapter.

(b) Designations

(1) In general

The Attorney General, after consultation with appropriate agencies of the Government, may designate any foreign state (or any part of such foreign state) under this subsection only if—

(A) the Attorney General finds that there is an ongoing armed conflict within the state and, due to such conflict, requiring the return of aliens who are nationals of that state to that state (or to the part of the state) would pose a serious threat to their personal safety;

(B) the Attorney General finds that—

(i) there has been an earthquake, flood, drought, epidemic, or other environmental disaster in the state resulting in a substantial, but temporary, disruption of living conditions in the area affected,

(ii) the foreign state is unable, temporarily, to handle adequately the return to the state of aliens who are nationals of the state, and

(iii) the foreign state officially has requested designation under this subparagraph; or

(C) the Attorney General finds that there exist extraordinary and temporary conditions in the foreign state that prevent aliens who are nationals of the state from returning to the state in safety, unless the Attorney General finds that permitting the aliens to remain temporarily in the United States is contrary to the national interest of the United States.

A designation of a foreign state (or part of such foreign state) under this paragraph shall not become effective unless notice of the designation (including a statement of the findings under this paragraph and the effective date of the designation) is published in the Federal Register. In such notice, the Attorney General shall also state an estimate of the number of nationals of the foreign state designated who are (or within the effective period of the designation are likely to become) eligible for temporary protected status under this section and their immigration status in the United States.

(2) Effective period of designation for foreign states

The designation of a foreign state (or part of such foreign state) under paragraph (1) shall—

(A) take effect upon the date of publication of the designation under such paragraph, or such later date as the Attorney General may specify in the

notice published under such paragraph, and

(B) shall remain in effect until the effective date of the termination of the designation under paragraph (3)(B).

For purposes of this section, the initial period of designation of a foreign state (or part thereof) under paragraph (1) is the period, specified by the Attorney General, of not less than 6 months and not more than 18 months.

(3) Periodic review, terminations, and extensions of designations

(A) Periodic review

At least 60 days before end of the initial period of designation, and any extended period of designation, of a foreign state (or part thereof) under this section the Attorney General, after consultation with appropriate agencies of the Government, shall review the conditions in the foreign state (or part of such foreign state) for which a designation is in effect under this subsection and shall determine whether the conditions for such designation under this subsection continue to be met. The Attorney General shall provide on a timely basis for the publication of notice of each such determination (including the basis for the determination, and, in the case of an affirmative determination, the period of extension of designation under subparagraph (C)) in the Federal Register.

(B) Termination of designation

If the Attorney General determines under subparagraph (A) that a foreign state (or part of such foreign state) no longer continues to meet the conditions for designation under paragraph (1), the Attorney General shall terminate the designation by publishing notice in the Federal Register of the determination under this subparagraph (including the basis for the determination). Such termination is effective in accordance with subsection (d)(3), but shall not be effective earlier than 60 days after the date the notice is published or, if later, the expiration of the most recent previous extension under subparagraph (C).

(C) Extension of designation

If the Attorney General does not determine under subparagraph (A) that a foreign state (or part of such foreign state) no longer meets the conditions for designation under paragraph (1), the period of designation of the foreign state is extended for an additional period of 6 months (or, in the discretion of the Attorney General, a period of 12 or 18 months).

(4) Information concerning protected status at time of designations

At the time of a designation of a foreign state under this subsection, the Attorney General shall make available information respecting the temporary protected status made available to aliens who are nationals of such designated foreign state.

(5) Review

(A) Designations

There is no judicial review of any determination of the Attorney General with respect to the designation, or termination or extension of a designation, of a foreign state under this subsection.

(B) Application to individuals

The Attorney General shall establish an administrative procedure for the review of the denial of benefits to aliens under this subsection. Such procedure shall not prevent an alien from asserting protection under this section in removal proceedings if the alien demonstrates that the alien is a national of a state designated under paragraph (1).

