

CURRENT DEVELOPMENTS IN IMMIGRATION LAW: TERMINATING TEMPORARY PROTECTED STATUS FOR EL SALVADOR

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I. INTRODUCTION

The Trump Administration has begun rolling back protections for Temporary Protected Status (“TPS”) beneficiaries, most recently for almost 200,000 Salvadorans who fled devastating earthquakes in 2001.¹ On January 8, Secretary of Homeland Security Kirstjen Nielsen announced her decision to terminate El Salvador’s TPS designation, which will take effect September 9, 2019. In addition, similar announcements have been made for Haiti² and Nicaragua,³ while about 40,000 Hondurans currently await their own determination.⁴

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1. Miriam Jordan, *Trump Administration Says That Nearly 200,000 Salvadorans Must Leave*, N.Y. TIMES (Jan. 8, 2018), https://www.nytimes.com/2018/01/08/us/salvadorans-tps-end.html?_r=0.

2. UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES (USCIS): TEMPORARY PROTECTED STATUS DESIGNATED COUNTRY: NICARAGUA (2018), <https://www.uscis.gov/humanitarian/temporary-protected-status/temporary-protected-status-designated-country-nicaragua>.

3. UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES (USCIS): TEMPORARY PROTECTED STATUS DESIGNATED COUNTRY: HAITI (2018), <https://www.uscis.gov/humanitarian/temporary-protected-status/temporary-protected-status-designated-country-haiti>.

4. Jordan, *supra* note 1.

Some news outlets report the policy reversal as extremist—even cruel⁵—in its mandate that hundreds of thousands of Salvadorans leave the country or, alternatively, find some way to attain citizenship.⁶ In contrast, the government insists that it is adhering to the original concept of the TPS program, namely that the relief granted was supposed to be temporary.⁷ Secretary Nielsen’s memorandum states that conditions in El Salvador are now sufficient to facilitate such a major resettlement.⁸ However, the communication does not address the 190,000 or so U.S.-born children to Salvadoran TPS recipients.⁹

This policy reversal comes in the wake of major immigration overhauls, most notably an end to the Obama-era Deferred Action for Childhood Arrivals (“DACA”) program. While the ultimate shape of these changes may be difficult to predict, it is clear that Salvadoran parents of child citizens may have some difficult choices ahead. In addressing this issue, this piece will take a closer look at the TPS program (Section II), discuss in more detail the decision to terminate El Salvador’s status (Section III), and present contrasting responses to these policy changes (Section IV).

II. WHAT IS “TEMPORARY PROTECTED STATUS”?

TPS is one avenue immigrants may pursue to stay legally in the United States.¹⁰ Enacted as part of the Immigration and Nationality Act of 1990,¹¹ this special visa provides relief for those unable to return to a foreign country because of political turmoil, ongoing armed conflict, environmental catastrophes, or other extraordinary or exceptional circumstances.¹² For example, the first Bush Administration granted Somalia TPS as a result of political

5. Raul A. Reyes, *Trump Administration’s New Immigration Decision Is Shortsighted and Cruel*, CNN (Jan. 9, 2018), <http://www.cnn.com/2018/01/09/opinions/tps-salvadoran-immigration-opinion-reyes/index.html>.

6. Jordan, *supra* note 1.

7. *Id.* (quoting former Secretary of State John Kelly in video: “By definition TPS is temporary, meant to be temporary. It’s not meant to be forever.”)

8. Press Release, Dep’t of Homeland Security, *Secretary of Homeland Security Kirstjen Nielsen Announcement on Temporary Protected Status for El Salvador* (Jan. 8, 2018), available at <https://www.dhs.gov/news/2018/01/08/secretary-homeland-security-kirstjen-m-nielsen-announcement-temporary-protected> (hereinafter Nielsen Memorandum); see also *Termination of the Designation of El Salvador for Temporary Protected Status*, 83 Fed. Reg. 2654, 2654-660 (2018).

