**CORRECTED**
**APPENDIX**

**APPENDIX A**

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 19-1311

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JOSE SANTOS SANCHEZ; SONIA GONZALEZ

v.

SECRETARY UNITED STATES DEPARTMENT OF HOMELAND SECURITY; DIRECTOR UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES; DIRECTOR UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES NEBRASKA SERVICE CENTER; DISTRICT DIRECTOR UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES NEWARK,
Appellants

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On Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 1-16-cv-00651)
District Judge: Honorable Robert B. Kugler

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Argued January 15, 2020
Before: HARDIMAN, PORTER, and PHIPPS, *Circuit Judges.*

(Filed: July 22, 2020)

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OPINION OF THE COURT

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HARDIMAN, *Circuit Judge.*

This appeal presents a question of statutory interpretation involving adjacent subsections of the Immigration and Nationality Act (INA), 8 U.S.C. § 1101 *et seq.*: Does the conferral of Temporary Protected Status (TPS) under § 1254a constitute an "admission" into the United States under § 1255? We hold it does not.

I

Jose Sanchez and Sonia Gonzalez (Plaintiffs or Appellees) are husband and wife and citizens of El Salvador. They entered the United States without inspection or admission in 1997 and again in 1998. Following a series of earthquakes in El Salvador in 2001, Plaintiffs applied for and received TPS. Over the next several years, the Attorney General[1] periodically

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[1] Although §§ 1254a and 1255 reference the Attorney General's authority and discretion in managing the TPS program, this authority now belongs to the Secretary of the Department of Homeland Security. *See Meija Rodriguez v. U.S. Dep't of Homeland Sec.*, 562 F.3d 1137, 1140 n.3 (11th Cir. 2009) (citing 8 U.S.C. § 1103(a) & 8

extended TPS eligibility for El Salvadoran nationals, which enabled Plaintiffs to remain in the United States.

In 2014, Plaintiffs applied to become lawful permanent residents under § 1255. The United States Citizenship and Immigration Services (USCIS) denied their applications, explaining that Sanchez was "statutorily ineligible" for adjustment of status because he had not been admitted into the United States. And USCIS denied Gonzalez's application because it depended on the success of Sanchez's application.

Plaintiffs challenged that decision in the United States District Court for the District of New Jersey, arguing Sanchez was "admitted" into the United States when he received TPS. *Sanchez v. Johnson*, 2018 WL 6427894, at *4 (D.N.J. 2018). The District Court granted Plaintiffs summary judgment, holding a grant of TPS meets § 1255(a)'s requirement that an alien must be "inspected and admitted or paroled" to be eligible for adjustment of status. *Id.* at *5–6. The Court reasoned that being considered in "lawful status" is "wholly consistent with being considered as though Plaintiffs had been 'inspected and admitted' under § 1255." *Id.* at *4. The Government filed this timely appeal.[2]

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C.F.R. § 244.2).

[2] The District Court had jurisdiction under 28 U.S.C. § 1331. We have jurisdiction under 28 U.S.C. § 1291. We review the summary judgment de novo, applying the same standard as the District Court. *Fraternal Order of Police Lodge 1 v. City of Camden*, 842 F.3d 231, 238 (3d Cir. 2016). Summary judgment is appropriate only if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). There is no genuine dispute over any material fact, so we review only the District Court's legal interpretation of §§ 1254a and 1255.

## II

TPS shields foreign nationals present in the United States from removal during armed conflict, environmental disasters, or other extraordinary conditions in their homelands. 8 U.S.C. § 1254a(b)(1). Once TPS is granted, "*the alien shall be considered as being in, and maintaining, lawful status as a nonimmigrant*" for adjustment-of-status purposes under § 1255. 8 U.S.C. § 1254a(f)(4) (emphasis added).

Section 1255(a) permits certain aliens present in the United States (including some who received TPS) to adjust their status. It provides:

> The status of an alien *who was inspected and admitted or paroled* into the United States . . . may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence.

8 U.S.C. § 1255(a) (emphasis added). The INA defines "admission" and "admitted" 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).

As relevant here, an applicant is ineligible for adjustment of status under § 1255 if he "has failed (other than through no fault of his own or for technical reasons) to maintain continuously a lawful status since entry into the United States." 8 U.S.C. § 1255(c)(2). An applicant may nevertheless seek adjustment of status despite that bar if "the alien, on the date of filing an application for

adjustment of status, is present in the United States *pursuant to a lawful admission*." 8 U.S.C. § 1255(k)(1) (emphasis added).

## III

Appellees claim they are eligible for adjustment of status because they were admitted when they received TPS. We disagree because their interpretation of §§ 1254a and 1255 is inconsistent with the text, context, structure, and purpose of those sections.

### A

The text of §§ 1254a and 1255 supports our determination that a grant of TPS does not constitute an admission.

The Government argues the District Court erred when it held that "being in, and maintaining, lawful status as a nonimmigrant" includes being "inspected and admitted or paroled" as required by § 1255(a). According to the Government, "lawful status" does not qualify as an "admission" because the concepts are distinct. Appellees agree that these terms have distinct meanings, so they do not argue that "being in any lawful status is equivalent to an admission." Sanchez Br. 8. Instead, they insist "that the process of obtaining TPS constitutes an admission, akin to an alien who is considered admitted after an adjustment of status." *Id.* (citing *In re Espinosa-Guillot*, 25 I. & N. Dec. 653, 654 (BIA 2011) ("An adjustment of status generally constitutes an admission."). Appellees contend "[a]n individual's original entry is irrelevant because the subsequent grant of TPS . . . provides the 'lawful entry' referred to in § 1101(a)(13)." *Id.* at 15. And

they emphasize that obtaining nonimmigrant status requires the admission of the alien, so the government admits TPS recipients by treating them as being in lawful nonimmigrant status under § 1254a(f)(4).

The Government's position is more consistent with the text of §§ 1254a and 1255. The INA defines "admission" and "admitted" 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). We have interpreted "admission" in § 1255(b) in accordance with that statutory definition. *Hanif v. Att'y Gen.*, 694 F.3d 479, 485 (3d Cir. 2012). And although "lawful status" is not defined in the INA, we have drawn a clear line between "admission" and "status," saying "[t]he date of gaining a new status is not the same as the date of the physical event of entering the country." *Id.*; *see also Taveras v. Att'y Gen.*, 731 F.3d 281, 290 (3d Cir. 2013) ("The words 'entry' and 'into' plainly indicate that 'admission' involves physical entrance into the country, which is inapposite to adjustment of status in removal proceedings, a procedure that is structured to take place entirely within the United States."). Nothing in §§ 1254a or 1255 suggests we should interpret these terms differently now.[3]

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[3] The Fifth Circuit also has recognized the distinction between admission and status:

> Admission and status are fundamentally distinct concepts. Admission is an occurrence, defined in wholly factual and procedural terms: An individual who presents himself at an immigration checkpoint, undergoes a procedurally regular inspection, and is given permission to enter has been admitted, regardless of whether he had any underlying legal

Appellees principally argue that "[b]y the very nature of obtaining lawful nonimmigrant status, the alien goes through inspection and is deemed admitted." Sanchez Br. 8 (quoting *Ramirez v. Brown*, 852 F.3d 954, 960 (9th Cir. 2017) (internal quotation marks omitted)). This assertion is unpersuasive for at least three reasons.