(c) Aliens eligible for temporary protected status

(1) In general

(A) Nationals of designated foreign states

Subject to paragraph (3), an alien, who is a national of a state designated under subsection (b)(1) (or in the case of an alien having no nationality, is a person who last habitually resided in such designated state), meets the requirements of this paragraph only if—

(i) the alien has been continuously physically present in the United States since the effective date of the most recent designation of that state;

(ii) the alien has continuously resided in the United States since such date as the Attorney General may designate;

(iii) the alien is admissible as an immigrant, except as otherwise provided under paragraph (2)(A), and is not ineligible for temporary protected status under paragraph (2)(B); and

(iv) to the extent and in a manner which the Attorney General establishes, the alien registers for the temporary protected status under this section during a registration period of not less than 180 days.

(B) Registration fee

The Attorney General may require payment of a reasonable fee as a condition of registering an alien under subparagraph (A)(iv) (including providing an alien with an "employment authorized" endorsement or other appropriate work permit under this section). The amount of any such fee shall not exceed $50. In the case of aliens registered pursuant to a designation under this section made after July 17, 1991, the Attorney General may impose a separate, additional fee for providing an alien with documentation of work authorization. Notwithstanding section 3302 of title 31, all fees collected under this subparagraph shall be credited to the appropriation to be used in carrying out this section.

(2) Eligibility standards

(A) Waiver of certain grounds for inadmissibility

In the determination of an alien's admissibility for purposes of subparagraph (A)(iii) of paragraph (1)—

(i) the provisions of paragraphs (5) and (7)(A) of section 1182(a) of this title shall not apply;

(ii) except as provided in clause (iii), the Attorney General may waive any other provision of section 1182(a) of this title in the case of individual aliens for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest; but

(iii) the Attorney General may not waive—

(I) paragraphs (2)(A) and (2)(B) (relating to criminals) of such section,

(II) paragraph (2)(C) of such section (relating to drug offenses), except for so much of such paragraph as relates to a single offense of simple possession of 30 grams or less of marijuana, or

(III) paragraphs (3)(A), (3)(B), (3)(C), and (3)(E) of such section (relating to national security and participation in the Nazi persecutions or those who have engaged in genocide).

(B) Aliens ineligible

An alien shall not be eligible for temporary

protected status under this section if the Attorney General finds that—

(i) the alien has been convicted of any felony or 2 or more misdemeanors committed in the United States, or

(ii) the alien is described in section 1158(b)(2)(A) of this title.

(3) Withdrawal of temporary protected status

The Attorney General shall withdraw temporary protected status granted to an alien under this section if—

(A) the Attorney General finds that the alien was not in fact eligible for such status under this section,

(B) except as provided in paragraph (4) and permitted in subsection (f)(3), the alien has not remained continuously physically present in the United States from the date the alien first was granted temporary protected status under this section, or

(C) the alien fails, without good cause, to register with the Attorney General annually, at the end of each 12-month period after the granting of such status, in a form and manner specified by the Attorney General.

(4) Treatment of brief, casual, and innocent departures and certain other absences

(A) For purposes of paragraphs (1)(A)(i) and (3)(B), an alien shall not be considered to have failed to maintain continuous physical presence in

the United States by virtue of brief, casual, and innocent absences from the United States, without regard to whether such absences were authorized by the Attorney General.

(B) For purposes of paragraph (1)(A)(ii), an alien shall not be considered to have failed to maintain continuous residence in the United States by reason of a brief, casual, and innocent absence described in subparagraph (A) or due merely to a brief temporary trip abroad required by emergency or extenuating circumstances outside the control of the alien.

(5) Construction

Nothing in this section shall be construed as authorizing an alien to apply for admission to, or to be admitted to, the United States in order to apply for temporary protected status under this section.

(6) Confidentiality of information

The Attorney General shall establish procedures to protect the confidentiality of information provided by aliens under this section.

(d) Documentation

(1) Initial issuance

Upon the granting of temporary protected status to an alien under this section, the Attorney General shall provide for the issuance of such temporary documentation and authorization as may be necessary to carry out the purposes of this section.

(2) Period of validity

Subject to paragraph (3), such documentation shall be valid during the initial period of designation of the foreign state (or part thereof) involved and any extension of such period. The Attorney General may stagger the periods of validity of the documentation and authorization in order to provide for an orderly renewal of such documentation and authorization and for an orderly transition (under paragraph (3)) upon the termination of a designation of a foreign state (or any part of such foreign state).