9. Nick Miroff & David Nakamura, *200,000 Salvadorans May Be Forced to Leave the U.S. As Trump Ends Immigration Protection*, WASHINGTON POST (Jan. 8, 2018), https://www.washingtonpost.com/world/national-security/trump-administration-to-end-provisional-residency-for-200000-salvadorans/2018/01/08/badfd90-f481-11e7-beb6-c8d48830c54d_story.html?utm_term=.7011652d76fe; see also Bishop Mark Seitz, *But What About the Children?*, THE HILL (Jan. 1, 2018), <http://thehill.com/opinion/immigration/366777-but-what-about-the-children-what-happens-to-the-192000-us-citizen>.

10. UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES (USCIS): TEMPORARY PROTECTED STATUS (2018), <https://www.uscis.gov/humanitarian/temporary-protected-status>.

11. Warren R. Leiden & David L. Neal, *Highlights of the U.S. Immigration Act of 1990*, 14 FORDHAM INT. L. REV. i. 1 art. 14 (1990).

12. Temporary Protected Status: An Overview, AM. IMMIGRATION COUNCIL (Aug. 24, 2017), <https://www.americanimmigrationcouncil.org/research/temporary-protected-status-overview>.

conflict, clan warfare, malnutrition, and drought.¹³ While the TPS visa is not a direct path to lawful permanent residence status (i.e. green card status), it does not preclude the beneficiary from pursuing other options, such as filing for nonimmigrant status or an adjustment of status.¹⁴ However, as further discussed in Section III, eligibility requirements can significantly restrict these options.

In 1990, Congress established the Immigration and Naturalization Services (“INS”)¹⁵ within the Department of Justice (“DOJ”) and gave the Attorney General the power to protect foreign nationals who are unable to return home. In response to the September 11 attacks, Congress enacted the Homeland Security Act¹⁶ in 2002, which dissolved the INS and established three separate immigration departments under the purview of the newly-created Department of Homeland Security (“DHS”). The DHS Secretary now has the power to assign or terminate TPS designations based on that country’s conditions.¹⁷ Foreign nationals shielded under TPS are immune from immediate removal proceedings.¹⁸ They may also obtain an Employment Authorization Document (EAD), which allows them to pursue legal work opportunities.¹⁹ Citizens of designated countries (or persons without nationality who at least habitually resided in designated countries) must be living in the United States on the day when TPS designation is determined.²⁰ Only if that designation is renewed—on a six, twelve, or 18-month basis²¹—may immigrants arriving after the original designation date apply.²²

A person is eligible for TPS if they are a national of a TPS designated country, submit an application during the appropriate filing period,²³ and have been continuously present and residing in the U.S. since the most recent designation date of that particular country.²⁴ To apply, a person must have proof of foreign nationality and date of entry into the U.S. With these documents, that person may submit an application and—provided she has not

13. Extension of the Designation of Somalia for Temporary Protected Status, 82 Fed. Reg. 4905, 4905-4911 (Jan. 17, 2017), available at <https://www.federalregister.gov/documents/2017/01/17/2016-31861/extension-of-the-designation-of-somalia-for-temporary-protected-status>.

14. Typically, this includes a Form I-130, Petition for Alien Relative, Form I-140, Immigrant Petition for Alien Worker, Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant, or another petition filed on the immigrant’s behalf and establishing the reason for immigration. The petition is necessary for determining the immigrant’s proper classification. *What Is an Immigrant Petition?*, USCIS, <https://my.uscis.gov/helpcenter/article/what-is-an-immigrant-petition>.

15. Immigration Act of 1990 (“IMMACT”), Pub. L. 101-649, 104 Stat. 4978.

16. Homeland Security Act, Pub. L. 107-296, 116 Stat. 2135 (2002).

17. USCIS: OUR HISTORY (2018), <https://www.uscis.gov/about-us/our-history>.

18. USCIS, *supra*, note 10 (click ‘What is TPS?’).

19. *Id.*

20. *Id.*

21. AM. IMMIGRATION COUNCIL, *supra* note 13.

22. USCIS *supra*, note 10 (click ‘What is TPS?’).

23. There is an exception for late filers with “good cause.” See USCIS, *supra* note 10 (click ‘Filing Late’).

24. USCIS, *supra* note 10.

been convicted of a felony or two or more misdemeanors²⁵— will be granted TPS status and, if applied for, an EAD for employment.

