PRACTICE ALERT: *SANCHEZ V. MAYORKAS*

TPS and Adjustment after the Supreme Court's Decision

By Ariel Brown

Note: Individuals with Temporary Protected Status (TPS) are still eligible to apply for permanent residence (a green card), and some may still be eligible to have their applications processed within the United States through adjustment of status. As this practice alert will describe in greater detail, the June 7, 2021 U.S. Supreme Court decision in *Sanchez v. Mayorkas* narrowly held that *some* TPS holders, who originally came to the United States without inspection, may be ineligible to process their green card applications within the United States and instead may have to consular process. It does not affect people who previously had TPS and have already adjusted their status, or limit in any way TPS protections and benefits for those who currently have TPS, including employment authorization and protection from deportation.

I. Introduction

In June 2021, the U.S. Supreme Court issued a decision in *Sanchez v. Mayorkas*[1] that addressed a circuit split regarding whether a grant of TPS was an "admission" such that it allowed an applicant for permanent residence to meet the threshold "inspected and admitted or paroled" requirement to adjust status within the United States. Previously, the Sixth, Ninth, and Eighth Circuit Courts of Appeal had held that it did,[2] whereas the Eleventh, Fifth, and Third Circuits had held that it did not.[3] Thus, until the Supreme Court weighed in, TPS holders living in the Ninth, Eighth, or Sixth Circuits could apply to adjust even if they had last entered the United

[1] No. 20-315, 2021 WL 2301964 (2021).

[2] *See Flores v. USCIS*, 718 F.3d 548 (6th Cir. 2013); *Ramirez v. Brown*, 852 F.3d 954 (9th Cir. 2017); *Velasquez v. Barr*, 979 F.3d 572 (8th Cir. 2020).

[3] *See Serrano v. United States Atty. Gen.*, 655 F.3d 1260 (11th Cir. 2011); *Nolasco v. Crockett*, 978 F.3d 955 (5th Cir. 2020); *Sanchez v. Secretary U.S. Dept. of Homeland Security*, 967 F.3d 242 (3rd Cir. 2020). The Third Circuit's decision was on appeal to the Supreme Court in this case.

States without inspection if they otherwise met the requirements under INA § 245. Note that final certification of the Supreme Court decision could be delayed as advocates are considering filing a request for rehearing. It is also important to watch for updated guidance from U.S. Citizenship and Immigration Services (USCIS), which adjudicates all adjustment of status applications unless the applicant is in removal proceedings,[4] regarding implementation of the Supreme Court decision, including whether currently pending adjustment of status cases will be decided based on the law in effect at time of filing, or the law in effect at time of adjudication.

In addition to the Supreme Court's decision in *Sanchez* on the ability of TPS holders to meet the INA § 245(a) inspected and admitted or paroled requirement by virtue of having been granted TPS status, in August 2020 the AAO issued a decision that USCIS then adopted, *Matter of Z-R-Z-C-*, [5] on the effect of TPS-authorized travel for meeting the threshold adjustment requirement as a "parole" entry. While the Supreme Court did not address the parole issue raised in *Z-R-Z-C-*,[6] together these two decisions appear to have dramatically narrowed the adjustment options for TPS holders who did not initially enter the United States with inspection. This practice alert will focus on the *Sanchez* decision; however, it will also briefly touch on the adopted AAO decision and its implications and limitations. The AAO decision only applies to TPS-authorized travel completed after August 20, 2020, and while it forecloses another avenue to adjustment for certain TPS holders, it does not entirely prevent TPS holders from adjusting status or otherwise applying for permanent residence (LPR status).

II. Brief Background on Adjustment of Status

Generally, in order for someone to be able to apply for permanent residence (a green card) through the adjustment of status process at INA § 245(a), they must have been "inspected and admitted or paroled" into the United States. They must also be admissible (or eligible for a waiver), and an immigrant visa must be immediately available. The requirement that someone be admitted or paroled has traditionally prevented many people who are otherwise eligible to

[4] USCIS also has exclusive jurisdiction to decide adjustment applications for individuals in removal proceedings who are classified as "arriving aliens," with a few minor exceptions. *See* 8 CFR §§ 245.2(a)(1), 1245.2(a)(1)(ii).

