GROUNDS OF INADMISSIBILITY FOR TEMPORARY PROTECTED STATUS

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Applicants for Temporary Protected Status (TPS) must demonstrate that they are admissible to the United States, with some exceptions.[1] Analyzing inadmissibility for TPS eligibility is unique. Not all grounds of inadmissibility apply to a TPS applicant. The statute and regulations provide exemptions to some grounds,[2] while USCIS policy clarifies that certain other grounds do not apply.[3] For many of the grounds that do apply to TPS applicants, a broad waiver is available. Yet, some grounds of inadmissibility are not waivable for those seeking TPS.

This practice advisory will provide an overview of the grounds of inadmissibility explaining which grounds do not apply to TPS applicants, which grounds are non-waivable, and which grounds are waivable. We will then provide a brief overview of the TPS waiver of inadmissibility. For a full exploration of TPS eligibility, see ILRC's manual, *Temporary Protected Status: Practice and Strategies (2022).*

I. TPS and Inadmissibility: Getting Started

TPS is an important form of humanitarian relief for noncitizens of certain designated countries who cannot return to their home country due to natural disaster, civil unrest, or violence that poses a significant risk to safety.[4] To be eligible for TPS, an applicant must generally show that they are admissible, with some exceptions. The grounds of inadmissibility are listed in the Immigration and Nationality Act at INA § 212(a)(2).

Doing the analysis: Generally, Form I-821, the application for TPS, covers all areas of possible ineligibility in Part 7. When assessing inadmissibility, you will have to determine whether any answer in that section 1) raises an inadmissibility issue and if so 2) whether there

[1] INA § 244(c)(1)(A)(iii), INA 244(c)(2)(A).
[2] See INA § 244(c)(2)(A) and 8 CFR § 244.3(a) which provide that the following inadmissibility grounds do not apply to TPS: public charge, INA § 212(a)(4); labor certification grounds, INA § 212(a)(5)(A); unqualified physicians, INA § 212(a)(5)(B); and documentation requirements, INA § 212(a)(7)(A)(i).
[3] See USCIS, Forms, I-601 Waiver of Inadmissibility, Instructions, p. 13 (2021), https://www.uscis.gov/sites/default/files/document/forms/i-601instr.pdf in which USCIS instructs TPS applicants not to file waivers for: INA § 212(a)(9)(B) 3/10-year bars for unlawful presence; INA § 212(a)(9)(C) permanent bar for unlawful attempted or actual reentry after accrual of unlawful presence or a removal order; INA § 212(a)(6)(A) bar for presence without admission or parole; INA § 212(a)(9)(A) bar for removal orders; INA § 212(a)(6)(D) bar for stowaways, and INA § 212(a)(6)(G) bar for student violators.
[4] The current information on countries designated for TPS and their dates for filing is found on the USCIS TPS web page, https://www.uscis.gov/humanitarian/temporary-protected-status.

is an exception to or a waiver available for that ground of inadmissibility. The TPS applicant bears the burden to demonstrate that they are admissible or that they qualify for a waiver for inadmissibility. In addition, for criminal and security issues, advocates must also assess whether other TPS bars might apply.

II. Grounds of Inadmissibility that *Do Not Apply* to TPS

TPS applicants are exempt from certain inadmissibility grounds. Several grounds of inadmissibility are waived by statute and regulation.[5] Other grounds have been waived by USCIS policy.[6] For these inadmissibility grounds, TPS applicants benefit from a blanket, automatic exemption. They do not need to apply for a waiver.

When seeking TPS, the following grounds of inadmissibility do not apply:

- Public charge (INA § 212(a)(4));
- Labor Certifications and qualifications for certain immigrants (INA § 212(a)(5));
- Aliens present without admission or parole (INA § 212(a)(6)(A));
- Stowaways (INA § 212(a)(6)(G));
- Student visa violators (INA § 212(a)(6)(G));
- Documentation requirements for immigrants and nonimmigrants (INA § 212(a)(7));
- Certain aliens previously removed (INA § 212(a)(9)(A));
- Aliens unlawfully present (INA § 212(a)(9)(B)); and
- Aliens unlawfully present after previous immigration violations (INA § 212(a)(9)(C)).