While ten countries are currently designated for TPS,²⁶ four are scheduled for termination²⁷ and—in the case of Honduras—the U.S. government is investigating the internal conditions.²⁸

III. THE DECISION TO TERMINATE TPS FOR EL SALVADOR

The decision to terminate El Salvador's status has serious impact because it affects the most TPS beneficiaries. According to the Congressional Research Service, Salvadorans outnumber the next highest concentration of foreign nationals by a ratio of four-to-one.²⁹ This high concentration is due in large part to earthquakes that hit the country in early 2001,³⁰ after which almost 300,000 Salvadorans fled to the U.S.³¹ The aggregate damage cost around 1.2 billion dollars and left one-in-four citizens homeless.³² Over the last 17 years, the U.S. government consistently granted status renewals for El Salvador, justifying the decision with evidence of unsafe conditions, infrastructure damage, gang violence, poverty, and drought.³³

Still today El Salvador's capital, San Salvador, is considered one of the most dangerous cities in the world³⁴ and the country's economy is in perilous straits.³⁵ Even so, Secretary Nielsen announced that pursuant to the INA the

25. USCIS, *supra* note 10 ('click Eligibility Requirements').

26. See USCIS, *supra* note 10 (the ten countries include: El Salvador, Haiti, Honduras, Nepal, Nicaragua, Somalia, Sudan, South Sudan, Syria, and Yemen).

27. El Salvador, Haiti, Nicaragua and Sudan are all scheduled to terminate in the years 2018 -19.

28. *Acting Secretary Elaine Duke Announcement on Temporary Protected Status for Nicaragua And Honduras*, DEP'T. OF HOMELAND SECURITY (Nov. 6, 2017), available at <https://www.dhs.gov/news/2017/11/06/acting-secretary-elaine-duke-announcement-temporary-protected-status-nicaragua-and-honduras>.

29. Robert Warren and Donald Kerwin, *A Statistical and Demographic Profile of the U.S. Temporary Protected Status Populations from El Salvador, Honduras, Haiti*, 5 J. ON MIGRATION AND HUMAN SECURITY no. 3 577, 577-92 (2017).

30. *On This Day: 2001: Earthquake Devastates El Salvador*, BBC (Jan. 13, 2001), http://news.bbc.co.uk/onthisday/hi/dates/stories/january/13/newsid_2554000/2554149.stm; see also *Another Deadly Earthquake Strikes El Salvador*, CNN (Feb. 13, 2001), <http://www.cnn.com/2001/fyi/news/02/13/salvador.quake/index.html>.

31. *Let the Salvadorans Stay*, THE ECONOMIST (Jan. 11, 2018), <https://www.economist.com/news/leaders/21734473-americas-decision-strip-200000-people-their-right-remain-mistakeunless-it-spurs>.

32. Eric Schmitt, *Salvadorans Illegally in U.S. Are Given Protected Status*, N.Y. TIMES (Mar. 3, 2001), <http://www.nytimes.com/2001/03/03/us/salvadorans-illegally-in-us-are-given-protected-status.html>; see also GOVERNMENT OF EL SALVADOR, EL SALVADOR: RECOVERY PLAN FROM THE DAMAGE CAUSED BY THE EARTHQUAKES OF JAN 13TH & FEB 13TH, 2001, ¶37 (2001), available at: <https://reliefweb.int/report/el-salvador/el-salvador-recovery-plan-damage-caused-earthquakes-jan-13th-feb-13th-2001>.