[5] *See Matter of Z-R-Z-C-* (AAO Aug. 20, 2020); USCIS, *Policy Memorandum:* Matter of Z-R-Z-C-*, Adopted Decision 2020-02 (AAO Aug. 20, 2020)*, https://www.uscis.gov/sites/default/files/document/aao-decisions/Matter-of-Z-R-Z-C-Adopted-AAO-Decision.pdf.

[6] See *Sanchez* footnote 4: "The Government notes that Sanchez was treated as 'paroled' when he returned from an authorized trip abroad after obtaining TPS. . . We express no view on whether a parole of the kind Sanchez received enables a TPS recipient to become an LPR . . ."

adjust status—but who entered unlawfully and were never granted parole—from obtaining a green card while remaining in the United States (unless they have 245(i)).[7]

"Admission" and "parole" have specific legal definitions in immigration law. "Parole" is when someone enters the country lawfully pursuant to a grant of parole, such as through humanitarian parole or advance parole.[8] "Admission" has been interpreted to cover several different scenarios. In the most standard case, an "admission" for adjustment of status refers to when someone presents themselves at a port of entry with valid immigration documents and is formally admitted to the United States. Such documentation might be a valid nonimmigrant tourist visa (commonly referred to as a "visitor visa" or B-2 visa) or other visa, such as an H-1B visa. However, some other grants of nonimmigrant status in which the individual is already inside the United States, such as U nonimmigrant status,[9] have also been held to be an "admission," even though technically the person was already in the United States, rather than at a port of entry trying to gain admittance to the United States. Similarly, prior to the Supreme Court's decision in *Sanchez*, the Sixth, Ninth, and Eighth Circuits had held that a grant of TPS was also an "admission" for purposes of § 245(a).

III. The *Sanchez* Decision

Mr. Sanchez originally entered the United States without inspection in 1997. He was granted TPS from El Salvador in 2001, which he has maintained ever since. In 2014, he applied to adjust status in the Third Circuit (one of the circuits that had not previously addressed this issue). After his adjustment application was denied by USCIS because his original entry was without inspection, he appealed to the district court which granted summary judgment in his favor. The Third Circuit reversed, and Mr. Sanchez appealed to the U.S. Supreme Court.

[7] Another avenue to adjust status from within the United States for those who entered without inspection and do not qualify under INA § 245(a) is adjustment under § 245(i), for qualifying beneficiaries of petitions filed on or before April 30, 2001. For more information on 245(i) eligibility, see ILRC, *245(i): Everything You Always Wanted to Know but Were Afraid to Ask* (July 2021), https://www.ilrc.org/245i-everything-you-always-wanted-know-were-afraid-ask.

[8] TPS recipients can request travel permission incident to their status, however the recent AAO decision *Matter of Z-R-Z-C-* upended the longstanding interpretation that such travel authorization was, in fact, advance parole that would result in a parole entry and corresponding threshold § 245(a) adjustment eligibility. *See Matter of Z-R-Z-C-* (TPS travel permission "is a unique form of travel authorization"; argues Congress did not intend TPS-authorized travel to be treated the same way as travel on advance parole since it did not use the term "parole" in INA § 244(f)(3)).

[9] *See, e.g., Alejandro Garnica Silva*, A098 269 615 (BIA June 29, 2017) (unpublished decision).