(3) Effective date of terminations

If the Attorney General terminates the designation of a foreign state (or part of such foreign state) under subsection (b)(3)(B), such termination shall only apply to documentation and authorization issued or renewed after the effective date of the publication of notice of the determination under that subsection (or, at the Attorney General's option, after such period after the effective date of the determination as the Attorney General determines to be appropriate in order to provide for an orderly transition).

(4) Detention of alien

An alien provided temporary protected status under this section shall not be detained by the Attorney General on the basis of the alien's immigration status in the United States.

(e) Relation of period of temporary protected status to cancellation of removal

With respect to an alien granted temporary protected

status under this section, the period of such status shall not be counted as a period of physical presence in the United States for purposes of section 1229b(a) of this title, unless the Attorney General determines that extreme hardship exists. Such period shall not cause a break in the continuity of residence of the period before and after such period for purposes of such section.

(f) Benefits and status during period of temporary protected status

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

(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 (as defined in section 1101(a)(36) of this title) 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.

(g) Exclusive remedy

Except as otherwise specifically provided, this section shall constitute the exclusive authority of the Attorney General under law to permit aliens who are or may become otherwise deportable or have been paroled into the United

States to remain in the United States temporarily because of their particular nationality or region of foreign state of nationality.

(h) Limitation on consideration in Senate of legislation adjusting status

(1) In general

Except as provided in paragraph (2), it shall not be in order in the Senate to consider any bill, resolution, or amendment that—

(A) provides for adjustment to lawful temporary or permanent resident alien status for any alien receiving temporary protected status under this section, or

(B) has the effect of amending this subsection or limiting the application of this subsection.

(2) Supermajority required

Paragraph (1) may be waived or suspended in the Senate only by the affirmative vote of three-fifths of the Members duly chosen and sworn. An affirmative vote of three-fifths of the Members of the Senate duly chosen and sworn shall be required in the Senate to sustain an appeal of the ruling of the Chair on a point of order raised under paragraph (1).

(3) Rules

Paragraphs (1) and (2) are enacted—

(A) as an exercise of the rulemaking power of the Senate and as such they are deemed a part of the rules of the Senate, but applicable only with respect to the matters described in paragraph (1) and

supersede other rules of the Senate only to the extent that such paragraphs are inconsistent therewith; and

(B) with full recognition of the constitutional right of the Senate to change such rules at any time, in the same manner as in the case of any other rule of the Senate.

(i) Annual report and review

(1) Annual report

Not later than March 1 of each year (beginning with 1992), the Attorney General, after consultation with the appropriate agencies of the Government, shall submit a report to the Committees on the Judiciary of the House of Representatives and of the Senate on the operation of this section during the previous year. Each report shall include—

(A) a listing of the foreign states or parts thereof designated under this section,

(B) the number of nationals of each such state who have been granted temporary protected status under this section and their immigration status before being granted such status, and

(C) an explanation of the reasons why foreign states or parts thereof were designated under subsection (b)(1) and, with respect to foreign states or parts thereof previously designated, why the designation was terminated or extended under subsection (b)(3).

(2) Committee report

No later than 180 days after the date of receipt of

such a report, the Committee on the Judiciary of each House of Congress shall report to its respective House such oversight findings and legislation as it deems appropriate.

8 U.S.C. § 1255. Adjustment of status of nonimmigrant to that of person admitted for permanent residence

(a) Status as person admitted for permanent residence on application and eligibility for immigrant visa

The status of an alien who was inspected and admitted or paroled into the United States or the status of any other alien having an approved petition for classification as a VAWA self-petitioner 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 if (1) the alien makes an application for such adjustment, (2) the alien 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 at the time his application is filed.

(b) Record of lawful admission for permanent residence; reduction of preference visas

Upon the approval of an application for adjustment made under subsection (a), the Attorney General shall record the alien's lawful admission for permanent residence as of the date the order of the Attorney General approving the application for the adjustment of status is made, and the Secretary of State shall reduce by one the number of the preference visas authorized to be issued under sections 1152 and 1153 of this title within the class to which the alien is chargeable for the fiscal year then current.