33. Nielsen Memorandum, *supra* note 8.

34. *The World's Most Dangerous Cities*, THE ECONOMIST (Mar. 31, 2017), <https://www.economist.com/blogs/graphicdetail/2017/03/daily-chart-23> ("[t]he top of the rankings has not changed. In both 2015 and 2016, El Salvador was the world's most violent country, and its capital, San Salvador, was the most murderous city").

35. Elizabeth Matsangou, *El Salvador's Economic Shackles*, WORLDFINANCE.COM (Apr. 19, 2017), <https://www.worldfinance.com/strategy/el-salvadors-economic-shackles> ("[l]ast year, the Salvadoran economy faced even further peril as it teetered on the brink of collapse – a result of substantial pressure on the fiscal cash flow after years of overspending and slow growth. This could be largely attributed to the government's failure to fully recogni[z]e the consequences of the global financial crisis, and specifically the endemic risk it faced as a result of plummeting export revenues").

government is required to terminate because of El Salvador's improved conditions: "the original conditions caused by the 2001 earthquakes no longer exist. Thus, under the applicable statute, the current TPS designation must be terminated."³⁶ This decision—while effectual—will not be implemented immediately. Secretary Nielsen has delayed the termination by 18 months to ensure "an orderly transition" out of the country.³⁷

Salvadorans have two potential avenues for relief, though success remains difficult to predict. First, they may apply for a green card. However, DHS eligibility requirements essentially render this a false choice. Entering the country without inspection is grounds to deny an application for legal permanent residence or citizenship.³⁸ However, two federal appellate courts—the Ninth³⁹ and Sixth⁴⁰ Circuits—have declared that an eligible TPS beneficiary may lawfully adjust their status regardless of whether they entered the country without inspection.⁴¹ Alternatively, the Eleventh Circuit⁴² ruled just the opposite, and in all other circuits the default position remains that lack of inspection is grounds for denial.⁴³ The problem for TPS recipients is that "a departure to have a visa interview [could] trigger bars to re-entry for up to 10 years."⁴⁴ As most Central American TPS recipients live outside of either the Ninth or Sixth Circuit,⁴⁵ the choice to pursue a green card may be an impractical one.

Second, Congress could create new legislation as part of a comprehensive immigration reform. According to the DHS, "[o]nly Congress can legislate a permanent solution addressing the lack of an enduring lawful immigration status of those currently protected by TPS who have lived and worked in the United States for many years."⁴⁶ The next 18 months will provide an opportunity for the government "to craft a potential legislative solution."⁴⁷ This seems to be an unlikely option, given the Trump Administration's reluctance to formulate pro-immigrant legislation.⁴⁸

However, these hardline decisions may be more malleable than they appear. In a meeting on January 9th, President Trump stated that he would

36. Nielsen Memorandum, *supra* note 8, at ¶2.

37. *Id.*

38. AM. IMMIGRATION COUNCIL, *supra* note 12.

39. *See Ramirez v. Brown*, 852 F.3d 954 (9th Cir. 2017).

40. *See Flores v. USCIS*, 718 F.3d 548 (6th Cir. 2017).

41. *Court Decision Ensure TPS Holders in Sixth and Ninth Circuits May Become Permanent Residents*, AM. IMMIGRATION COUNCIL (Sept. 16, 2017), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/court_decisions_ensure_tps_holders_in_sixth_and_ninth_circuits_may_become_permanent_residents.pdf.

42. *See Serrano v. U.S. Att'y Gen.*, 655 F.3d 1260, 1265 (11th Cir. 2011) (per curiam).

43. AM. IMMIGRATION COUNCIL, *supra* note 12.

44. *Id.*

45. Warren & Kerwin, *supra* note 29.

46. Nielsen Memorandum, *supra*, note 8.

47. *Id.*

48. *See infra* notes 49-53.