In practice, although USCIS does not require a waiver in these contexts, the applicant should disclose any inadmissibility issues related to these grounds to show that it was properly considered during the adjudication of their application.

CAUTION: Although certain grounds of inadmissibility do not apply to TPS applicants in their TPS application, the grounds may apply if the applicant seeks a different immigration benefit in the future. For instance, unlawful presence bars, including the permanent bar for illegal reentry after unlawful presence or removal, are not considered when applying for TPS but would apply if the person seeks to immigrate through a visa petition filed by a relative.

[5] See INA § 244(c)(2)(A) and 8 CFR § 244.3(a) which provide that the following inadmissibility grounds do not apply to TPS: public charge, INA § 212(a)(4); labor certification grounds, INA § 212(a)(5)(A); unqualified physicians, INA § 212(a)(5)(B); and documentation requirements, INA § 212(a)(7)(A)(i).
[6] See USCIS, Forms, *I-601 Waiver of Inadmissibility, Instructions*, p. 13 (2022), https://www.uscis.gov/sites/default/files/document/forms/i-601instr.pdf in which USCIS instructs TPS applicants not to file waivers for: the 3/10-year bars for unlawful presence, INA § 212(a)(9)(B); permanent bar for unlawful attempted or actual reentry after accrual of unlawful presence or a removal order, INA § 212(A)(9)(c); bar for presence without admission or parole, INA § 212(a)(6)(A); bar for removal orders, INA § 212(a)(9)(A); bar for stowaways, INA § 212(a)(6)(D); bar for student violators, INA § 212(a)(6)(G).

III. *Non-Waivable* Grounds of Inadmissibility

Certain criminal grounds and security related grounds of inadmissibility are not waivable for TPS applicants.[7] If an applicant triggers these inadmissibility issues, they will be barred from TPS eligibility. No waiver is available to TPS applicants for the following inadmissibility grounds:

- Admission or conviction of a crime involving moral turpitude (INA § 212(a)(2)(A)(i)(I)) (unless the petty offense or youthful offender exception applies);
- Admission or conviction of a controlled substance (drug) offense (INA § 212(a)(2)(A)(i)(II)) (except a waiver is available for a single offense involving simple possession of 30 grams or less of marijuana);
- Multiple criminal convictions with an aggregate sentence of five years (INA § 212(a)(2)(B));
- Where a DHS or consular official knows or has reason to believe the person aided or engaged in controlled substance trafficking, and some family members who benefited from this (INA § 212(a)(2)(C));
- General security and related grounds (INA § 212(a)(3)(A));
- Terrorist activities (INA § 212(a)(3)(B));
- Adverse foreign policy consequences for the United States (INA § 212(a)(3)(C));
- Membership in totalitarian party (INA § 212(a)(3)(D)); and
- Participation in Nazi persecution, genocide, or the commission of any act of torture or extrajudicial killing (INA § 212(a)(3)(E)).

NOTE: Many of these grounds will overlap with other bars. For instance, a controlled substance trafficking offense triggers inadmissibility as a controlled substance violation, and it may also bar eligibility as a particularly serious crime and as a felony conviction. For an exploration of the impact of crimes for TPS, see ILRC's practice advisory, *The Impact of Crimes on Eligibility for Temporary Protected Status (March 2023).*

WARNING ABOUT LEGALIZED MARIJUANA: Medical or recreational marijuana is legalized in the majority of states. But even if marijuana is legal under state law, it is still a federally defined controlled substance. Noncitizens who admit that they have possessed or used marijuana, even if they do so legally under state law, in their own homes, can be found inadmissible. For more information, including a Practice Advisory about drug convictions and admissions and education flyers for community members, see ILRC information about marijuana.[8]

[7] INA § 244(c)(2)(A)(iii).
[8] ILRC community alerts, a practice advisory, and other educational materials may be found at https://www.ilrc.org/warning-immigrants-about-medical-and-legalized-marijuana and https://www.ilrc.org/noncitizens-cannabis-warnings.