(c) Alien crewmen, aliens continuing or accepting unauthorized employment, and aliens admitted in transit without visa

Other than an alien having an approved petition for classification as a VAWA self-petitioner, subsection (a) shall not be applicable to (1) an alien crewman; (2) subject to subsection (k), an alien (other than an immediate relative as defined in section 1151(b) of this title or a special immigrant described in section 1101(a)(27)(H), (I), (J), or (K) of this title) who hereafter continues in or accepts unauthorized employment prior to filing an application for adjustment of status or who is in unlawful immigration status on the date of filing the application for adjustment of status or 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; (3) any alien admitted in transit without visa under section 1182(d)(4)(C) of this title; (4) an alien (other than an immediate relative as defined in section 1151(b) of this title) who was admitted as a nonimmigrant visitor without a visa under section 1182(*l*) of this title or section 1187 of this title; (5) an alien who was admitted as a nonimmigrant described in section 1101(a)(15)(S) of this title,[4] (6) an alien who is deportable under section 1227(a)(4)(B) of this title; (7) any alien who seeks adjustment of status to that of an immigrant under section 1153(b) of this title and is not in a lawful nonimmigrant status; or (8) any alien who was employed while the alien was an unauthorized alien, as defined in section 1324a(h)(3) of this title, or who has otherwise violated the terms of a nonimmigrant visa.

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[4] So in original. The comma probably should be a semicolon.

(d) Alien admitted for permanent residence on conditional basis; fiancée or fiancé of citizen

The Attorney General may not adjust, under subsection (a), the status of an alien lawfully admitted to the United States for permanent residence on a conditional basis under section 1186a of this title. The Attorney General may not adjust, under subsection (a), the status of a nonimmigrant alien described in section 1101(a)(15)(K) of this title except to that of an alien lawfully admitted to the United States on a conditional basis under section 1186a of this title as a result of the marriage of the nonimmigrant (or, in the case of a minor child, the parent) to the citizen who filed the petition to accord that alien's nonimmigrant status under section 1101(a)(15)(K) of this title.

(e) Restriction on adjustment of status based on marriages entered while in admissibility or deportation proceedings; bona fide marriage exception

(1) Except as provided in paragraph (3), an alien who is seeking to receive an immigrant visa on the basis of a marriage which was entered into during the period described in paragraph (2) may not have the alien's status adjusted under subsection (a).

(2) The period described in this paragraph is the period during which administrative or judicial proceedings are pending regarding the alien's right to be admitted or remain in the United States.

(3) Paragraph (1) and section 1154(g) of this title shall not apply with respect to a marriage if the alien establishes by clear and convincing evidence to the

satisfaction of the Attorney General that the marriage was entered into in good faith and in accordance with the laws of the place where the marriage took place and the marriage was not entered into for the purpose of procuring the alien's admission as an immigrant and no fee or other consideration was given (other than a fee or other consideration to an attorney for assistance in preparation of a lawful petition) for the filing of a petition under section 1154(a) of this title or subsection (d) or (p)[5] of section 1184 of this title with respect to the alien spouse or alien son or daughter. In accordance with regulations, there shall be only one level of administrative appellate review for each alien under the previous sentence.

(f) Limitation on adjustment of status

The Attorney General may not adjust, under subsection (a), the status of an alien lawfully admitted to the United States for permanent residence on a conditional basis under section 1186b of this title.

(g) Special immigrants

In applying this section to a special immigrant described in section 1101(a)(27)(K) of this title, such an immigrant shall be deemed, for purposes of subsection (a), to have been paroled into the United States.

(h) Application with respect to special immigrants

In applying this section to a special immigrant described in section 1101(a)(27)(J) of this title—

(1) such an immigrant shall be deemed, for purposes of subsection (a), to have been paroled into the United

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[5] See References in Text note below.

States; and

(2) in determining the alien's admissibility as an immigrant—

(A) paragraphs (4), (5)(A), (6)(A), (6)(C), (6)(D), (7)(A), and (9)(B) of section 1182(a) of this title shall not apply; and

(B) the Attorney General may waive other paragraphs of section 1182(a) of this title (other than paragraphs (2)(A), (2)(B), (2)(C) (except for so much of such paragraph as related to a single offense of simple possession of 30 grams or less of marijuana), (3)(A), (3)(B), (3)(C), and (3)(E)) in the case of individual aliens for humanitarian purposes, family unity, or when it is otherwise in the public interest.