First, the text of § 1254a does not mention that a grant of TPS is (or should be considered) an inspection and admission. Second, a grant of TPS cannot be an "admission" because § 1254a requires an alien to be present in the United States to be eligible for TPS. Consistent with that fact, we have recognized that TPS is not "a program of entry for an alien." *De Leon-Ochoa v. Att'y Gen.*, 622 F.3d 341, 353–54 (3d Cir. 2010). Third, although Appellees are correct that admission often accompanies a grant of lawful status, it does not follow that a grant of lawful status *is* an admission. For example, "a grant of asylum places the individual in valid immigration status but is not an 'admission.'" *In re H-G-G-*, 27 I. & N. Dec. 617, 635 (AAO 2019) (citing *In re V-X-*, 26 I. & N. Dec. 147 (BIA 2013)). "And a grant of benefits under the Family Unity Program confers a 'status' for immigration purposes, but does not constitute an 'admission.'" *Id.* (quoting *In re Fajardo Espinoza*, 26 I. & N. Dec. 603, 605 (BIA 2015)).[4]

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> right to do so. Status, by contrast, usually describes the type of permission to be present in the United States that an individual has.

*Gomez v. Lynch*, 831 F.3d 652, 658 (5th Cir. 2016) (citations omitted).

[4] Although we owe no deference to the agency's interpretation of these statutes, the Immigration and Naturalization Service (INS) General Counsel issued an opinion just one year after Congress

B

The statutory context and structure also support our holding that a grant of TPS does not constitute an admission.

Congress created an exception to the admission requirement for some aliens but did not do so for TPS recipients. Instead, it said that an alien with TPS "shall be considered as being in, and maintaining, lawful status as a nonimmigrant." 8 U.S.C. § 1254a(f)(4). It did not say the alien would also be considered "inspected and admitted or paroled," which is the first requirement for adjustment of status under § 1255(a). But Congress did provide an exception to the "inspected and admitted or paroled" requirement for "special immigrants" described by § 1101(a)(27)(J) and aliens eligible for a visa. *See* 8 U.S.C. § 1255(h), (i). Unlike special immigrants and aliens eligible for a visa, TPS recipients were not excepted from the admission requirement because "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *I.N.S. v. Cardoza-*

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enacted the TPS statute endorsing the Government's view. *Temporary Protected Status and Eligibility for Adjustment of Status under Section [1255]*, INS Gen. Counsel Op. No. 91-27, 1991 WL 1185138 (Mar. 4, 1991) (1991 Opinion), *incorporated at* 7 USCIS Policy Manual B.2(A)(5), https://www.uscis.gov/policymanual (advising that a grant of TPS should not be construed as an admission into the United States). And when the INS promulgated regulations later that year, it declined to adopt a proposal that would have allowed TPS recipients to adjust their status no matter how they entered the United States. *See In re H-G-G-*, 27 I. & N. at 621. These agency actions suggest § 1254a(f)(4) was not understood to supersede § 1255(a)'s admission requirement.

*Fonseca*, 480 U.S. 421, 432 (1987) (internal citation and quotation marks omitted).

The interpretation Appellees propose also risks rendering part of § 1254a superfluous. Section 1254a(h) enables Congress to pass special legislation adjusting the status of aliens receiving TPS only by a supermajority of the Senate. 8 U.S.C. § 1254a(h)(2). Reading § 1254a(f)(4) to place aliens effectively in lawful status and to satisfy § 1255's threshold requirement would pave a clear path to status adjustment for TPS recipients in derogation of § 1254a(h)(2)'s supermajority requirement. We doubt Congress intended that. *See Hibbs v. Winn*, 542 U.S. 88, 101 (2004) ("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.") (internal quotation marks and citation omitted).

Other subsections in § 1255 refer to admission and lawful status as distinct concepts, further highlighting the independent significance of both. For example, § 1255(k) says an alien is eligible for adjustment of status if "subsequent to such lawful *admission* [the alien] has not . . . failed to maintain, continuously, a lawful *status*." 8 U.S.C. § 1255(k)(2)(A) (emphasis added). And § 1255(m)(1) provides: "The Secretary of Homeland Security may adjust the *status* of an alien *admitted* into the United States (or otherwise provided nonimmigrant status)." 8 U.S.C. § 1255(m)(1) (emphasis added).

Beyond the textual differences between the sections, the structure of § 1255 also supports our opinion that §§ 1254a(f)(4) and 1255(a) refer to different requirements. If being considered in lawful nonimmigrant status was the same as being inspected and admitted or paroled, there would be no need for § 1255 to list inspection and

admission or parole as a threshold requirement in § 1255(a) and failure to maintain lawful status as a bar to eligibility for adjustment of status in § 1255(c)(2). Under Appellees' theory, anyone who is considered in lawful status would be able to satisfy § 1255(a)'s admission requirement, thus rendering the two provisions superfluous.

C

Finally, Appellees' interpretation would undermine the purpose of the TPS statute. As we have held, "[b]y the terms of the statute, the TPS program was designed to shield aliens already in the country from removal when a natural disaster or similar occurrence has rendered removal unsafe." *De Leon-Ochoa*, 622 F.3d at 353. As its name suggests, this protection is meant to be temporary. Treating a grant of TPS as an admission would open the door to more permanent status adjustments that Congress did not intend.

IV

The District Court did not read the INA in the manner we just described. Instead, it cited *Flores v. USCIS*, 718 F.3d 548 (6th Cir. 2013), and *Ramirez v. Brown*, 852 F.3d 954 (9th Cir. 2017), to support its conclusion that a grant of TPS constitutes an admission. We respectfully disagree with those opinions.

A

The petitioner in *Flores*, Saady Suazo, entered the United States without inspection or admission in 1998. 718 F.3d at 550. The Attorney General granted Suazo

TPS in 1999 and he remained in the United States for the next fifteen years. *Id.* at 549–50. After marrying an American citizen, Suazo sought adjustment of status through an "Immediate Relative Petition." *Id.* at 550. The USCIS denied his petition because he entered the United States without inspection. *Id.* Suazo was also unsuccessful in the district court, which held the plain language of § 1255 "precludes a TPS beneficiary who was not initially 'inspected and admitted or paroled' into the United States . . . from adjusting his status." *Id.* at 550–51.

On appeal, Suazo argued the plain language of § 1255 "shows that Congress's clear intent was that a TPS beneficiary is afforded with a pathway to [Lawful Permanent Resident] status." *Id.* at 552. Although he conceded that an alien must be "admitted" to be eligible for adjustment of status, Suazo argued "TPS beneficiaries are afforded with an exception under the TPS statute which operates as an inadmissibility waiver." *Id.* The Sixth Circuit agreed, holding the text of §§ 1254a and 1255 suggests TPS functions as an inspection and admission for aliens who entered the country illegally. *Id.* at 551–54.

In so holding, the Sixth Circuit purported to follow the plain language of §§ 1254a and 1255. *Id.* at 553. It reasoned that to have lawful status as a nonimmigrant under § 1255, an alien must also be considered admitted. *Id.* It took § 1254a(f)(4)'s statement about status and applied it to all of § 1255, including the admission requirement. *Id.* The court also considered "the statutory scheme as a whole." *Id.* It noted that although the Attorney General has discretion to waive certain grounds of inadmissibility for groups of aliens, § 1254a also explicitly limits the Attorney General's discretion as to

particular groups. *Id.* TPS recipients are not included in the groups of aliens prohibited from discretionary relief, so the court reasoned that "Congress did not intend to strip the Attorney General of discretion to waive admissibility requirements for all TPS beneficiaries." *Id.* at 554. Moreover, the court took TPS recipients' absence from a list of "[c]lasses of aliens ineligible for visas or admission" as further proof that they are eligible for adjustment of status, regardless of whether they were admitted when they entered the United States. *Id.* (quoting 8 U.S.C. § 1182) (alteration in original).