A. Waiver available for single incident involving possession of 30 grams or less of marijuana

While controlled substance offenses are generally not waivable for TPS, a discretionary waiver is available for one or more convictions or admissions of offenses relating to a single incident involving simple possession for personal use of 30 grams or less of marijuana under INA § 244(c)(2)(A).[9]

WARNING: The traditional 212(h) waiver for inadmissibility based on crimes differs from the TPS waiver at INA § 244(c)(2)(A) in important ways. While a 212(h) waiver has the potential to waive CIMTs, the TPS waiver does not. Like the section 212(h) waiver, the TPS waiver cannot waive any drug offense other than one or more convictions relating to a single incident involving simple possession of thirty grams or less marijuana. In addition, because the TPS waiver requirements are broader and do not require a showing of hardship to a "qualifying relative" a TPS applicant may be eligible for a waiver of a simple possession marijuana offense, but not be eligible for the 212(h) waiver needed to adjust status.

> **Example**: Jun has a conviction for simple possession of 20 grams of marijuana, and so qualifies for a TPS waiver. Jun's sister filed a visa petition for Jun, and the priority date will be current in a couple years. However, to obtain a waiver of the same marijuana conviction to be granted permanent residence based on that petition, Jun will need a spouse, parent, or son or daughter who is a U.S. citizen or permanent resident who will suffer extreme hardship if she is not approved for a 212(h) waiver. Conceding inadmissibility for TPS will likely mean Jun will not be eligible to become an LPR in the future if she has none of these "qualifying relatives".

IV. Grounds of Inadmissibility with *Waiver Available*

The remaining inadmissibility grounds—those that apply in the TPS process and do not bar TPS eligibility outright—can be waived in the TPS application process. It is important to disclose these issues to avoid any concern that TPS was granted improperly later down the road. An applicant will not be automatically barred from TPS eligibility if they are granted a waiver. These include:

- Health-Related Grounds: Communicable Diseases, Required Vaccinations, Dangerous Disorders, Addiction, and Abuse (INA § 212(a)(1));
- Assisting in unlawful entry of a noncitizen ("alien smuggling") (INA § 212(a)(6)(E));
- Failure to Attend a Removal Proceeding (INA § 212(a)(6)(B));
- Fraud and Misrepresentation (INA § 212(a)(6)(C)(i));
- False Claim to U.S. Citizenship (INA § 212(a)(6)(C)(iii));
- Draft Evasion (INA § 212(a)(8)), unlawful voting (INA § 212(a)(10)(D)), child abduction (INA § 212(A)(10)(C)), practicing polygamy (INA § 212(a)(10)(A));

[9] For more information, see ILRC, Practice Advisory: Immigrants and Marijuana (May 2021) along with other information about marijuana at https://www.ilrc.org/warning-immigrants-about-medical-and-legalizedmarijuana.

- Admission or conviction of a controlled substance offense relating to a single incident involving possession of 30 grams or less of marijuana (INA 212(A)(2)(A)(i)(II));
- Prostitution and commercialized vice (INA § 212(a)(2)(D));
- Serious criminal activity where the person has asserted immunity from prosecution (INA § 212(a)(2)(E));
- Foreign government officials who have committed particularly severe violations of religious freedom (INA § 212(a)(2)(G));
- Where a DHS or consular official knows or has reason to believe the person aided or engaged in human trafficking, and some family members who benefitted from this (INA § 212(a)(2)(H));
- Where a DHS or consular official knows or has reason to believe the person engaged in or is entering the United States to engage in money laundering (INA § 212(a)(2)(I)).

For a more thorough discussion of these grounds, see ILRC's manual, *Temporary Protected Status: Practice and Strategies (2022)*. We discuss a few common grounds below.

