

DRAFT FOR COMMENT ONLY

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U.S. Citizenship and Immigration Services
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U.S. Citizenship
and Immigration
Services

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Draft Policy Memorandum

SUBJECT: Clarification of Grounds of Inadmissibility that do not Apply to Applicants for Temporary Protected Status (TPS) and Circumstances Requiring an Individual Waiver of Inadmissibility; Revisions to the *Adjudicator's Field Manual (AFM)* Chapters 38.1(e)(1), 40.9.2(a)(8), 40.9.2(b)(1)(F)(iii), 40.9.2(c)(1)(D), and 40.9.2(c)(2)(C); *AFM* Update AD11-15

Purpose

This Policy Memorandum (PM) clarifies that applicants for TPS cannot be found ineligible for certain grounds of inadmissibility.

Scope

Unless specifically exempted herein, this PM applies to and binds all USCIS employees.

Authority

Sections 212(a)(7), 212(a)(9), 244(a)(5), 244(c)(2)(A) of the Act; and 8 CFR 244

Background

On May 6, 2009 U.S. Citizenship and Immigration Services (USCIS) issued a memorandum entitled, "[Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212\(a\)\(9\)\(B\)\(i\) and 212\(a\)\(9\)\(C\)\(i\)\(I\) of the Act/Revision to and Re-designation of Adjudicator's Field Manual \(AFM\) Chapter 30.1\(d\) as Chapter 40.9 \(AFM Update AD 08-03\).](#)" That memorandum established comprehensive policy guidance for adjudicators concerning the accrual of unlawful presence and the resulting inadmissibility. It also addressed TPS adjudications in Chapters 40.9.2(b)(1)(F), (c)(1)(D), and (c)(2)(C) of the *AFM*. It informed adjudicators that an applicant for TPS may seek a waiver for inadmissibility grounds under sections 212(a)(9)(B) and (C)(i)(I) of the Act by filing Form I-601, Application for Waiver of Grounds of Inadmissibility.

With the recent designation of Haiti for TPS, there has been confusion about inadmissibility, ineligibility, and waivers in the TPS context. Section 244(a)(5) of the Act specifies that TPS should not be denied on the basis of an alien's immigration status, which USCIS also interprets to include the alien's lack of status. Since the May 6, 2009 memo noted above was issued, USCIS has determined that denying TPS based on the inadmissibility grounds in sections 212(a)(9)(A), (B), and (C) of the Act regarding unlawful presence or an alien's attempt to seek

admission to the United States after being ordered removed is inconsistent and incompatible with the TPS law's prohibition against denying TPS based on an alien's immigration status or lack of status under section 244(a)(5) of the Act. Based on this interpretation, an applicant cannot be denied TPS on the basis of section 212(a)(9) of the Act, and an applicant is not required to file for a waiver of inadmissibility based on inadmissibility under section 212(a)(9) of the Act to be eligible for TPS.

Additionally, section 244(c)(2)(A)(i) of the Act exempts TPS applicants from inadmissibility for failure to meet immigrant documentary requirements under section 212(a)(7)(A) of the Act. USCIS has further determined that denying TPS to an individual based on his or her failure to meet the documentary requirements for nonimmigrants in section 212(a)(7)(B) of the Act is inconsistent with the proscription against TPS denials based on status in section 244(a)(5) of the Act. For these reasons, a TPS applicant shall not be denied TPS or required to submit a request for a waiver on the basis of either section 212(a)(7)(A) or 212(a)(7)(B) of the Act.

The revisions to the corresponding *AFM* chapters clarify that the grounds of inadmissibility in sections 212(a)(7) and 212(a)(9) do not apply to TPS applicants. Revisions to the *AFM* addressing inadmissibility based on a previous removal [sections 212(a)(9)(A) and (C)(i)(II) of the Act] or based on the unlawful presence bars following an alien's departure [sections 212(a)(9)(B) and (C)(i)(I) of the Act] will incorporate these determinations.

Policy

The following grounds of inadmissibility do not apply to TPS applicants either because section 244(c)(2)(A)(i) of the Act specifically exempts applicants from the ground or because 8 CFR 244.3(a) provides a "blanket" waiver, without the need for an individual waiver application, under to the authority in section 244(c)(2)(A)(ii) of the Act:

- Section 212(a)(4) of the Act - Public Charge grounds;
- Section 212(a)(5) of the Act - Labor certification requirements; and
- Section 212(a)(7)(A) of the Act - Documentation requirements for immigrants.

In addition, TPS cannot be denied on the basis of the following grounds of inadmissibility because USCIS has determined that, as a matter of law, such denials are inconsistent with the prohibition in Section 244(a)(5) of the Act against denying TPS based on an alien's immigration status or lack of status:

- Section 212(a)(6)(A) of the Act – Aliens present without admission or parole;
- Section 212(a)(6)(D) of the Act – Stowaways;
- Section 212(a)(6)(G) of the Act - Student visa violators;
- Section 212(a)(7)(B) of the Act – Documentary requirements for non-immigrants;
- Section 212(a)(9)(A) of the Act - Certain aliens previously removed and seeking admission;

- Section 212(a)(9)(B) of the Act – Unlawful presence; and
- Section 212(a)(9)(C) of the Act - Aliens unlawfully present after previous immigration violations.