The *Flores* court also relied on "Congress's apparent intent" to conclude that, because "a TPS beneficiary is a member of a class of people that Congress chose to protect," courts should read § 1254a(f)(4) as satisfying § 1255's admission requirement. *Id.* And finally, the court considered policy considerations, saying "[the petitioner] seems to be the exact type of person that Congress would have in mind to allow adjustment of status," *id.* at 555, and it was "disturbed by the Government's incessant and injudicious opposition in cases like this," *id.* at 556.

We disagree with the Sixth Circuit's interpretation for three reasons.

*First*, the court concluded § 1254a(f)(4) should be read as satisfying all of § 1255's requirements. *Id.* at 553. But that conflates "lawful status" with "admission." Even if § 1254a applies to all of § 1255, it does not follow that considering an alien to be in lawful status means he or she was admitted into the United States. As we explained already, status and admission are distinct—an alien can possess lawful status without ever having been admitted.

*Second*, we find the court's analysis of the "statutory scheme as a whole" and Congressional intent unpersuasive. TPS recipients' exclusion from a list of aliens ineligible for discretionary relief has no bearing on whether they are excused from § 1255's admission requirement. Moreover, the very nature of TPS—a program of *temporary* protection— undermines the Sixth Circuit's conclusion that Congress intended to waive § 1255's admissibility requirement so TPS recipients could readily become permanent residents.

*Third*, although the court claimed to be guided by the text of §§ 1254a and 1255, it betrayed its policy-driven approach at the outset of its opinion, stating:

> This case illustrates the archaic and convoluted state of our current immigration system. While many suggest that immigrants should simply "get in line" and pursue a legal pathway to citizenship, for Saady Suazo and other similarly situated Temporary Protected Status beneficiaries, the Government proposes that there is simply no line available for them to join.

*Id.* at 549.

We express no opinion about the merits of this broadside against how the other branches of the federal government have handled immigration policy. If it's true that our nation's immigration system is "archaic" or "convoluted," such criticism is no substitute for a careful evaluation of the statute's text, context, and history. The court ended its opinion by saying it was "disturbed" by the Government's position in the case and it considered Suazo—whom the court called a "contributing member of

society"—"the exact type of person" that Congress would have wanted to be eligible for adjustment of status. *Id.* at 555–56. But a petitioner's personal characteristics, however commendable they may be, are irrelevant to whether he or she has satisfied § 1255's requirements. *See* 28 U.S.C. § 453 (requiring federal judges to "administer justice without respect to persons").

B

The Ninth Circuit's decision in *Ramirez* is similarly unpersuasive. As in *Flores*, the *Ramirez* court considered whether a TPS recipient who entered the United States without inspection or admission was eligible for adjustment of status by virtue of marrying an American citizen. 852 F.3d at 957. The Ninth Circuit agreed with the Sixth Circuit that an alien who is considered in lawful status under § 1254a(f)(4) should also be considered to have been admitted under § 1255(a). *Id.* at 959. To support this conclusion, the court cited several sections of the immigration code in which Congress discussed "admission" and "nonimmigrant" status together and held that "by the very nature of obtaining lawful nonimmigrant status, the alien goes through inspection and is deemed 'admitted.'" *Id.* at 960.

The court also emphasized similarities in the rigor of the admission and TPS application processes and concluded that an alien who receives TPS has also been admitted. *Id.* And although the court acknowledged its interpretation of §§ 1254a and 1255 does not align with the statutory definition of "admitted," it cited Ninth Circuit caselaw allowing it to "'embrace[] an alternative construction of the term' when the statutory context so dictates." *Id.* at 961 (quoting *Negrete-Ramirez v. Holder*,

741 F.3d 1047, 1052 (9th Cir. 2014)).

The *Ramirez* court then turned to the structure of the statutory scheme to support its interpretation. First, it concluded that the title of § 1255—"Adjustment of status of nonimmigrant to that of person admitted for permanent residence"—shows that Congress intended TPS recipients to be able to "make use of § 1255." *Id.* It then discussed § 1254a(f)(4)'s applicability to § 1258(a), which provides that "[t]he Secretary of Homeland Security may . . . 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." *Id.* (alterations in original). The court concluded that § 1254a(f)(4) satisfies § 1255's admission requirement because it "equates 'being in . . . lawful status as a nonimmigrant' with § 1258(a)'s 'lawfully admitted . . . as a nonimmigrant.'" *Id.* at 961–62 (alterations in original). It also opined that an alternative interpretation would limit § 1254a(f)(4)'s applicability to § 1255(c)(2) and "yield an anomalous result" by not benefitting immediate relatives of American citizens. *Id.* at 962.

Finally, the Ninth Circuit held its interpretation of §§ 1254a and 1255 is consistent with the purpose of TPS. *Id.* at 963. It explained: "Because TPS confers an actual status on and provides a slew of benefits to an alien who satisfies rigorous eligibility requirements, it is different than other forms of temporary reprieve we ordinarily would not consider sufficient for 'admission.'" *Id.* And it reasoned that forcing TPS recipients to leave the United States, return to their homelands, then reenter with inspection and admission or parole, would undermine

TPS's purpose of protecting aliens from unsafe conditions in those countries. *Id.* at 964.

We disagree with the Ninth Circuit's decision in *Ramirez* largely for the reasons we disagree with the Sixth Circuit's decision in *Flores*.

*First*, the court failed to acknowledge the meaningful differences between "status" and "admission" that we previously explained. And § 1254a(f)(4) is clear—aliens with TPS are granted only lawful status, they are not "admitted." Moreover, the court overlooked distinctions between a conferral of TPS and an admission. For example, an alien at a port of entry may be subject to a full range of inadmissibility grounds that an applicant for TPS is not. *Compare* 8 U.S.C. § 1182(a) *with* 8 U.S.C. § 1254a(c)(2).

*Second*, the Ninth Circuit brushed off the statutory definition of "admission" because its own caselaw allowed it to "embrace[] an alternative construction of the term when the statutory context so dictates." *Ramirez*, 852 F.3d at 961 (internal citation and quotation marks omitted). Our caselaw does not permit such a move. *See Hanif*, 694 F.3d at 485. Instead, we are bound to follow Congress's definition in § 1101(a)(13)(A), which defines admission as the physical event of entering the country. *Taveras*, 731 F.3d at 290.

*Third*, the Ninth Circuit's discussion of the structure of the immigration code is unpersuasive. The court said the title of § 1255 suggests Congress intended TPS recipients to be able to "make use" of its process for adjusting status. *Ramirez*, 852 F.3d at 961. Fair enough. But § 1255 also establishes that adjustment of status is available only for TPS recipients *lawfully admitted* into the United States.

The Ninth Circuit also reasoned that limiting § 1255 eligibility to TPS recipients lawfully admitted when they entered the United States would "yield an anomalous result" by not benefitting relatives of American citizens. *Id.* at 962. This rationale ignores the fact that TPS recipients who marry American citizens will be eligible for adjustment of status so long as they were inspected and admitted or paroled when they entered the United States. So our interpretation does not bar eligibility for TPS recipients who entered the country legally.[5]

*Fourth*, the court compared § 1254a to other sections of the immigration code and concluded that § 1254a(f)(4) "equates 'being in . . . lawful status as a nonimmigrant' with § 1258(a)'s 'lawfully admitted . . . as a nonimmigrant.'" *Id.* at 961–62 (alterations in original). But that analysis again failed to recognize the difference between "status" and "admission." Section 1258(a) applies to "any alien lawfully *admitted* to the United States as a nonimmigrant who is continuing to maintain that *status*." (emphasis added). Nothing in § 1258(a) suggests that we should collapse the admission and status elements into a single requirement. Instead, § 1254a(f)(4) applies to § 1258(a) (just like § 1255) to excuse only a lapse in lawful status following a lawful admission.