A. Assisting a noncitizen enter unlawfully ("alien smuggling"): INA § 212(a)(6)(E)

Noncitizens who in almost any way, and at any time, help bring other noncitizens illegally into the United States are inadmissible.[10] This ground of inadmissibility includes anyone who "knowingly has encouraged, induced, assisted, abetted, or aided" any other noncitizen to enter or try to enter the United States.[11] This broad definition of assistance includes, sending money to pay for someone's travel as part of their unauthorized entry into the United States, as well as merely encouraging someone to enter the United States illegally.

A note on waivers: The TPS waiver for this ground is broader than the waiver available in the traditional inadmissibility context. For those pursuing a family-based visa or adjustment to lawful permanent resident, the person must have smuggled only their parent, spouse, son, or daughter to qualify for a waiver.[12] For TPS purposes, anyone who is inadmissible for this ground can apply for the TPS-based waiver. While this provides immediate relief for someone in this situation, they will still face this bar in a future adjustment application for LPR status.

> **Example**: Ana paid a coyote to help her niece come to the United States. She applied for TPS with a waiver for alien smuggling. She is now married to a U.S. citizen and wants to apply for LPR status. To apply for LPR status, she will have to show she is admissible. The traditional waiver for alien smuggling is only available to those that assisted their parent, spouse, or son or daughter. There is no waiver for helping a niece. While Ana is eligible for TPS with a waiver, she will be barred from getting her LPR status through a family-based petition because she helped her niece come to the United States.

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[10] See INA § 212(a)(6)(E).
[11] *Id.*
[12] See INA § 212(d)(11).

B. Fraud and misrepresentation: INA § 212(a)(6)(C)(i)

People who "misrepresent a material fact" or commit fraud in an application to the Department of Homeland Security or the Department of State are inadmissible.[13] The USCIS Policy Manual contains recent guidance on how USCIS determines whether the fraud and misrepresentation inadmissibility ground has been triggered.[14]

To be found inadmissible for making a misrepresentation, the misrepresentation must have been made knowingly, it must be material to the decision the officer is making, and it must be made to a government official.[15]

To be material, the misrepresentation must be one that could make a difference in the government's decision. It does not have to *actually* influence the government's decision; it only matters that it could have.[16]

> **Example**: Estella immigrated through her U.S. citizen husband. During her immigrant visa interview, she made two misrepresentations to the consular officer. First, she told the officer that she had no other relatives living in the United States, even though she did. Second, she told the officer that she and her husband were still married, when in fact they were divorced.
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> The first misrepresentation was not material. The fact that Estella has other relatives in the United States would not have changed the officer's decision. While her statement was not true, it was not material and therefore was not a material misrepresentation.
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> The second misrepresentation was material. If the officer had known Estella and her husband were divorced, he would not have granted the visa because it was based on the marriage. Estella committed a material misrepresentation.

C. False claim to U.S. citizenship: INA § 212(a)(6)(C)(ii)

Any person who falsely claims to be a U.S. citizen for any purpose or benefit under the INA, *or under any other federal or state law* is inadmissible.[17] This provision applies only to false representations of U.S. citizenship made on or after September 30, 1996, though false claims prior to that date may still fall within the fraud or material representation ground of inadmissibility. A TPS applicant can apply for TPS with a waiver for this ground but would not be eligible for a family-based visa or adjustment of status to lawful permanent resident. This is because this ground of inadmissibility is broadly written and outside special cases, such as TPS, there is no waiver of this ground.

According to several circuit courts and USCIS, the person to whom the false claim to citizenship is made, does not have to be a U.S. government official if the misrepresentation

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[13] See INA § 212(a)(6)(C)(i).
[14] See 8 USCIS-PM J.2(A).
[15] See 8 USCIS-PM J.2(B).
[16] See *Matter of D-R-,* 25 I. & N. Dec. 445, 450-51 (BIA 2011) ("It is not necessary for the Government to show that the statement actually influenced the agency, only that the misrepresentation was capable of affecting or influencing the governmental decision.").
[17] INA § 212(a)(6)(C)(ii).

was made to obtain a benefit or purpose under state or federal laws.[18] A benefit must be identifiable and enumerated in the INA or any other federal or state law.[19] A benefit includes, but is not limited to, a U.S. passport[20], entry into the United States[21], and obtaining employment, loans, or any other benefit under federal or state law, if citizenship is a requirement for eligibility[22].