The relationship between an alien and the alien's natural parents or prior adoptive parents shall not be considered a factor in making a waiver under paragraph (2)(B). Nothing in this subsection or section 1101(a)(27)(J) of this title shall be construed as authorizing an alien to apply for admission or be admitted to the United States in order to obtain special immigrant status described in such section.

(i) Adjustment in status of certain aliens physically present in United States

(1) Notwithstanding the provisions of subsections (a) and (c) of this section, an alien physically present in the United States—

(A) who—

(i) entered the United States without inspection; or

(ii) is within one of the classes enumerated in subsection (c) of this section;

(B) who is the beneficiary (including a spouse or child of the principal alien, if eligible to receive a visa under section 1153(d) of this title) of—

(i) a petition for classification under section 1154 of this title that was filed with the Attorney General on or before April 30, 2001; or

(ii) an application for a labor certification under section 1182(a)(5)(A) of this title that was filed pursuant to the regulations of the Secretary of Labor on or before such date; and

(C) who, in the case of a beneficiary of a petition for classification, or an application for labor certification, described in subparagraph (B) that was filed after January 14, 1998, is physically present in the United States on December 21, 2000;

may apply to the Attorney General for the adjustment of his or her status to that of an alien lawfully admitted for permanent residence. The Attorney General may accept such application only if the alien remits with such application a sum equalling $1,000 as of the date of receipt of the application, but such sum shall not be required from a child under the age of seventeen, or an alien who is the spouse or unmarried child of an individual who obtained temporary or permanent resident status under section 1160 or 1255a of this title or section 202 of the Immigration Reform and Control Act of 1986 at any date, who—

(i) as of May 5, 1988, was the unmarried child or spouse of the individual who obtained

temporary or permanent resident status under section 1160 or 1255a of this title or section 202 of the Immigration Reform and Control Act of 1986;

(ii) entered the United States before May 5, 1988, resided in the United States on May 5, 1988, and is not a lawful permanent resident; and

(iii) applied for benefits under section 301(a) of the Immigration Act of 1990. The sum specified herein shall be in addition to the fee normally required for the processing of an application under this section.

(2) Upon receipt of such an application and the sum hereby required, the Attorney General may adjust the status of the alien to that of an alien lawfully admitted for permanent residence if—

(A) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence; and

(B) an immigrant visa is immediately available to the alien at the time the application is filed.

(3)(A) The portion of each application fee (not to exceed $200) that the Attorney General determines is required to process an application under this section and is remitted to the Attorney General pursuant to paragraphs (1) and (2) of this subsection shall be disposed of by the Attorney General as provided in subsections (m), (n), and (*o*) of section 1356 of this title.

(B) Any remaining portion of such fees remitted

under such paragraphs shall be deposited by the Attorney General into the Breached Bond/Detention Fund established under section 1356(r) of this title, except that in the case of fees attributable to applications for a beneficiary with respect to whom a petition for classification, or an application for labor certification, described in paragraph (1)(B) was filed after January 14, 1998, one-half of such remaining portion shall be deposited by the Attorney General into the Immigration Examinations Fee Account established under section 1356(m) of this title.

(j) Adjustment to permanent resident status

(1) If, in the opinion of the Attorney General—

(A) a nonimmigrant admitted into the United States under section 1101(a)(15)(S)(i) of this title has supplied information described in subclause (I) of such section; and

(B) the provision of such information has substantially contributed to the success of an authorized criminal investigation or the prosecution of an individual described in subclause (III) of that section,

the Attorney General may adjust the status of the alien (and the spouse, married and unmarried sons and daughters, and parents of the alien if admitted under that section) to that of an alien lawfully admitted for permanent residence if the alien is not described in section 1182(a)(3)(E) of this title.

(2) If, in the sole discretion of the Attorney General—

(A) a nonimmigrant admitted into the United States under section 1101(a)(15)(S)(ii) of this title has supplied information described in subclause (I) of such section, and

(B) the provision of such information has substantially contributed to—

(i) the prevention or frustration of an act of terrorism against a United States person or United States property, or

(ii) the success of an authorized criminal investigation of, or the prosecution of, an individual involved in such an act of terrorism, and

(C) the nonimmigrant has received a reward under section 2708(a) of title 22,

the Attorney General may adjust the status of the alien (and the spouse, married and unmarried sons and daughters, and parents of the alien if admitted under such section) to that of an alien lawfully admitted for permanent residence if the alien is not described in section 1182(a)(3)(E) of this title.