*Finally*, the Ninth Circuit's discussion of the purpose of TPS is contradictory. The court correctly noted that TPS "provides a *limited, temporary* form of relief." *Id.* at 963

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[5] Nonimmigrants inspected and admitted or paroled when they entered the United States are eligible for TPS. *See, e.g., Saliba v. Att'y Gen.*, 828 F.3d 182, 186 (3d Cir. 2016) (nonimmigrant who lawfully entered the United States on a student visa applied for, and received, TPS); *Mejia Rodriguez*, 562 F.3d at 1140 (same for nonimmigrant with B-2 visa).

(emphasis added). But then it interpreted § 1254a(f)(4) broadly to satisfy § 1255's admission requirement. *Id.* Absent a clear statutory directive, a program that provides "limited, temporary" relief should not be read to facilitate permanent residence for aliens who entered the country illegally.

The court reasoned further that forcing TPS recipients who entered illegally to leave the country and reenter lawfully before seeking adjustment of status would undermine the purpose of TPS. *Id.* at 964. According to the Ninth Circuit, this process would be particularly troubling for TPS recipients because their home countries are unsafe. *Id.* But that ignores the fact that TPS recipients may remain in the United States—without seeking adjustment of status—as long as the Secretary of Homeland Security extends TPS for their homelands. Although they may be unable to adjust their status during that time (if they entered the country illegally), they are free to remain in the United States with lawful nonimmigrant status.

For these reasons, we respectfully disagree with the Sixth and Ninth Circuits' interpretations of the statute. We hold that Congress did not intend a grant of TPS to serve as an admission for those who entered the United States illegally.[6]

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[6] Our interpretation of §§ 1254a and 1255 is closely aligned with the Eleventh Circuit's opinion in *Serrano v. Att'y Gen.*, 655 F.3d 1260 (11th Cir. 2011) (per curiam). There, the petitioner argued he was exempt from § 1255(a)'s admission requirement because he had been granted TPS. 655 F.3d at 1265. Although that argument is slightly different than the argument raised in this appeal (and in *Flores* and *Ramirez*), the court said: "That an alien with Temporary Protected Status has 'lawful status as a nonimmigrant' for purposes of adjusting

## V[7]

We cannot square the District Court's opinion with the text, context, structure, and purpose of §§ 1254a and 1255. For the foregoing reasons, we hold that a grant of TPS does not constitute an "admission" into the United States under § 1255. We will reverse.

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his status does not change § 1255(a)'s threshold requirement that he is eligible for adjustment of status only if he was initially inspected and admitted or paroled." *Id.* That holding, like ours today, respects the distinction between status and admission and is faithful to the text of §§ 1254a and 1255.

[7] Sanchez and Gonzalez also argue they are eligible for adjustment of status under § 1255(k). That section provides an exception for aliens seeking to adjust status for employment purposes if, *inter alia*, the alien "on the date of filing an application for adjustment of status, is present in the United States pursuant to a lawful admission." Because Sanchez and Gonzalez were never admitted, they are ineligible for adjustment under § 1255(k).

## APPENDIX B

**NOT FOR PUBLICATION**

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF NEW JERSEY**
**CAMDEN VICINAGE**

| | |
|---|---|
| JOSE SANTOS SANCHEZ, *et al.* | |
| Plaintiffs, | No. 16-651 (RBK) |
| v. | **OPINION** |
| JEH JOHNSON, *et al.*, | |
| Defendants. | |

**KUGLER,** United States District Judge:

**THIS MATTER** comes before the Court on Defendants' Motion to Dismiss and Motion for Summary Judgment (Doc. No 27) and Plaintiffs' Motion for Summary Judgment (Doc. No 28). For the reasons articulated in this Opinion, the Court **GRANTS** Plaintiffs' Motion for Summary Judgment and **GRANTS** Defendants' Motion to Dismiss Plaintiffs' claims for Mandamus relief and Due Process violations (Count II). This Court relatedly **DENIES** Defendants' Motion for Summary Judgment.

## I. BACKGROUND

This case involves the interpretation of two provisions within the Immigration and Nationality Act: 8 U.S.C. 1254(a)(f)(4) and 8 U.S.C. 1255(a). The first statute classifies an alien with Temporary Protected Status as having "lawful status." The second statute requires an alien seeking to adjust status to have been "inspected and admitted." The central issue is whether Section 1254(a)(f)(4)'s grant of Temporary Protected Status and having "lawful status" satisfies Section 1255(a)'s threshold requirement of being "inspected and admitted." This Court, consistent with courts in the Sixth, Ninth, and Third Circuits, holds that it does.

❖

The parties in this case do not dispute the factual record. Jose Santos Sanchez and Sonia Gonzalez ("Plaintiffs") are husband and wife and citizens of El Salvador. Pls. St. of Mat'l Fact ("SMOF") [Doc. No. 29-1] ¶ 1. They entered the United States without inspection in 1997 and 1998. *Id.* ¶ 3. They subsequently sought two changes to their immigrant status: Temporary Permanent Status in 2001 and Registered Permanent Residence in 2014.

With El Salvador experiencing a series of earthquakes in 2001, Plaintiffs submitted applications to the United States Attorney General for Temporary Protected Status ("TPS"). *See* 8 U.S.C. §1254(a). The United States Citizenship and Immigration Services ("USCIS") granted them Temporary Protected Status. *Id.* ¶ 4. And over the next several years, the Attorney General periodically extended the TPS eligibility for Plaintiffs and other El Salvadorian nationals. *See* 81 F.R. 44645-51 (July 8, 2016).

In June 2014, Plaintiffs attempted another change of status. Compl. [Doc. No. 1]. ¶¶ 18–20. This time they filed an I-485 Application to Register Permanent Residence or Adjustment of Status. *Id.* USCIS denied the application in March 2015. *Id.*

Following USCIS's denial, Plaintiffs filed a Complaint in this Court seeking relief through a Writ of Mandamus and Declaratory Judgment regarding their statutory eligibility to adjust status. *Id.* Plaintiffs also alleged due process violations. *Id.* In November 2016, USCIS reopened their I-485 application and issued a Notice of Intent to Deny ("NOID"). Pls. SMOF ¶ 11. The NOID found Plaintiffs to be "statutorily ineligible" for adjustment of status. *Id.*

On February 8, 2017, USCIS formally denied the application for adjustment of status. *Id.* ¶ 13. In the denial letter, USCIS indicated that Plaintiff Sanchez had not been admitted and inspected into the United States because he had engaged in unauthorized employment that exceeded 180 days; he therefore was "statutorily ineligible" to adjust his status under 8 U.S.C. §1255(a). *Id.* ¶ 14. USCIS also denied Gonzalez's adjustment because it was dependent on Sanchez's approval. *Id.* at ¶ 15. While USCIS recognized that Sanchez's past entry into the United States was via parole, it concluded that neither this parole nor his TPS were proper "admissions" to overcome the bar to his adjustment of status at 8 U.S.C. § 1255(c) for unauthorized employment. Defs Br. [Doc. No. 27-1] at 3.