“take the heat” for signing a more solicitous immigration bill,⁴⁹ provided that Democrats concede to funding border security projects like building a wall.⁵⁰ If the government can make timely changes to the law, Salvadorans may have a chance. As reported by *The Economist*, it would behoove the Trump Administration to pass “comprehensive immigration reform that treats [TPS beneficiaries] humanely and fairly, if nothing else because 17 years of established life is a strong incentive to remain in the country illegally.”⁵¹ Increasing the number of undocumented immigrants in this country would only compound an already nationally divisive problem.

IV. RESPONSE

News outlets decry the DHS decision as shortsighted and ineffective.⁵² Some support the decision as being in line with a restrictionist immigration policy,⁵³ and helping El Salvador’s economy.⁵⁴ What is clear is that this decision is the latest in a series of immigration changes including: reduced refugee admissions,⁵⁵ expanded hiring of Immigration and Customs Enforcement officers,⁵⁶ phasing-out the Deferred Action for Childhood Arrivals program starting in March of this year,⁵⁷ and Executive Order 13769, also colloquially named the “Muslim” or “travel” ban.⁵⁸ Terminating TPS has been “legally

49. Jeff Mason & Richard Cowan, *Trump Promises to ‘Take The Heat’ for Broad Immigration Deal*, REUTERS (Jan. 9, 2018 6:03AM), <https://www.reuters.com/article/us-usa-trump-immigration/trump-promises-to-take-the-heat-for-broad-immigration-deal-idUSKBN1EY149>.

50. *Id.*; see also Schmitt, *supra* note 32.

51. See *How Will El Salvador Cope With Deportees From America?*, THE ECONOMIST (Jan. 11, 2018), <https://www.economist.com/news/americas/21734477-united-states-wants-expel-up-200000-salvadoreans-both-they-and-their-home-country> (“Many will stay in the United States illegally, even if they lose their jobs and homes”).

52. Reyes, *supra* note 5; see also Rafael Bernal, *Mayors Ask Administration to Extend Immigration Program for El Salvador*, THE HILL (Jan. 3, 2018), <http://thehill.com/latino/367193-mayors-ask-administration-to-extend-immigration-program-for-el-salvador>.

53. Jordan, *supra* note 1 (quoting Mark Krikorian, executive director of the right-leaning Center for Immigration Studies: “[TPS] has to be temporary. This has gone on far too long.”).

54. John Binder, *El Salvador Official: Trump Sending 200K El Salvadorans Home Will Have ‘Beneficial’ Effects on Economy*, BREITBART (Jan. 16, 2018), <http://www.breitbart.com/big-government/2018/01/16/el-salvador-official-trump-sending-200k-el-salvadorans-home-will-have-beneficial-effects-on-economy/>.

55. Yeganeh Torbati, *U.S. Will Admit Up to 45,000 Refugees Next Year – Trump*, REUTERS (Sept. 29, 2019), <https://www.reuters.com/article/legal-us-usa-immigration-refugees/u-s-will-admit-up-to-45000-refugees-next-year-trump-idUSKCN1C4345>.

56. Mark Hay, *Trump’s Deportation Force Is His First Year’s Most Lasting Legacy*, VICE (Jan. 21, 2018), https://www.vice.com/en_ca/article/59wepz/trumps-deportation-force-is-his-first-years-most-lasting-legacy-trumpweek.

57. Mildred García, *Fix DACA and Move On*, U.S. NEWS & WORLD REPORT (Jan. 19, 2018), <https://www.usnews.com/opinion/thomas-jefferson-street/articles/2018-01-19/daca-isnt-a-partisan-issue-americans-want-congress-and-trump-to-fix-it>.

58. Lawrence Hurley, *Supreme Court to Decide Legality of Trump Travel Ban*, REUTERS (Jan. 19, 2018 2:12PM), <https://www.reuters.com/article/us-usa-court-immigration/supreme-court-to-decide-legality-of-trump-travel-ban-idUSKBN1F82EY>.

and politically easier”⁵⁹ than some of these policy changes, but it raises questions about the economic and social motivations behind these changes.