(3) Upon the approval of adjustment of status under paragraph (1) or (2), the Attorney General shall record the alien's lawful admission for permanent residence as of the date of such approval and the Secretary of State shall reduce by one the number of visas authorized to be issued under sections 1151(d) and 1153(b)(4) of this title for the fiscal year then current.

(k) Inapplicability of certain provisions for certain employment-based immigrants

An alien who is eligible to receive an immigrant visa under paragraph (1), (2), or (3) of section 1153(b) of this title (or, in the case of an alien who is an immigrant described in section 1101(a)(27)(C) of this title, under section 1153(b)(4) of this title) may adjust status pursuant to subsection (a) and notwithstanding subsection (c)(2), (c)(7), and (c)(8), if—

(1) the alien, on the date of filing an application for adjustment of status, is present in the United States pursuant to a lawful admission;

(2) the alien, subsequent to such lawful admission has not, for an aggregate period exceeding 180 days—

(A) failed to maintain, continuously, a lawful status;

(B) engaged in unauthorized employment; or

(C) otherwise violated the terms and conditions of the alien's admission.

(*l*) Adjustment of status for victims of trafficking

(1) If, in the opinion of the Secretary of Homeland Security, or in the case of subparagraph (C)(i), in the opinion of the Secretary of Homeland Security, in consultation with the Attorney General, as appropriate[6] a nonimmigrant admitted into the United States under section 1101(a)(15)(T)(i) of this title—

(A) has been physically present in the United States for a continuous period of at least 3 years

[6] So in original. Probably should be followed by a comma.

since the date of admission as a nonimmigrant under section 1101(a)(15)(T)(i) of this title, or has been physically present in the United States for a continuous period during the investigation or prosecution of acts of trafficking and that, in the opinion of the Attorney General, the investigation or prosecution is complete, whichever period of time is less;

(B) subject to paragraph (6), has, throughout such period, been a person of good moral character; and

(C)(i) has, during such period, complied with any reasonable request for assistance in the investigation or prosecution of acts of trafficking;

(ii) the alien[7] would suffer extreme hardship involving unusual and severe harm upon removal from the United States; or

(iii) was younger than 18 years of age at the time of the victimization qualifying the alien for relief under section 1101(a)(15)(T) of this title.[8]

the Secretary of Homeland Security may adjust the status of the alien (and any person admitted under section 1101(a)(15)(T)(ii) of this title as the spouse, parent, sibling, or child of the alien) to that of an alien lawfully admitted for permanent residence.

(2) Paragraph (1) shall not apply to an alien admitted under section 1101(a)(15)(T) of this title who is inadmissible to the United States by reason of a

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[7] So in original. The words "the alien" probably should not appear.
[8] So in original. The period probably should be a comma.

ground that has not been waived under section 1182 of this title, except that, if the Secretary of Homeland Security considers it to be in the national interest to do so, the Secretary of Homeland Security, in the Attorney General's[9] discretion, may waive the application of—

(A) paragraphs (1) and (4) of section 1182(a) of this title; and

(B) any other provision of such section (excluding paragraphs (3), (10)(C), and (10(E))[10], if the activities rendering the alien inadmissible under the provision were caused by, or were incident to, the victimization described in section 1101(a)(15)(T)(i)(I) of this title.

(3) An alien shall be considered to have failed to maintain continuous physical presence in the United States under paragraph (1)(A) if the alien has departed from the United States for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days, unless—

(A) the absence was necessary to assist in the investigation or prosecution described in paragraph (1)(A); or

(B) an official involved in the investigation or prosecution certifies that the absence was otherwise justified.

(4)(A) The total number of aliens whose status may be adjusted under paragraph (1) during any fiscal year

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[9] So in original. Probably should be "Secretary's".
[10] So in original. Probably should be "(10)(E)),".

may not exceed 5,000.

(B) The numerical limitation of subparagraph (A) shall only apply to principal aliens and not to the spouses, sons, daughters, siblings, or parents of such aliens.

(5) Upon the approval of adjustment of status under paragraph (1), the Secretary of Homeland Security shall record the alien's lawful admission for permanent residence as of the date of such approval.