The parties now both move for summary judgment on Plaintiffs' claim for mandamus relief and declaratory judgment under the Immigration and Nationality Act ("INA") and Administrative Procedures Act ("APA"). 8

U.S.C. § 1101, *et. seq.*; 5 U.S.C. § 706. Following the USCIS denial, Defendants filed the instant motion for summary judgment and motion to dismiss for lack of jurisdiction. [Doc. No. 27]. Defendants argue that the USCIS decision should be upheld as a matter of law, Plaintiffs' request for mandamus relief should be dismissed as moot, and Plaintiffs' substantive due process claim should be denied. Defs Br. at 9–12. Plaintiffs similarly filed a Motion for Summary Judgment. [Doc. No. 28]. There, Plaintiffs argue that a grant of TPS under § 1254(a)(f)(4) is sufficient to meet the requirement of a "lawful admission" into the United States under § 1255(a). Pls. Br. at 2. This Court now considers these motions and the corresponding briefs.

## II. MOTIONS FOR SUMMARY JUDGMENT ON ADMINISTRATIVE PROCEDURES ACT CLAIM

### A. Standards of Review

#### 1. Summary Judgment Standard

A court should grant a motion for summary judgment when the moving party "shows that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). An issue is "material" to the dispute if it could alter the outcome, and a dispute of a material fact is "genuine" if "a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) ("Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'") (quoting *First Nat'l Bank of Az. v. Cities*

*Serv. Co.*, 391 U.S. 253, 289 (1968)). In deciding whether there is any genuine issue for trial, the court is not to weigh evidence or decide issues of fact. *Anderson*, 477 U.S. at 248. Because fact and credibility determinations are for the jury, the non-moving party's evidence is to be believed and ambiguities construed in its favor. *Id.* at 255; *Matsushita*, 475 U.S. at 587.

Although the movant bears the burden of demonstrating that there is no genuine issue of material fact, the non-movant likewise must present more than mere allegations or denials to successfully oppose summary judgment. *Anderson*, 477 U.S. at 256. The non-moving party must at least put forth probative evidence from which the jury might return a verdict in his favor. *Id.* at 257. Where the non-moving party fails to "make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial," the movant is entitled to summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

**2. Reviewing an Administrative Agency Decision**

The scope of judicial review of agency rulemaking under the Administrative Procedures Act "is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Although a reviewing court "may not supply a reasoned basis for the agency's action that the agency itself has not given," it may nevertheless "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Id.*

A federal court reviewing an administrative agency decision adopts the "arbitrary and capricious standard." 5 U.S.C. § 706(2)(A). Under that standard, a court may conclude that a regulation is arbitrary and capricious only "if the agency relied on facts other than those intended by Congress, did not consider 'an important aspect' of the issue confronting the agency, provided an explanation for its decision which 'runs counter to the evidence before the agency,' or is entirely implausible." *Rite Aid of Pa., Inc. v. Houstoun*, 171 F.3d 842, 853 (3d Cir. 1999). Relatedly, the "judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Chevron, U.S.A., Inc. v. Nat'l Res. Defense Council, Inc.*, 467 U.S. 837, 843 n. 9 (1984).

The review of an agency's interpretation of a statute is a two-part analysis. *Id.* At step one, the court must determine "whether Congress has directly spoken to the precise question at issue" and "unambiguously expressed [its] intent." *Id.* at 842–43. If so, the inquiry ends, as both the agency and the court must give effect to the plain language of the statute. *Id.* at 842–43. If "the statute is silent or ambiguous with respect to the specific issue," the court proceeds to step two and inquires whether the agency's determination is based "on a permissible construction of the statute." *Id.* at 843. Under this second prong, *Chevron* "requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980, (2005) (citing *Chevron*, 467 U.S. at 843–44 & n. 11). Said another way, the agency's interpretation "governs if it is a

reasonable interpretation of the statute—not necessarily the only possible interpretation, nor even the interpretation deemed most reasonable by the courts." *Energy Corp. v. Riverskeeper, Inc.*, 556 U.S. 208 (2009).

## B. DISCUSSION

The parties both move for summary judgment on Plaintiffs' claim for declaratory judgment under the Immigration and Nationality Act ("INA") and Administrative Procedures Act ("APA"). 8 U.S.C. § 1101, *et. seq.*; 5 U.S.C. § 706. The parties agree that the central issue in this matter is one of statutory interpretation: whether the grant of Temporary Protected Status under 8 U.S.C. § 1254(a) satisfies the threshold requirement of being "inspected and admitted or paroled into the United States" for purposes of adjustment of status under 8 U.S.C. § 1255(a). Plaintiffs argue that the plain language of § 1254(a)(f)(4) governs § 1255. Meanwhile, Defendants argue that § 1255(c) precludes Plaintiffs' application because Plaintiff Sanchez entered without inspection and engaged in unauthorized employment.

### 1. Relevant Statutes

**a. *Definition of Admission and Admitted under INA: § 1101(a)(13)(A)***

> The terms 'admission' and 'admitted' mean, with respect to an alien, the lawful entry of the alien to the United States *after* inspection and authorization by an immigration officer.

8 U.S.C. 1101(a)(13)(A)(emphasis added)

**b. *Temporary Protected Status: § 1254(a)(f):***

> 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 1225 of this title and change of status under section 1258 of this title, the alien *shall be considered as being in, and maintaining, lawful status as a nonimmigrant.*

8 U.S.C. § 1254(a)(f) (emphasis added)

c. ***Adjustment of Status: § 1255(a)***

The status of an alien who *was inspected and admitted* or paroled into the United States . . . *may be adjusted* by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of 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.

8 U.S.C. § 1255(a)(emphasis added)

**d.** ***Bars to Adjustment: § 1255(c)(2)***

... [S]ubsection (a) *shall not be* applicable to .... [A]n alien... 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*;

8 U.S.C. § 1255(c)(2)(emphasis added)

**e.** ***Waiver of Ineligibility Bar: § 1255(k)***

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.

8 U.S.C. § 1255(k) (emphasis added)

**2. Statutory Interpretation**

Under the Administrative Procedure Act ("APA"), federal courts can review an agency's interpretation of a statute. 5 U.S.C. § 706. As explained, "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842–43. In determining the intent of Congress, the Court must consider "not only the particular statutory language, but to the design of the statute as a whole and its object and policy." *U.S. ex rel. Stinson, Lyons, Gerlin Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1155 (3d Cir. 1991) (internal quotation omitted).

Here, the central point of disagreement relates to the

meaning of § 1255(a), which states, "the status of an alien who was inspected and admitted or paroled" may be adjusted. *Id.* Defendants argue that Plaintiff Sanchez, who initially entered the U.S. without inspection, can never satisfy the threshold requirement of being "admitted." Meanwhile, Plaintiffs argues that the plain language of § 1254(a)(f) satisfies the threshold requirement of § 1255(a). Specifically, Plaintiffs argue that Sanchez satisfied the requirement by virtue of the TPS because 8 U.S.C. § 1254a(f)(4) states, "[d]uring a period in which an alien is granted temporary protected status under this section . . . for purposes of adjustment of status under § 1255 of this title . . . the alien shall be considered being in, and maintaining, *lawful status* as a nonimmigrant." *Id.* (emphasis added).

This Court finds the statute clear and unambiguous. Section 1254(a)(f)(4) applies to the entirety of § 1255. Again, section 1254(a)(f)(4) states, "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.*" (emphasis added). This lawful status is wholly consistent with being considered as though Plaintiffs had been "inspected and admitted" under § 1255.