Writing for a unanimous court, Justice Kagan rejected the idea that TPS "constructively 'admit[s]' a TPS recipient,"[10] such that someone with TPS could meet the threshold inspected and admitted or paroled INA § 245(a) requirement if their last, physical entry to the United States was without inspection. The Court reasoned that someone who originally entered the United States without inspection is not eligible to adjust solely on the basis of a grant of TPS because it did not appear that Congress intended that: "[W]hen Congress . . . confers status, but says nothing about admission, for purposes of § 1255—we have no basis for ruling an unlawful entrant eligible to become an LPR."[11] The Court focused on a perceived distinction between "admission" and "lawful status," disagreeing with Sanchez's claim that the grant of TPS status should be treated as an admission. Consequently, the Court viewed the TPS provision at § 244(f)(4) which states that "for purposes of adjustment of status. . ." a TPS holder "shall be considered as being in, and maintaining, lawful status as a nonimmigrant," as something distinct from an "admission" that would allow a TPS recipient to meet the "inspected and admitted or paroled" requirement at 245(a). To support this interpretation, the Court offered crewman and U nonimmigrants as examples of immigrants who have been granted status but who have not been admitted. However, an unpublished BIA decision from 2017 held that a grant of U nonimmigrant status *is* an "admission," notwithstanding the fact that the statutory definition of "admission" generally requires a physical "entry."[12] Immigration law experts are troubled by the Court's problematic analysis, including this harmful dicta on U nonimmigrant status.

Who is impacted by the *Sanchez* decision:

- TPS recipients **in the Ninth, Sixth, or Eighth Circuits** who were intending to adjust based on their TPS grant as an admission and who do not otherwise meet the threshold inspected and admitted or paroled requirement (or have 245(i) protection[13]);

- TPS recipients **outside the Ninth, Sixth, Eighth, Eleventh, Fifth, and Third Circuits** who were hoping to adjust based on the holdings in the Ninth, Sixth, and Eighth Circuits.

Who is *not* impacted by the *Sanchez* decision:

- Anyone who had TPS and has **already adjusted status** to lawful permanent resident;

- Anyone with TPS who is **not planning to apply for adjustment of status**, including those who are **planning to consular process instead**;

[10] *Sanchez* at *6.

[11] *Sanchez* at *8.

[12] *Alejandro Garnica Silva*, A098 269 615 (BIA June 29, 2017).

[13] See note 7, *supra*.

- Anyone with TPS who is otherwise eligible to adjust and **last entered the United States with a visa, or can show they were inspected and admitted in some other way**, including "wave throughs" and admissions with a fraudulent visa or other document,[14] or who **has 245(i)**;

- Anyone with TPS who is otherwise eligible to adjust and **who traveled and returned to the United States with advance parole prior to August 20, 2020**.[15]

  Example: Laura, who lives in California, adjusted status last year, in 2020, based on her TPS grant being an admission, and is now a permanent resident. Is Laura impacted by *Sanchez*?

  No, *Sanchez* does not impact her status as a permanent resident. While it is not anticipated that such an individual will face issues at time of naturalization, for having been improperly admitted as an LPR, it will be important to track how USCIS addresses this and subsequent developments in order to advise LPRs in this situation.

  Example: Hector has had TPS continuously since 2001. He has never left the United States since his initial entry, in 1995, without inspection. Hector is married to a U.S. citizen. Can he apply to adjust?

  Unfortunately, no. Based on the Supreme Court's decision in *Sanchez*, his TPS grant is not considered an "admission" that would allow him to meet the inspected and admitted or paroled requirement to adjust. However, he can still apply for permanent residence based on a petition filed by his U.S. citizen wife—he will just have to consular process instead of adjust. And since he has a U.S. citizen spouse, he will have a qualifying relative for the unlawful presence waiver he will likely need when he consular processes.[16]

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[14] As long as it was not a false claim to U.S. citizenship, which is treated as an entry without inspection. *See Matter of Quilantan*, 25 I&N Dec. 285, 293 (BIA 2010); *see also Reid v. INS*, 95 S. Ct. 1164, 1168 (1975); *Matter of Pinzon*, 26 I&N Dec. 189 (BIA 2013). Note that an individual who entered with some type of misrepresentation will require a waiver of inadmissibility. For more information on the legal significance of different types of entries, see ILRC, *How to Interview Clients About their Entries and Attempted Entries to the United States (and Understand their Answers)*, (Dec. 2018), https://www.ilrc.org/how-interview-clients-about-their-entries-and-attempted-entries-united-states-and-understand-their.

[15] *See Matter of Z-R-Z-C*.