(6) For purposes of paragraph (1)(B), the Secretary of Homeland Security may waive consideration of a disqualification from good moral character with respect to an alien if the disqualification was caused by, or incident to, the trafficking described in section 1101(a)(15)(T)(i)(I) of this title.

(7) The Secretary of Homeland Security shall permit aliens to apply for a waiver of any fees associated with filing an application for relief through final adjudication of the adjustment of status for a VAWA self-petitioner and for relief under sections 1101(a)(15)(T), 1101(a)(15)(U), 1105a, 1229b(b)(2), and 1254a(a)(3) of this title (as in effect on March 31, 1997).

(m) Adjustment of status for victims of crimes against women

(1) The Secretary of Homeland Security may adjust the status of an alien admitted into the United States (or otherwise provided nonimmigrant status) under section 1101(a)(15)(U) of this title to that of an alien lawfully admitted for permanent residence if the alien is not described in section 1182(a)(3)(E) of this title, unless the Secretary determines based on affirmative

evidence that the alien unreasonably refused to provide assistance in a criminal investigation or prosecution, if—

(A) the alien has been physically present in the United States for a continuous period of at least 3 years since the date of admission as a nonimmigrant under clause (i) or (ii) of section 1101(a)(15)(U) of this title; and

(B) in the opinion of the Secretary of Homeland Security, the alien's continued presence in the United States is justified on humanitarian grounds, to ensure family unity, or is otherwise in the public interest.

(2) An alien shall be considered to have failed to maintain continuous physical presence in the United States under paragraph (1)(A) if the alien has departed from the United States for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days unless the absence is in order to assist in the investigation or prosecution or unless an official involved in the investigation or prosecution certifies that the absence was otherwise justified.

(3) Upon approval of adjustment of status under paragraph (1) of an alien described in section 1101(a)(15)(U)(i) of this title the Secretary of Homeland Security may adjust the status of or issue an immigrant visa to a spouse, a child, or, in the case of an alien child, a parent who did not receive a nonimmigrant visa under section 1101(a)(15)(U)(ii) of this title if the Secretary considers the grant of such status or visa necessary to avoid extreme hardship.

(4) Upon the approval of adjustment of status under paragraph (1) or (3), the Secretary of Homeland Security shall record the alien's lawful admission for permanent residence as of the date of such approval.

(5)(A) The Secretary of Homeland Security shall consult with the Attorney General, as appropriate, in making a determination under paragraph (1) whether affirmative evidence demonstrates that the alien unreasonably refused to provide assistance to a Federal law enforcement official, Federal prosecutor, Federal judge, or other Federal authority investigating or prosecuting criminal activity described in section 1101(a)(15)(U)(iii) of this title.

(B) Nothing in paragraph (1)(B) may be construed to prevent the Secretary from consulting with the Attorney General in making a determination whether affirmative evidence demonstrates that the alien unreasonably refused to provide assistance to a State or local law enforcement official, State or local prosecutor, State or local judge, or other State or local authority investigating or prosecuting criminal activity described in section 1101(a)(15)(U)(iii) of this title.

8 U.S.C. § 1258. Change of nonimmigrant classification

(a) The Secretary of Homeland Security may, under such conditions as he may prescribe, authorize a change from any nonimmigrant classification to any other nonimmigrant classification in the case of any alien lawfully admitted to the United States as a nonimmigrant who is continuing to maintain that status and who is not inadmissible under section 1182(a)(9)(B)(i) of this title (or whose inadmissibility under such section is waived under section 1182(a)(9)(B)(v) of this title), except (subject to subsection (b)) in the case of—

(1) an alien classified as a nonimmigrant under subparagraph (C), (D), (K), or (S) of section 1101(a)(15) of this title,

(2) an alien classified as a nonimmigrant under subparagraph (J) of section 1101(a)(15) of this title who came to the United States or acquired such classification in order to receive graduate medical education or training,

(3) an alien (other than an alien described in paragraph (2)) classified as a nonimmigrant under subparagraph (J) of section 1101(a)(15) of this title who is subject to the two-year foreign residence requirement of section 1182(e) of this title and has not received a waiver thereof, unless such alien applies to have the alien's classification changed from classification under subparagraph (J) of section 1101(a)(15) of this title to a classification under subparagraph (A) or (G) of such section, and

(4) an alien admitted as a nonimmigrant visitor

without a visa under section 1182(*l*) of this title or section 1187 of this title.