Whether the false claim must have been made knowingly is now in doubt. Previous guidance required that the false claim be made knowingly and allowed for defenses for minors and others who did not or could not make a false claim knowingly.[23] This interpretation changed with a 2019 Board of Immigration Appeals (BIA) decision finding that the parallel ground of deportability for making a false claim to U.S. citizenship does not require knowledge.[24] The BIA found that the plain language of the statute does not require knowledge or specific intent when making the false claim.[25] The USCIS Policy Manual applies the *Zhang* holding to the ground of inadmissibility for false claim to U.S. citizenship. [26] Therefore, for the purposes of inadmissibility under INA § 212(a)(6)(C)(ii), a noncitizen need not intend to falsely claim citizenship in order to trigger this ground of inadmissibility.[27]

WARNING: While the TPS process provides a generous waiver for these inadmissibility grounds, advocates should consider arguments that these grounds do not apply in an individual's case. Disclosing inadmissibility based on one of these grounds could raise issues that would bar future relief. For instance, a false claim to U.S. citizenship cannot be waived in a traditional adjustment of status to become a lawful permanent resident.

For a more detailed discussion of the grounds of inadmissibility and waivers in the TPS context, please see ILRC's manual, *Temporary Protected Status: Practice and Strategies (2022).*

[18] See 8 USCIS-PM K.2(B)(2)
[19] See 8 USCIS-PM K.2(D)(2)
[20] See *Matter of Barcenas-Barrera (PDF),* 25 I&N Dec. 40 (BIA 2009). See *Matter of Villanueva (PDF),* 19 I&N Dec. 101, 103 (BIA 1984).
[21] See *Matter of Barcenas-Barrera (PDF),* 25 I&N Dec. 40 (BIA 2009). See *Jamieson v. Gonzales*, 424 F.3d 765 (8th Cir. 2005). See *Reid v. INS,* 420 U.S. 619 (1975).
[22] See *Dakura v. Holder,* 772 F.3d 994 (4th Cir. 2014). See *Crocock v. Holder,* 670 F.3d 400, 403 (2nd Cir. 2012). See *Castro v. Att'y Gen. of U.S.,* 671 F.3d 356, 368 (3rd Cir. 2012). See *Rodriguez v. Mukasey,* 519 F.3d 773 (8th Cir. 2008). See *Kechkar v. Gonzales,* 500 F.3d 1080 (10th Cir. 2007). See *Theodros v. Gonzales,* 490 F.3d 396 (5th Cir. 2007). See *Matter of Bett (PDF),* 26 I&N Dec. 437 (BIA 2014).
[23] See, *e.g.,* Letter from the U.S. Dep't of State to Senator Harry Reid (Aug. 29, 2013); Letter from the U.S. Dep't of Homeland Security to Senator Harry Reid (Sept. 12, 2013), available from AILA (AILA Doc. No. 13092060) (Sept. 20, 2013).
[24] *Matter of Zhang*, 27 I&N Dec. 569 (BIA 2019).
[25] *Id.* (citing *Patel v. U.S. Attorney General*, 917 F.3d 1319, 1326 n.5 (11th Cir. 2019); *Valadez-Munoz v. Holder,* 623 F.3d 1304, 1309 n.7 (9th Cir. 2010); *Richmond v. Holder*, 714 F.3d 725, 729 n.3 (2d Cir. 2013)).
[26] 8 USCIS-PM K.2, n.1.
[27] *Id.*

V. TPS Waiver Application

USCIS may grant discretionary waivers of certain inadmissibility grounds for humanitarian purposes, to assure family unity, or because it is otherwise in the public interest. INA § 244(c)(2)(A)(ii). This is the standard for any waivable inadmissibility ground in the TPS application process, regardless of whether a different waiver is available for other purposes like adjustment of status.