This Court further notes that other courts support this conclusion. *See Flores v. U.S. Citizenship and Immigration Serv.*, 718 F.3d 548, 533 (6th Cir. 2013) ("We interpret the statute exactly as writing – as allowing [the applicant] to be considered as being in lawful status as a nonimmigrant for purposes of adjustment of status under §1255."); *Medina v. Beers*, 65 F. Supp. 3d 419, 429 (E.D.Pa. 2014) ("By its clear terms, § 1254(a)(f)(4) applies

to the entirety of § 1255 and thereby satisfies the 'inspected and admitted or paroled' prerequisite of § 1255(a)"). *See also Bonilla v.* Johnson, 149 F.3d 1135 (D. MN. 2016); *Ramirez v. Dougherty*, 23 F. Supp. 3d 1322, 1324 (W.D. Wash. 2014).

Defendants argue that the Court should ignore this line of cases and adopt the Eleventh Circuit's more narrow interpretation. *See Serrano v. U.S. Attorney General*, 655 F.3d 1260, 1265 (11th Cir. 1011). In *Serrano*, the Court interpreted § 1254(a)(f)(4) and § 1255(a) distinctly. *Id.* ("That an alien with Temporary Protected Status has 'lawful status as a nonimmigrant' for purposes of adjusting his status does not change § 1255(a)'s threshold requirement that he is eligible for adjustment of status only if he was initially inspected and admitted or paroled.")

The Eleventh Circuit's reading offers little persuasive analysis, however. While the Plaintiffs here — like the Sixth Circuit in *Flores* and the district Court in *Ramirez* — attempt to distinguish *Serrano* on the ground that the petitioner there did not disclose his illegal entry into the country in his TPS application, *Serrano*, 655 F.3d at 1265 n.4, the Ninth Circuit correctly concluded that this factual difference does not appear to bear on the Eleventh Circuit's conclusion. *Ramirez v. Brown*, 852 F.3d 954, 960 (9th Cir. 2017). More generally, *Serrano* offers little reasoning to support its reading of these statutes. The conclusion *is* simply because it *is*.

Peeling back the veneer of *Serrano*, Defendants offer little else to support such a narrow reading of § 1254(a)(f)(4). Specifically, Defendants conclude that Sanchez's lawful status was not "maintained" under § 1254 because of his unauthorized work prior to the grant of

Temporary Protected Status. This argument is fundamentally flawed, however. Most obviously, § 1254(a)(f)(4) governs "a period in which an alien is *granted* temporary protected status . . ." *Id.* (emphasis added). The government, however, focuses on Sanchez's work in the 1990s, long before his grant of TPS. Thus, the government essentially argues that work predating Sanchez's lawful status bars his later ability to "maintain" a lawful status.

This reading of § 1254 does not make sense to the Court. In the most simplistic and common-sense terms, a person must *first* have lawful status in order to "maintain" that lawful status. By way of analogy, a person who fails to maintain her garden must first have a garden. The government ignores this common sense understanding and instead insists that Plaintiff Sanchez could never have maintained lawful status "because of the period of his unlawful status and unauthorized employment *prior* to obtaining TPS." Defs Br. at 12.

The Defendants' additional arguments are unpersuasive. Similar to the government in *Medina*, Defendants here argue that the references to "admission" and "lawful status" within sections 1254 and 1255 refer to separate requirements under the law. Defendants accordingly conclude that the term "admission" and "admitted" mean a *physical* entry into the United States —"a positional event." Defs Br. at 16 (emphasis added). Relying on both § 1101(a)(13)(A) and the Third Circuit's ruling in *Hanif v. Attorney General of the United States*, 694 F.3d 2479 (3d Cir. 2012), Defendants suggest that obtaining "lawful status as a nonimmigrant" under § 1254(a) cannot mean physical admission under § 1255.

Again, this Court is not fooled by the government's

careful attempt to parse words in light of § 1255's clear language. *See Medina*, 65 F. Supp. 3d at 436 ("Defendants' repeated attempts to twist this basic language into either meaning something extremely specific or applying only to specific portions of § 1255 constitute tortured interpretations that do not comport with a plain language reading.") Nor is this Court convinced by the argument for blind deference to the agency's determinations. *See Flores*, 718 F.3d at 555 ("[b]eing consistently wrong does not afford this agency more deference than having valid reasoning.")

While this Court relies predominantly on the statute's clear and unambiguous language, it agrees with Judge Buckwalter's analysis in *Medina* when considering the Defendant's remaining arguments. *Medina*, 65 F.Supp.3d at 429–36 (addressing the government's arguments that (1) Congress intended different meanings for the words "lawful status as a nonimmigrant" from "inspected and admitted or paroled"; (2) if plaintiff's interpretation is correct, there would be no need for § 1255 to separately refer to admission or parole as a threshold requirement in subsection (a), and to refer to the failure to maintain lawful status as a bar to eligibility in subsection (c); (3) the plain language of § 1254(a)(f) addresses only the bar to adjustment of status in § 1255(c)(2); (4) plaintiff's interpretation of the statutory language conflicts with portions of § 1255; (5) the Court should apply *Serrano*; and (6) the government's interpretation is consistent with Congressional intent. *See also Bonilla v. Johnson*, 149 F.Supp.3d 1135 (D.MN. 2016) (summarizing *Medina*'s analysis of the arguments raised by the government). Put simply, the government's attempts, while numerous, simply fail to overcome this Court's

reading of the statutes in question. Therefore, this Court finds that a grant of Temporary Protected Status under § 1254(a)(f)(4) is sufficient to meet the requirement of "inspected and admitted" under § 1255(a). Relatedly, the agency's ultimate decision was arbitrary and capricious.

To the extent that Plaintiffs ask for approval of their I-485 application, Proposed Order [Doc. No 28-2], this Court notes that adjustment of status under 8 U.S.C. 1255(a) is a discretionary application reserved by the Attorney General. *Id.* Thus, while the previous application was based on a fundamental misinterpretation of the controlling statutes, this Court cannot grant the application as a matter of law. The case is therefore remanded back to the USCIS for further review.

## III. DEFENDANTS' MOTION TO DISMISS

### A. Motion to Dismiss Standard

In considering a motion to dismiss, "courts accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009) (quoting *Phillips v. Cty. of Allegheny*, 515 F.3d 224, 233 (3d Cir. 2008) ). A complaint survives a motion to dismiss if it contains enough factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

In reviewing a Motion to Dismiss, a court conducts a three-part analysis. *Santiago v. Warminster Twp.*, 629

F.3d 121, 130 (3d Cir. 2010). First, the court "takes note of the elements a plaintiff must plead to state a claim." *Id.* (quoting *Iqbal*, 556 U.S. at 675). Second, the court identifies allegations that, "because they are no more than conclusions, are not entitled to the assumption of truth." *Id.* at 131 (quoting *Iqbal*, 556 U.S. at 680). Finally, "where there are well-pleaded factual allegations," the court "assume[s] their veracity and then determine[s] whether they plausibly give rise to an entitlement for relief." *Id.* (quoting *Iqbal*, 556 U.S. at 680). This plausibility determination is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679. A complaint cannot survive where a court can only infer that a claim is merely possible rather than plausible. *Id.*

**B. Plaintiffs' Request for Mandamus Relief**

Defendants seek dismissal of Plaintiffs' request for a writ of mandamus. When USCIS has already adjudicated an alien's application for adjustment of status, a petition for writ of mandamus is considered moot because there is no justiciable case or controversy. *See Hollingsworth v Perry*, 558 U.S. 183, 190 (2010). As discussed, after the filing of Plaintiffs' complaint, the USCIS issued a denial of Plaintiffs' application to adjust status. Plaintiffs' mandamus claim is therefore dismissed as moot.