[16] If Hector did not have a U.S. citizen or permanent resident spouse or parent, he should *not* consular process because he would trigger a 10-year unlawful presence bar when he would depart for his consular interview, stranding him outside the United States with no way to seek a waiver to return sooner.

Example: What if Hector from the example above had traveled with TPS advance parole in December 2019. Then could he adjust?

Yes, see next section. Travel with TPS advance parole before August 20, 2020 is treated as a "parole" entry that would allow someone like Hector, who initially entered without inspection, to meet the threshold adjustment requirement. But, if he traveled with TPS advance parole after August 20, 2020, then the travel would not count as "parole."

IV. TPS Advance Parole No Longer an Alternative Option to Adjust after August 20, 2020

As mentioned above, in August 2020 USCIS adopted an AAO decision that held that unlike other travel with advance parole, travel with TPS advance parole is "unique" and does not result in a parole entry that would enable someone who previously entered the United States without inspection to meet the threshold adjustment requirement upon their return.[17] However, this decision will not be applied retroactively, so any TPS holders who traveled before August 20, 2020, the date of the decision, may still adjust based on that parole entry.[18]

Example: Maria, from El Salvador, originally entered the United States without inspection in 1998. She has had TPS since 2001, and in 2010 she traveled with TPS advance parole to visit family abroad. Maria has a 21-year-old U.S. citizen daughter, Dolores, who just filed a petition for her. Can Maria adjust, if she files her adjustment application now?

Yes. Although according to the *Sanchez* decision her TPS grant is not an admission, luckily she also traveled with TPS advance parole before August 20, 2020, which USCIS will treat as a "parole" entry that allows her to meet the inspected and admitted or paroled requirement.

Example: Arturo has TPS. He has lived in the United States since he came without inspection in 1997. Arturo has a U.S. citizen son who could petition for him, and he wants to apply to adjust. Arturo traveled with TPS advance parole in December 2020. Will that travel enable him to adjust even though he entered without inspection?

[17] *See Matter of Z-R-Z-C-* (AAO Aug. 20, 2020); USCIS, *Policy Memorandum:* Matter of Z-R-Z-C-*, Adopted Decision 2020-02 (AAO Aug. 20, 2020)*, https://www.uscis.gov/sites/default/files/document/aao-decisions/Matter-of-Z-R-Z-C-Adopted-AAO-Decision.pdf.

[18] *See id.*

Unfortunately, no. Current USCIS policy applies *Z-R-Z-C-* to TPS-authorized travel after August 20, 2020, such that someone who travels with TPS advance parole after that date will not be treated as if they have made a parole entry. He is unable to meet the inspected and admitted or paroled requirement, both because *Sanchez* says his TPS grant is not an admission for adjustment purposes and *Z-R-Z-C-* says that his travel with TPS advance parole was not a "parole" entry. Arturo may be able to consular process, but he may not qualify for the required waiver of unlawful presence if his U.S. citizen son is his only relative with status.

Note: Advocates are pushing for the Biden administration to rescind USCIS's policy adopting *Z-R-Z-C-*, which would restore the ability for TPS holders to meet the threshold adjustment requirement upon their return from travel with advance parole, even if the travel was after August 20, 2020. While this would not change the impact of the *Sanchez* decision, that a grant of TPS is not an admission for purposes of adjustment under 245(a), rescinding *Z-R-Z-C-* would enable someone to once again meet the threshold adjustment requirement through travel with TPS advance parole. Thus, this is a space to watch for updates.

V. Next Steps

A. Pending TPS Adjustments

Advocates are urging for the quick processing of pending adjustment applications in the Ninth, Eighth, and Sixth Circuits. Practitioners with pending adjustments that will be affected by *Sanchez* may want to try to expedite their interview, as a final certified decision could be delayed if a petition for rehearing is filed.

Advocates are also requesting that USCIS decide these cases based on the law in effect at the time they were filed,[19] before the Supreme Court's ruling upended what had been the prevailing law at the time many of these TPS holders submitted their adjustment applications.