If a relevant ground of inadmissibility applies to an applicant and a waiver is available, you can apply using Form I-601 at the time of filing. If you do not include a Form I-601 waiver and USCIS determines that inadmissibility applies, they will request a waiver through the Request for Evidence (RFE) process. The application will not be denied without this opportunity to seek a waiver.

It is important to state all potential grounds of inadmissibility on the application, in order to ensure that the waiver covers all potential issues (while keeping in mind that certain types of admissions could trigger inadmissibility that could make the client ineligible for TPS or lawful permanent residence in the future). Also, remember that criminal convictions are very problematic in the TPS context and can trigger the criminal and asylum bars to TPS in addition to raising inadmissibility issues.

It helps to have documentation to support a waiver application. Although humanitarian purposes, family unity, and the public interest are listed as three distinct grounds in the statute, these areas overlap and the same documentation may be used to establish eligibility under each of the three bases. Practitioners often provide evidence of family ties and any other information that would persuade an officer that the waiver should be granted. A short declaration from the applicant is best practice. The amount of evidence submitted will depend on the particular case and whether the inadmissibility concern is particularly egregious, warranting the need for a stronger and more persuasive waiver application.

Once a TPS holder is granted a waiver of a ground of inadmissibility in conjunction with the prior TPS application, they do not need to seek another waiver for the same incident or circumstance when they re-register for TPS. However, if the applicant committed another inadmissible act that was not previously waived, such as assisting a family member to enter the U.S. without documentation, they would need to file for a waiver with their TPS re-registration.

A. An inadmissibility waiver granted for TPS is only valid for TPS

A waiver granted in conjunction with an application for TPS will not “cure” the inadmissibility ground for other purposes, such as immigrating through a family visa. The waiver will only be valid in the context of TPS.

> **Example:** Marta was apprehended at the border during her initial entry. At the time, she showed a fake U.S. birth certificate to the border patrol officer. Since that time, she re-entered without inspection. Marta is now eligible for TPS. As a TPS applicant, she is eligible for a waiver for having made a false claim to U.S. citizenship. She might also have

a removal order from this border incident, but this would not harm her application for TPS. Under current policy, DHS will consider that ground to be automatically waived.

If Marta later marries a U.S. citizen, she will not be able to pursue a family-based green card. She faces permanent bars to showing admissibility for that purpose. The granted TPS waiver is not applicable to the family-based adjustment process. Additionally, she might also be facing the permanent bar at INA § 212 (a)(9)(C) for illegal re-entry after a prior order. Because the inadmissibility waiver is broader for TPS than in other contexts, she can move forward with TPS where the traditional family-based visa process is not available to her.

If a TPS applicant seeks an immigrant visa or adjustment of status, you may need to apply for a new waiver at that time. Some inadmissibility grounds will be waivable at time of adjustment, but under a different standard. Some might not be waivable. And other grounds might benefit from a waiver that does not exist for TPS.

Example: Josi is inadmissible for having re-entered without inspection after a removal order. She faces the so-called "permanent bar" that requires a person to remain outside the U.S. for ten years before applying for a waiver. If she is otherwise eligible, Josi can apply for TPS, because this ground does not apply. Under current USCIS policy, she would not need to file a waiver! If she later wanted to adjust status through a petition filed by a U.S. spouse, she would still have the permanent bar to contend with, and would need to remain outside the U.S. for ten years before she could apply.

Example: John was convicted of a fraud offense, which is a crime involving moral turpitude, and received an 8-month sentence from the criminal court judge. He is barred from TPS eligibility, because there is no waiver for crimes involving moral turpitude in the TPS process. If John can immigrate through a visa petition filed by a family member or employer, he could apply for the traditional crimes waiver under INA § 212(h). (Note that John's conviction does not qualify for the petty offense exception, which would exempt him from CIMT ground of inadmissibility. See INA § 212(a)(2)(A)(ii).

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