Legal Sidebar

Termination of Temporary Protected Status for Certain Countries: Recent Litigation Developments

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Certain aliens (as defined in the Immigration and Nationality Act (INA)) who otherwise might be subject to removal from the United States may stay and work here when the Department of Homeland Security (DHS) designates their countries for Temporary Protected Status (TPS) because of unstable or dangerous conditions in those countries. In 2017 and 2018, DHS announced the termination of TPS designations for Sudan, Nicaragua, Haiti, El Salvador, Nepal, and Honduras. The agency's decisions affect, as of this writing, roughly 292,000 TPS beneficiaries from those six countries who potentially could lose authorization to remain in the United States upon the effective termination date of the countries' TPS designations. Several lawsuits challenged DHS's decisions on certain constitutional and statutory grounds. In *Ramos v. Wolf*, the U.S. Court of Appeals for the Ninth Circuit in 2020 reversed a lower court's preliminary injunction barring DHS from ending the TPS designations for four of those countries—Sudan, Nicaragua, Haiti, and El Salvador—but that decision is not final. A separate court challenge to the termination of the TPS designations for Honduras and Nepal remains stayed pending the outcome in *Ramos*. In the meantime, DHS newly designated Haiti and Sudan for TPS in 2021 and 2022, thereby allowing nationals of those countries to apply for TPS benefits based on the newer designations. This Legal Sidebar examines the litigation concerning the TPS designation terminations and the implications it may have for TPS recipients.

Background

Under INA § 244(b), 8 U.S.C. § 1254a, DHS, in consultation with other federal agencies, may designate a country (or any part of a country) for TPS if (1) there is an armed conflict that prevents the safe return of nationals from that country; (2) there has been an environmental disaster in the country that substantially disrupts living conditions in the area affected; or (3) there are "extraordinary and temporary conditions" in the foreign country that prevent alien nationals from safely returning. An alien from a country designated for TPS may be permitted to remain and work in the United States for the period in which the TPS designation is in effect, even if the alien had not originally entered the United States lawfully. The initial period of TPS designation may last between 6 and 18 months, and the designation may be extended

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thereafter. If the DHS Secretary concludes that the designated country "no longer continues to meet the conditions for [TPS] designation," the agency "shall terminate" the TPS designation. INA § 244(b)(5), 8 U.S.C. § 1254a(b)(5), provides that "[t]here is no judicial review of any determination of the [DHS Secretary] with respect to the designation, or termination or extension of a designation, of a foreign state ... ." Upon termination of their respective country's TPS designation, TPS beneficiaries are to revert to the same immigration status they had before TPS (unless that status has since expired or been terminated) or to any lawful immigration status they obtained while registered for TPS relief (as long as the lawful status remains valid on the date a TPS designation terminates).

From September 2017 through May 2018, DHS successively announced the termination of TPS designations for Sudan, Nicaragua, Haiti, El Salvador, Nepal, and Honduras. In its *Federal Register* notices, the agency declared that the conditions which originally warranted TPS designations for these countries no longer existed or had substantially improved. The agency, however, granted 12- or 18-month wind-down periods for each country before the terminations would become effective.

Preliminary Injunction in *Ramos v. Wolf* and Related Litigation

In *Ramos v. Wolf*, nine TPS beneficiaries and their five U.S. citizen children filed a lawsuit in the U.S. District Court for the Northern District of California, challenging DHS's decisions to end TPS designations for Sudan, Nicaragua, Haiti, and El Salvador. The plaintiffs argued that, in terminating the TPS designations, DHS only considered whether the original country conditions warranting those designations had continued, without examining more recent events in those countries. The plaintiffs argued that DHS's actions violated the Administrative Procedure Act (APA) because they "represented a sudden and unexplained departure from decades of decision-making practices and ordinary procedures." The plaintiffs also argued that DHS's decision to terminate TPS violated their constitutional right to equal protection because it was "motivated in significant part by racial and national-origin animus."

In October 2018, the district court issued a preliminary injunction barring DHS from terminating the TPS designations for Sudan, Nicaragua, Haiti, and El Salvador pending the outcome of the litigation. Previously, the court had rejected the government's contention that INA § 244(b)(5), 8 U.S.C. § 1254a(b)(5), barred judicial review of DHS's TPS terminations, reasoning that the statute did not bar review of the "general policies or practices" employed in deciding whether to end a TPS designation, and that the jurisdictional provision did not foreclose constitutional challenges. In its October 2018 order, the court determined that, given DHS's failure to explain its "change in practice" of only considering the original country conditions when making a TPS determination, plaintiffs had shown serious questions or a likelihood of success on the merits of their APA claim. The court also ruled that the plaintiffs raised serious questions on their equal protection claim based on evidence that race may have been a "motivating factor" in the TPS designation decisions. The court cited statements reportedly made by President Trump that "expressed animus against non-white, non-European immigrants," and other evidence suggesting that the DHS Secretary may have been "influenced" by President Trump and administration officials.