**C. Plaintiffs' Due Process Claim**

Defendants similarly seek to dismiss Plaintiffs' claim of due process violations. The complaint indicates that this is a substantive due process claim because Defendants "fail[ed] to give Plaintiffs [a] meaningful opportunity to challenge the basis of the denial . . ." Compl. at 10. To state a due process claim under the Fifth Amendment,

Plaintiffs first must establish they have been deprived of a protected interest. *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999). A protected interest is a "legitimate claim of entitlement." *Bd. Of Regents v. Roth*, 408 U.S. 564, 577 (1972).

Here, Plaintiffs' due process claim fails because they cannot show they are entitled to the adjustment of status. As explained, an adjustment of status under 8 U.S.C. 1255(a) is a discretionary determination made by the Attorney General. *Id.* The Third Circuit explained in *Mudric*, "While an alien may be eligible for a grant of asylum or an adjustment of status under the immigration laws, he is not entitled to such benefits as a constitutional matter." *Mudric v. Att'y Gen. of U.S.*, 469 F.3d 94, 98 (3d Cir. 2006).

This Court further notes that Plaintiffs' reliance on *Shaughnessy* in the complaint is misguided. *U.S. ex. Rel Accardi v. Shaughnessy*, 347 U.S. 260 (1954). There, the Supreme Court found a substantive due process violation because the agency "fail[ed] to exercise its own discretion." *Id.* at 268. As explained, the USCIS did exercise discretion and denied the application. Even though this Court found the determination to be arbitrary and capricious, the agency did not "fail" to exercise discretion like the agency had in *Shaughnessy*. This claim is therefore denied.

## IV. CONCLUSION

Based on the foregoing, Plaintiffs' Motion for Summary Judgment as to the Administrative Procedures Act is **GRANTED**, and Defendants' competing Motion for Summary Judgment is **DENIED**. In addition,

Defendants' Motion to Dismiss Plaintiffs' claims based on mandamus relief and due process violations is **GRANTED**. The case shall, therefore, be remanded to the United States Citizenship and Immigration Service for further review consistent with this Opinion and related Order.

Dated: 12/7/2018

s/Robert B. Kugler

ROBERT B. KUGLER

United States District Judge

## APPENDIX C

February 8, 2017

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
P.O. Box 82521
Lincoln, NE 68501-2521

U.S. Citizenship and Immigration Services

JOSE SANTOS SANCHEZ
[redacted]
US

RE: JOSE SANTOS SANCHEZ
I-485, Application to Register Permanent Residence or Adjust Status

### DECISION

This notice refers to your Form I-485, Application to Register Permanent Residence or Adjust Status, which you filed on June 4, 2014. The application seeks Employment-Based (EB) adjustment of status to Lawful Permanent Resident (LPR) under section 245 of the Immigration and Nationality Act (INA), as amended.

In a letter dated November 4, 2016, U.S. Citizenship and Immigration Services (USCIS) notified you of its intent to deny your application and set forth the reasons for that intended decision. You were given opportunity to respond to the intended denial, and your response was received on

December 6, 2016, and added to the record. USCIS concludes that you are not eligible for adjustment of status as you have not been admitted and inspected, and that you have engaged in unauthorized employment that exceeds 180 days.

Statute and regulation restrict the eligibility of certain aliens to apply for adjustment of status.

INA 245(a) limits adjustment of status, a discretionary benefit, to applicants who are eligible to receive an immigrant visa and admissible to the United States. An applicant who, after admission, fails to continuously maintain a lawful status, engages in unauthorized employment or otherwise violates the terms and conditions of their admission is barred from adjusting by INA 245(c) and USCIS regulation.

INA 245(c) states, in pertinent part:

> (c) Other than an alien having an approved petition for classification as a VAWA self-petitioner, subsection (a) shall not be applicable to...
>
> (2) subject to subsection (k), an alien (other than an immediate relative as defined in section 201(b) or a special immigrant described in section 101 (a)(27)(H) , (I) , (J) , or (K)) 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; ...

(7) any alien who seeks adjustment of status to that of an immigrant under section 203(b) 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 274A(h)(3) , or who has otherwise violated the terms of a nonimmigrant visa.

Title 8, Code of Federal Regulations (CFR) Part 245.1(b) states, in pertinent part:

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

(9) Any alien who seeks adjustment of status pursuant to an employment-based immigrant visa petition under section 203(b) of the Act and who is not maintaining a lawful nonimmigrant status at the time he or she files an application for adjustment of status; and

(10) Any alien who was ever employed in the United States without authorization of the Service....For purposes of this paragraph an alien who meets the requirements of

> §274a.12(c)(9) of this chapter shall not be deemed to have engaged in unauthorized employment during the pendency of his or her adjustment application.

INA 274A(h)(3) defines the term "unauthorized alien" to mean that "the alien is not...either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this Act or by the Attorney General."

8 CFR 274a.12(c)(9) states:

> An alien who has filed an application for adjustment of status to lawful permanent resident pursuant to part 245 of this chapter. For purposes of section 245(c)(8) of the Act, an alien will not be deemed to be an "unauthorized alien" as defined in section 274A(h)(3) of the Act while his or her properly filed Form I-485 application is pending final adjudication, if the alien has otherwise obtained permission from the Service pursuant to 8 CRF 274a.12 to engage in employment...

INA 245(k) permits the adjustment of certain lawfully admitted Employment-Based applicants despite limited violations under INA 245(c)(2), (7) or (8). The full provisions of INA 245(k) are as follows:

> (k) An alien who is eligible to receive an immigrant visa under paragraph (1), (2), or (3) of section 203(b) (or, in the case of an alien who is an immigrant described in section 101(a)(27)(C), under section 203(b)(4)) 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.

For INA 245(k) adjustment purposes, lapses or violations of lawful status are counted from the time of the applicant's last admission until filing for adjustment of status. Any unauthorized employment is counted from the time of the last admission until alien adjusts, as clarified in chapter 23.5(d) of the Adjudicator's Field Manual (AFM):

(4) Counting against the 180 days timeframe...

(A) General Guidelines. If the adjudicator determines that an employment-based adjustment of status applicant... is subject to any of the bars to adjustment of status set forth in Sections 245(c)(2), (c)(7), or (c)(8), then the adjudicator must determine whether the aggregate period in which the alien failed to continuously maintain lawful status, worked

without authorization, or otherwise violated the terms and conditions of the alien's admission since the date of the alien's last lawful admission to the United States is 180 days or less... An alien may be subject to more than one bar or violation described in section 245(k)(2) at the same time... each day in which one or more of these violations existed must be counted as one day...

(B) Engaged in Unauthorized Employment.

(1) General. "Unauthorized employment" means any service or labor performed by an alien for an employer within the United States that is not authorized under 8 CFR 274a.12(a), (b), or (c) or exceeds the authorized period of employment. The filing of an adjustment of status application does not, in itself, authorize employment or excuse unauthorized employment... With respect to engaging in unlawful employment, the count commences on the first date of the unauthorized employment and continues until the date the unauthorized employment ended, the date an employment authorization document (EAD) is approved, or the date the pending adjustment of status application is adjudicated... It is completely within the control of the alien as to whether he or she engages in employment without authorization...

(C) Failed to Maintain a Lawful Status and/or Violated the Terms of a Nonimmigrant Visa.