[19] Specifically, advocates are asking that all adjustment applications postmarked by June 6, 2021, the day before the Supreme Court issued its decision in *Sanchez*, be decided based on the law in effect prior to the Supreme Court's decision. *See* Letter from Justice Action Center, National TPS Alliance, et al. to President Biden, Attorney General Garland, et al., dated June 10, 2021, available at https://cliniclegal.org/file-download/download/public/7259.

In addition, practitioners will want to argue that any pending adjustments were filed in reliance on the prevailing caselaw at that time, and thus should not be penalized for the Supreme Court's decision to the contrary.[20]

Note: Denied adjustment applications and enforcement priorities. Under current (interim) enforcement priorities which govern, among other actions, the issuance of Notices to Appear (NTA) that would place individuals in removal proceedings, TPS holders whose adjustment applications are denied solely based on ineligibility according to the *Sanchez* decision should not be at risk of being issued an NTA even if they are no longer in current TPS status.[21] (And of course current TPS holders are protected from removal for the duration of their TPS status.) These interim enforcement priorities rescinded previous NTA policy from 2018, that said individuals whose applications were denied and had no other lawful status would be placed in removal proceedings. Under current guidance, enforcement priorities are only those who pose a threat to national security (related to terrorism or espionage), public safety (defined as those released from jail or prison on or after January 20, 2021 who also have aggravated felony convictions and are determined to pose a threat to public safety), or border security (those apprehended at the border attempting to enter unlawfully on or after November 1, 2020).[22]

B. Adjustment: Deciding Whether to File Now

For a TPS holder who was planning to rely upon the TPS grant as an admission for adjustment of status purposes, it is not advisable at this time to submit an application for adjustment of status. However, if the TPS holder last entered the United States with a visa or other admission, or traveled with advance parole prior to August 20, 2020, or has 245(i) protection, then they remain eligible to submit an application for adjustment of status (assuming they are admissible or eligible for an inadmissibility waiver and meet all the other requirements). Also, keep in mind that even if someone is ineligible to adjust, they may still be able to pursue permanent residence through consular processing, although consular processing raises its own set of risks and considerations, including the potential to trigger grounds of inadmissibility with a departure, so it is important to screen for these grounds of inadmissibility, like unlawful presence, and whether the individual would have a qualifying relative for a waiver.

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[20] *See, e.g.*, *Garfias-Rodriguez v. Holder*, 702 F.3d 504 (9th Cir. 2012) (setting up a reliance test for retroactive application of a new rule to already pending cases, in the context of 212(a)(9)(C) inadmissibility and 245(i) adjustment eligibility).

[21] *See* DHS, *Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities*, (Jan. 20, 2021), https://www.dhs.gov/sites/default/files/publications/21_0120_enforcement-memo_signed.pdf.

[22] *See id.*

Advocates are also requesting that USCIS rescind the policy memo adopting *Z-R-Z-C-*, thereby restoring the effect of TPS-authorized travel to make a person who previously entered the United States without inspection able to meet the threshold adjustment requirement upon their return with a parole entry. If USCIS rescinds its adoption of *Z-R-Z-C-*, then travel and re-entry on TPS advance parole at any time will again be an alternative option for establishing threshold 245(a) adjustment eligibility.

C. Legislative Solutions

Two bills for pending legislation, H.R. 6 the Dream and Promise Act and the SECURE Act, would amend language in the INA to make it clear that TPS holders are eligible to adjust status pursuant to 245(a) even if they last entered the United States without inspection. Thus, if these bills were to become law, the *Sanchez* decision would no longer have any effect and would become moot; the Supreme Court, in *Sanchez*, noted this pending legislation.[23]

D. Resources

For updates on TPS and adjustment, see:

- The ILRC's dedicated page on TPS, coming soon at https://www.ilrc.org/
- CLINIC (The Catholic Legal Immigration Network, Inc.) page on TPS and DED: https://cliniclegal.org/issues/temporary-protected-status-tps-and-deferred-enforced-departure-ded
- National TPS Alliance: https://www.nationaltpsalliance.org/

[23] *Sanchez* at *9.

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