While the *Ramos* lawsuit was pending, a group of plaintiffs in *Bhattarai v. Wolf* challenged DHS's termination of TPS designations for Honduras and Nepal in the U.S. District Court for the Northern District of California. In March 2019, following the *Ramos* injunction, the court in *Bhattarai* stayed the proceedings pending adjudication of the government's appeal in *Ramos*. Further, the government agreed not to terminate the TPS designations for Nepal and Honduras pending resolution of that appeal.

Additionally, in *Saget v. Trump*, a group of plaintiffs filed a lawsuit in the U.S. District Court for the Eastern District of New York challenging DHS's termination of Haiti's TPS designation. In April 2019, the court issued a preliminary injunction enjoining DHS from terminating Haiti's TPS designation, largely on the same grounds that the *Ramos* court relied on in issuing an injunction.

The Ninth Circuit's Decision in *Ramos v. Wolf*

The government appealed the preliminary injunction in *Ramos v. Wolf* to the Ninth Circuit. On September 14, 2020, the Ninth Circuit, in a split decision, reversed and vacated the injunction. In the majority opinion authored by Judge Callahan, the court held that INA § 244(b)(5), 8 U.S.C. § 1254a(b)(5), barred judicial review of the plaintiffs' APA challenge to DHS's decision to terminate the TPS designations for Sudan, Nicaragua, Haiti, and El Salvador. Recognizing the DHS Secretary's "broad and unique" discretion over TPS designations, the court read § 244(b)(5) as barring review of the Secretary's "country-specific TPS determinations," but not "general collateral challenges to unconstitutional practices and policies used by the agency" in reaching those determinations. According to the court, the Secretary's unreviewable TPS determinations include the substantive "considerations and reasoning" underlying those determinations, such as an assessment of country conditions. The court construed the plaintiffs' arguments about DHS's failure to consider intervening events in a country when making TPS determinations as "essentially an attack on the substantive considerations underlying the Secretary's specific TPS determinations, over which the statute prohibits judicial review."

The court rejected the plaintiffs' claim that INA § 244(b)(5), 8 U.S.C. § 1254a(b)(5), did not bar judicial review because they challenged DHS's new "agency practice" of ignoring intervening events rather than the TPS determination itself. The court reasoned that the plaintiffs' claim "depends on a review and comparison of the substantive merits of the Secretary's specific TPS terminations, which is generally barred by [§ 244(b)(5)]." Thus, the court determined that the plaintiffs did not seek to challenge an agency policy that was "collateral to, and distinct from" the DHS Secretary's TPS determinations. Because the plaintiffs' claim "fundamentally attacks the Secretary's specific TPS determinations," the court held that there was no jurisdiction to review those decisions.

The Ninth Circuit, however, addressed the plaintiffs' equal protection claim, reasoning that INA § 244(b)(5), 8 U.S.C. § 1254a(b)(5), did not foreclose "colorable constitutional claims." First, the court rejected the government's argument that the equal protection claim should be analyzed under the deferential "rational basis" standard employed by the Supreme Court in *Trump v. Hawaii*. There, the Supreme Court upheld a Presidential Proclamation barring the entry of certain nationals of mainly Muslim-majority countries, concluding that it was rationally related to legitimate national security concerns. The Ninth Circuit concluded that a less deferential standard applied here because, unlike the aliens in *Trump v. Hawaii*, TPS recipients have entered the United States and oftentimes remained in the country for many years, and the Executive's administration of the TPS program raised less national security implications than the proclamation at issue in *Hawaii*. The court thus applied the standard adopted by the Supreme Court in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, which looks to whether a discriminatory purpose was "a motivating factor" behind a challenged decision.

The Ninth Circuit held that the plaintiffs failed to present serious questions on the merits of their claim that the TPS terminations were influenced by the President's "animus against non-white, non-European immigrants." The court determined there was a "glaring lack of evidence" linking the President's alleged discriminatory intent to the specific TPS terminations. For example, the court explained that, although the President had made "offensive and disparaging" statements about immigrants, there was no evidence that these statements "played any role in the TPS decision-making process." Additionally, in the court's view, the fact that White House officials had sought to influence the TPS determinations did not in itself show

that the President's alleged racial animus was a motivating factor, given the expectation that executive officials "conform their decisions to the administration's policies." Finally, the court held, the fact that the TPS terminations affected non-European countries with mainly "non-white" populations did not establish racial animus either, because virtually all countries designated for TPS have that characteristic, and so any TPS termination would disproportionately impact such countries. The court thus vacated the district court's injunction and remanded the case to the lower court for further proceedings, and those proceedings remain ongoing.

In addition to joining the panel opinion, Judge Nelson wrote a concurring opinion arguing that the lower court also erred by requiring the government to present evidence outside the administrative record, and that the court should have limited the scope of the injunction to cover only individuals who were a party to the case, rather than issuing a "universal" injunction that applied nationwide. In a dissenting opinion, Judge Christen argued that INA § 244(b)(5) did not bar judicial review of the plaintiffs' challenge to the DHS Secretary's "changed practice" of ignoring intervening country conditions when making a TPS determination, reasoning that plaintiffs sought to challenge the "the process used to make TPS termination decisions, not the decisions themselves." Judge Christen thus argued that plaintiffs were likely to succeed on their APA claim to warrant an injunction, and declined to consider their equal protection claim.