The government’s narrative is that the TPS program was never intended to permanently shelter its recipients.⁶⁰ If the original requirements are merely pre-textual, it undermines the legitimate avenues already in place to obtain permanent resident status or citizenship.⁶¹ This is a logical argument, which makes it all the more important for Congress to act on immigration reform and avoid what will otherwise be severe economic hits to the U.S and El Salvador. For the last 17 years, TPS recipients have entered the workforce, purchased homes, consumed goods, and raised families. By one estimate, terminating TPS for El Salvador, Honduras, and Haiti will reduce GDP by over \$45 billion.⁶² As for El Salvador, many families rely on monetary support from relatives working in this country;⁶³ forcing them out would eliminate that supplemental income.

Furthermore, according to a recent podcast with Brookings Institute expert Dany Bahar, the potential underlying economic motivations behind this tighter regime of immigration policy may be misguided. For example, there is little evidence that immigrants and refugees compete with citizens for jobs; rather, economists believe that migrants compete with migrants, unless and until they obtain the education necessary to compete for better paying positions.⁶⁴ Bahar posits that immigrants benefit economies because they: (1) provide a diversity of skills and thought, (2) are highly entrepreneurial,⁶⁵ and (3) consume, invest, and “constantly inject resources into the local economy [creating] the need for more jobs for others.”⁶⁶ These insights further support comprehensive immigration reform, a contentious debate that—for three days in January 2018—resulted in a government shutdown.⁶⁷

59. THE ECONOMIST, *supra* note 31.

60. Nielsen Memorandum, *supra* note 8.

61. THE ECONOMIST, *supra* note 31.

62. AMANDA BARAN & JOSE MAGAÑA-SALGADO & TOM K. WONG, *ECONOMIC CONTRIBUTIONS BY SALVADORAN, HONDURAN, AND HAITIAN TPS HOLDERS*, IMMIGRATION LEGAL RESOURCE CENTER (2017), available at: https://www.ilrc.org/sites/default/files/resources/2017-04-18_economic_contributions_by_salvadoran_honduran_and_haitian_tps_holders.pdf.

63. Joshua Partlow, *Salvadorans Fear TPS Decisions Will Be a Huge Economic Blow But Pin Hopes on Congress*, WASHINGTON POST (Jan. 8, 2018), https://www.washingtonpost.com/world/the_americas/salvadorans-fear-tps-decision-will-be-a-huge-economic-blow-to-their-country/2018/01/08/eefd9ab4-f486-11e7-9af7-a50bc3300042_story.html?utm_term=.1d85875a3b09; see also Christopher Woody, *Trump’s Latest Immigration Crackdown Threatens the Economy—Both in the U.S. and in El Salvador*, BUSINESSINSIDER.COM (Jan. 17, 2018), <http://www.businessinsider.com/trump-ending-tps-el-salvador-threatens-economy-2018-1>.

64. 5 ON 45: THE MOTIVATION BEHIND TRUMP’S IMMIGRATION POLICY, BROOKINGS INSTITUTE (2018), https://www.brookings.edu/podcast-episode/the-motivation-behind-trumps-immigration-policy/?utm_campaign=Brookings%20Brief&utm_source=hs_email&utm_medium=email&utm_content=5990956.

65. *Id.* (quoted in podcast: “In the U.S., migrants represent about 15% of the population but they represent about 25% of all entrepreneurs”).

66. *Id.*

67. Nicholas Fandos, *Shutdown Day 2: Congress Seems Far Apart on a Resolution*, N.Y. TIMES (Jan. 21, 2018), <https://www.nytimes.com/2018/01/21/us/politics/congress-government-shutdown.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=first-column-region®ion=top-news&WT.nav=top-news>; see also Joshua Jamerson, *Liberal Groups Call Democrats ‘Weak-*

Congress must weigh the social and economic consequences of mass deportation against the presumption of *de facto* permanent status arising from a temporary program and decide what shall be the country's priorities; the outcome could very well solidify the paradigm shift in immigration for which the 2016 Trump campaign so ardently advocated.