(b) The exceptions specified in paragraphs (1) through (4) of subsection (a) shall not apply to a change of nonimmigrant classification to that of a nonimmigrant under subparagraph (T) or (U) of section 1101(a)(15) of this title.

8 C.F.R. § 103.3 Denials, appeals, and precedent decisions.

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(c) *Service precedent decisions.* The Secretary of Homeland Security, or specific officials of the Department of Homeland Security designated by the Secretary with the concurrence of the Attorney General, may file with the Attorney General decisions relating to the administration of the immigration laws of the United States for publication as precedent in future proceedings, and upon approval of the Attorney General as to the lawfulness of such decision, the Director of the Executive Office for Immigration Review shall cause such decisions to be published in the same manner as decisions of the Board and the Attorney General. In addition to Attorney General and Board decisions referred to in §1003.1(g) of chapter V, designated Service decisions are to serve as precedents in all proceedings involving the same issue(s). Except as these decisions may be modified or overruled by later precedent decisions, they are binding on all Service employees in the administration of the Act. Precedent decisions must be published and made available to the public as described in 8 CFR 103.10(e).

8 C.F.R. § 244.2 Eligibility.

Except as provided in §§244.3 and 244.4, an alien may in the discretion of the director be granted Temporary Protected Status if the alien establishes that he or she:

(a) Is a national, as defined in section 101(a)(21) of the Act, of a foreign state designated under section 244(b) of the Act;

(b) Has been continuously physically present in the United States since the effective date of the most recent designation of that foreign state;

(c) Has continuously resided in the United States since such date as the Attorney General may designate;

(d) Is admissible as an immigrant except as provided under §244.3;

(e) Is not ineligible under §244.4; and

(f)(1) Registers for Temporary Protected Status during the initial registration period announced by public notice in the FEDERAL REGISTER, or

(2) During any subsequent extension of such designation if at the time of the initial registration period:

(i) The applicant is a nonimmigrant or has been granted voluntary departure status or any relief from removal;

(ii) The applicant has an application for change of status, adjustment of status, asylum, voluntary departure, or any relief from removal which is pending or subject to further review or appeal;

(iii) The applicant is a parolee or has a pending request for reparole; or

(iv) The applicant is a spouse or child of an alien currently eligible to be a TPS registrant.

(3) Eligibility for late initial registration in a currently

designated foreign state shall also continue until January 15, 1999, for any applicant who would have been eligible to apply previously if paragraph (f)(2) of this section as revised had been in effect before November 16, 1998.

(g) Has filed an application for late registration with the appropriate Service director within a 60-day period immediately following the expiration or termination of conditions described in paragraph (f)(2) of this section.

8 C.F.R. § 245.1 Eligibility.

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(d) *Definitions*—(1) *Lawful immigration status.* For purposes of section 245(c)(2) of the Act, the term "lawful immigration status" will only describe the immigration status of an individual who is:

(i) In lawful permanent resident status;

(ii) An alien admitted to the United States in nonimmigrant status as defined in section 101(a)(15) of the Act, whose initial period of admission has not expired or whose nonimmigrant status has been extended in accordance with part 214 of this chapter;

(iii) In refugee status under section 207 of the Act, such status not having been revoked;

(iv) In asylee status under section 208 of the Act, such status not having been revoked;

(v) In parole status which has not expired, been revoked or terminated; or

(vi) Eligible for the benefits of Public Law 101-238 (the Immigration Nursing Relief Act of 1989) and files an application for adjustment of status on or before October 17, 1991.

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8 C.F.R. § 1003.1 Organization, jurisdiction, and powers of the Board of Immigration Appeals.

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(i) *Publication of Secretary's precedent decisions.* The Secretary of Homeland Security, or specific officials of the Department of Homeland Security designated by the Secretary with the concurrence of the Attorney General, may file with the Attorney General decisions relating to the administration of the immigration laws of the United States for publication as precedent in future proceedings, and, upon approval of the Attorney General as to the lawfulness of such decision, the Director of the Executive Office for Immigration Review shall cause such decisions to be published in the same manner as decisions of the Board and the Attorney General.

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