New TPS Designations for Haiti and Sudan

On August 3, 2021, less than a year after the *Ramos* ruling, DHS newly designated Haiti for TPS. That designation enabled Haitian nationals, including those who received TPS under the previous 2011 designation, as well as those who entered the United States more recently, to pursue TPS benefits under the 2021 designation. Given this development, on October 15, 2021, the parties in the *Saget* case (which involved a challenge to the termination of Haiti's original TPS designation) agreed to dismiss that case. More recently, on December 5, 2022, DHS extended and redesignated Haiti for TPS, allowing Haitian nationals residing in the United States as of November 6, 2022, to pursue TPS relief based on this new designation.

Additionally, on April 19, 2022, DHS newly designated Sudan for TPS. That designation allows Sudanese nationals, including those with TPS relief under the prior 2013 designation, as well as those who came to the United States more recently, to pursue TPS benefits under the 2022 designation. The newer TPS designations for Haiti and Sudan are currently set to last until August 3, 2024, and October 19, 2023, respectively.

Implications for TPS Recipients

The Ninth Circuit's decision in *Ramos* would allow DHS to proceed with terminating the TPS designations for El Salvador and Nicaragua, and the *previous* 2011 and 2013 TPS designations for Haiti and Sudan. Those TPS recipients may become subject to removal once their TPS expires (unless they acquired some other lawful immigration status that remains valid). Additionally, the *Ramos* ruling could impact TPS recipients from Nepal and Honduras, whose countries' TPS termination decisions were separately challenged in *Bhattarai v. Wolf*. In that case, the court had stayed the proceedings pending adjudication of the government's appeal in *Ramos*. Given the Ninth Circuit's ruling, TPS recipients from Nepal and Honduras could also become subject to removal. All told, the *Ramos* decision potentially renders about 292,000 TPS recipients removable upon the effective termination date of their countries' TPS designations.

Nonetheless, TPS recipients from El Salvador, Nicaragua, Nepal, Honduras, and Haiti and Sudan (under those countries' 2011 and 2013 designations) will not immediately lose their authorization to remain in the United States. The *Ramos* plaintiffs previously filed a petition for panel rehearing and rehearing *en*

banc in that case, and the Ninth Circuit has not yet issued its mandate directing the federal district court to enforce its decision. Following filing of the rehearing petition, the Ninth Circuit stayed the proceedings pending settlement discussions between the parties in light of the Biden Administration's decision to review the TPS designation terminations. Those settlement efforts have reportedly ended without agreement, and, in the meantime, the Ninth Circuit has not yet ruled on the rehearing petition. Consequently, the lower court's injunction remains in effect because the mandate has yet to be issued. DHS's U.S. Citizenship and Immigration Services (USCIS) has thus extended TPS-related documentation (e.g., work authorization) for TPS recipients from El Salvador, Nicaragua, Honduras, and Nepal, and for TPS recipients from Haiti and Sudan (under those countries' 2011 and 2013 designations) until June 30, 2024. Further, as discussed, nationals of Haiti and Sudan with TPS under those countries' previous designations may pursue TPS benefits under the newer designations, thereby ensuring that they maintain TPS benefits in the event the *Ramos* ruling becomes final.

USCIS has announced that if the government ultimately prevails in the *Ramos* litigation (i.e., when the Ninth Circuit issues its mandate), the TPS terminations for El Salvador, Honduras, Nepal, and Nicaragua would take effect no earlier than 365 days from issuance of the mandate. As noted, the Ninth Circuit has not yet issued its mandate, which would occur seven days after the court's entry of an order denying the plaintiffs' petition for rehearing, as the court has not yet ruled on the rehearing petition. Should the Ninth Circuit deny rehearing and issue its mandate (which would trigger the 365-day period), the plaintiffs could petition for review before the Supreme Court, and request a stay of the Ninth Circuit's ruling pending disposition of that petition. The plaintiffs could also file in the Ninth Circuit a motion to stay the mandate pending the Supreme Court's consideration of their petition.

While any TPS-related litigation continues, Congress may consider legislative options for TPS recipients. For example, the American Dream and Promise Act of 2021 (H.R. 6), which passed the House in 2021, would allow certain nationals of countries designated for TPS to pursue adjustment of status to lawful permanent resident (LPR). Another bill introduced in the 117th Congress that would impact TPS recipients is an appropriations bill that passed the House in 2021 (H.R. 4502), which would allow TPS recipients to obtain federal financial aid for higher education. Other legislation introduced in the 117th Congress would add new countries or regions to those designated for TPS (e.g., Hong Kong, Lebanon, and Ukraine), or, similar to H.R. 6, would allow TPS recipients who have lived in the United States for several years to adjust to LPR status. Conversely, some bills introduced in the 117th Congress would limit TPS by making those who are members of criminal gangs or lack lawful immigration status ineligible for TPS, terminate an individual's TPS if that person fails to appear for a removal proceeding, or transfer authority from DHS to Congress to designate countries for TPS.

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