(1) General...for purposes of the 180-day counting period, calculation of the number of days for failing to maintain status or violating a nonimmigrant visa will stop as of the date USCIS receives a properly filed adjustment of status application.

The documentation provided in support of your application establishes that your last entry to the U.S. was in 1997 without inspection. The record also shows this entry was not an advance parole approved on the basis of a Form I-485 adjustment application which remains pending currently, or a previous Form I-485 which was pending at the time the present Form I-485 was filed. Additionally, you state that you were employed without authorization from the date you entered the United States until the date you were granted Temporary Protected Status (TPS) in 2001.

A foreign national who enters the United States without inspection and subsequently is granted TPS does not meet the inspected and admitted or inspected and paroled requirement. There is no legislative provision or history to suggest that Congress intended that recipients of TPS be eligible for adjustment.

The 6th Circuit Court of Appeals has ruled that TPS status meets the inspected and admitted requirement for adjustment of status under INA 245 even if a foreign national granted TPS status entered the United States without inspection. See *Flores v. USCIS*, 718 F.3d 548

(6th Cir. 2013). This decision is only binding on cases within the jurisdiction of the 6th Circuit. The applicant resides in the state of New Jersey which is not within the 6th Circuit's jurisdiction.

USCIS's approval of TPS confers lawful immigration status on the foreign national, but only for the stipulated time period and so long as the foreign national complies with all TPS requirements. Recipients of TPS must still meet the threshold requirement that a foreign national has been inspected and admitted or inspected and paroled in order to be eligible for adjustment of status. A grant of TPS does not cure a foreign national's entry without inspection or constitute an inspection and admission of the foreign national.

As an undocumented entrant, you were not inspected and admitted or inspected and paroled. Therefore, you are not eligible to adjust status under INA 245(a).

Further, you are not eligible to adjust status under INA 245(k). As the grant of TPS in 2001 is not an admission, the unauthorized employment prior to that date counts against the 180 day timeframe. The record shows that the aggregate period of unauthorized employment exceeds the 180 day maximum described under INA 245(k).

USCIS further reviewed your application to determination whether you are eligible to overcome the above restrictions and adjust under INA 245(i). To be eligible under INA 245(i), an applicant must be the beneficiary of a qualifying immigrant visa petition (or labor certification) filed on or before April 30, 2001. The record fails to show you are such an alien or that you are

a grandfathered alien eligible to apply under INA 245(i) through a prior immigrant visa petition (or labor certification) properly filed on or before April 30, 2001. As such, you remain an alien restricted from adjusting as described under INA 245(c)(2), (7) or (8) and this application may not be approved.

In view of the above, you are ineligible to adjust your status under INA 245.

In *Matter of Tanahan* 18 I&N Dec. 339 (Reg. Comm. 1981), it was found that an applicant for adjustment of status under INA 245 who meets the objective prerequisites is merely eligible to apply for adjustment of status. An applicant is in no way entitled to adjustment. When an alien seeks the favorable exercise of USCIS discretion, it is incumbent on that person to establish that he or she merits adjustment.

The application is denied.

USCIS regulations do not provide for an appeal to this decision. However, you may file a motion to reopen or reconsider within thirty days of the date on this decision (33 days if this notice was received by mail). Any motion must be filed using Form I-290B, Notice of Appeal or Motion with the appropriate fee. Blank forms and current fee information are available online at www.uscis.gov under "Forms." Forms are also available by calling the USCIS National Customer Service Center (NCSC) at 1-800-375-5283.

Sincerely,

*/s/ Mark J. Hazuda*
Mark J. Hazuda
Director
Officer: 0375

## APPENDIX D

February 8, 2017

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
P.O. Box 82521
Lincoln, NE 68501-2521

U.S. Citizenship and Immigration Services

SONIA GONZALEZ
[redacted]
US

[redacted]

RE: SONIA GONZALEZ
I-485, Application to Register Permanent Residence or Adjust Status

### DECISION

This notice refers to your Form I-485, Application to Register Permanent Residence or Adjust Status, which you filed on June 4, 2014. The application seeks Employment-Based (EB) adjustment of status to Lawful Permanent Resident (LPR) under section 245 of the Immigration and Nationality Act (INA), as amended.

INA 203(d) states, in pertinent part:

> A spouse or child as defined in subparagraph (A), (B), (C), (D), or (E) of section 101(b)(1) shall, if not otherwise entitled to an immigrant status and the immediate issuance of a visa under subsection (a), (b), or (c), be entitled to the same status, and the same

order of consideration provided in the respective subsection, if accompanying or following to join, the spouse or parent.

The record establishes that your adjustment application is dependent on the application of Jose Santos Sanchez, your spouse, also filed on June 7, 2014. The record in that matter establishes that your spouse's adjustment application has been denied. Therefore, there is no basis on which to grant accompanying or following-to-join status to a dependent spouse or child.

In *Matter of Tanahan* 18 I&N Dec. 339 (Reg. Comm. 1981), it was found that an applicant for adjustment of status under INA 245 who meets the objective prerequisites is merely eligible to apply for adjustment of status. An applicant is in no way entitled to adjustment. When an alien seeks the favorable exercise of USCIS discretion, it is incumbent on that person to establish that he or she merits adjustment. Because that establishment has not been made here, your application must be, and hereby is, denied.

USCIS regulations do not provide for an appeal to this decision. However, you may file a motion to reopen or reconsider within thirty days of the date on this decision (33 days if this notice was received by mail). Any motion must be filed using Form I-290B, Notice of Appeal or Motion with the appropriate fee. Blank forms and current fee information are available online at www.uscis.gov under "Forms." Forms are also available by calling the USCIS National Customer Service Center (NCSC) at 1-800-375-5283.

Sincerely,

*/s/ Mark J. Hazuda*
Mark J. Hazuda
Director
Officer: 0375

## APPENDIX E

### 8 U.S.C. § 1101. Definitions

(a) As used in this chapter--

* * * * *

(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.

* * * * *

(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 U.S.C. 288 et seq.], accredited resident members of

[1] See References in Text note below.

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 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

---

[2] See References in Text note below.

(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

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

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 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.

* * * * *

# APPENDIX F

## 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.

* * * * *

## APPENDIX G

### 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) of this section (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) of this section, 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) of this section, 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) of this section, 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) of this section 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) of this section, 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) of this section (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) of this section, 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) of this section and, with respect to foreign states or parts thereof previously designated, why the designation was terminated or extended under subsection (b)(3) of this section.

**(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.

## APPENDIX H

### 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) of this section, 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) of this section shall not be applicable to (1) an alien crewman; (2) subject to subsection (k) of this section, 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,[1] (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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[1] So in original. The comma probably should be a semicolon.

**(d) Alien admitted for permanent residence on conditional basis; fiancee or fiance of citizen**

The Attorney General may not adjust, under subsection (a) of this section, 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) of this section, 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) of this section.

(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)[2] 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) of this section, 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) of this section, 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

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[2] See References in Text note below.

of subsection (a) of this section, to have been paroled into the United 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) of this section and notwithstanding subsection (c)(2), (c)(7), and (c)(8) of this section, 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[3] 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 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

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

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[4] 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.[5]

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 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[6] discretion, may waive the application of—

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[4] So in original. The words "the alien" probably should not appear.
[5] So in original. The period probably should be a comma.
[6] So in original. Probably should be "Secretary's".

(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))[7], 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 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

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[7] So in original. Probably should be "(10)(E)),".

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.

# APPENDIX I

## 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.