The exemption of TPS applicants from any of the inadmissibility grounds noted above does not waive the inadmissibility ground for any other immigration benefit application for which the alien must establish admissibility and where the specific ground applies. It also does not relieve the applicant from any other ground of TPS ineligibility outside the scope of section 212(a) of the Act, *see* section 244(c) of the Act; 8 CFR 244.2–244.4; and 244.6-244.9. The exemptions from these grounds are valid for purposes of TPS only and alleviate an applicant from having to file Form I-601 to request an individual waiver of inadmissibility.¹

Officers should administratively close any waiver application that was filed solely on account of inadmissibility under sections 212(a)(6)(A), (D), or (G); 212(a)(7)(B); 212(a) (9) of the Act, and adjudicate the TPS application.

Implementation

The *AFM* is revised as follows:

- ☞ 1. Chapter 38.1(e)(1), Form I-821, is revised to read:

(e) Adjudication Procedures Relating to Initial Applications for TPS Classification.

(1) Review the Form I-821.

- (A) Check the form for completeness and correctness.
- (B) Compare its contents with the information in the USCIS printouts.
- (C) Review Part 4, Eligibility Standards. The alien must meet the criteria set forth in 8 CFR 244.2:
 - Be a national of a designated country or an alien with no nationality who last habitually resided in a designated country.
 - Demonstrate continuous physical presence in the United States since the effective date of the designation.

¹ For all other grounds of inadmissibility that may apply to a TPS applicant, except the non-waivable criminal and security grounds cited in section 244(c)(2)(A)(ii) of the Act, the applicant must file Form I-601 to request an individual waiver. The discretionary waiver may be granted for humanitarian purposes, to assure family unity, or in the public interest. 8 CFR 244.3(b).

- Demonstrate continuous residence in the U.S. since the date set by the Secretary of Homeland Security.
- Be admissible as an immigrant, except as provided under 8 CFR 244.3. In addition to the grounds of inadmissibility in 8 CFR 244.3 that do not apply to TPS applicants, certain other inadmissibility grounds in sections 212(a)(6)(A), (D), and (G), 212(a)(7)(B), and 212(a)(9) of the Act do not apply to TPS applicants because TPS cannot be denied based on an alien's immigration status or lack of status under section 244(a)(5) of the Act. See AFM Chapter 38.1(e)(13) and (14).

If an individual waiver of inadmissibility is available, the waiver may be approved if it serves humanitarian purposes, assures family unity, or when the granting of such a waiver is in the public interest according to section 244(c)(2) of the Act and 8 CFR 244.3(b). The waiver is filed on Form I-601, Application for Waiver of Grounds of Inadmissibility, with the appropriate fee. The adjudicative standard for a Form I-601 filed by a TPS applicant is different from the adjudicative standard applied to Form I-601s filed by applicants seeking adjustment of status or an immigrant visa. The adjudicator must follow the legal criteria in 8 CFR 244.3(b) when adjudicating a waiver of inadmissibility; there is no need for an underlying qualifying relationship to obtain an individual waiver of inadmissibility for TPS purposes.

- Not be ineligible because of mandatory ineligibility grounds in 8 CFR 244.3(c) or 244.4. See AFM Chapter 38.1(e)(12).
- Not be ineligible because of mandatory ineligibility under section 241(a)(5) of the Act (reinstatement of removal orders). Reinstatement is not automatic, but an affirmative action that must be taken by ICE. There must be evidence of a reinstatement actively taking place for this mandatory ineligibility to apply.
- Not be ineligible because of mandatory ineligibility under section 208(d)(6) of the Act (frivolous asylum filing). For this mandatory ineligibility to apply, there must be evidence that an Immigration Judge or the Board of Immigration Appeals found that the alien filed a frivolous asylum application on or after April 1, 1997.

- Register for TPS during the initial registration period announced in the Federal Register for the country or during any subsequent extension of such designation if the criteria in 8 CFR 244.2(f)(2) and 244.2(g) are met.

(D) Review the signature block to make sure the signature is original and that the form is dated. Reminder: All forms of signature are acceptable, including an "X," thumbprint, or an original facsimile signature stamp. A typewritten name is not a signature. Applicants 14 years of age or older must sign their own applications. Applications submitted for applicants under the age of 14 or for applicants who are mentally or physically disabled may be signed by a parent or guardian.

☞ 2. *AFM* Chapter 38.1(e)(13), Inadmissibility Grounds that Do Not Apply, is amended to read:

(13) Inadmissibility Grounds That **Do Not Apply**.

The following grounds of inadmissibility do not apply to TPS applicants, either because they are listed in section 244(c)(2)(A)(i) of the Act, 8 CFR 244.3, or because they relate to status, and the exemption is therefore consistent with section 244(a)(5) of the Act (prohibiting a TPS denial based on an alien's status):

- Section 212(a)(4) of the Act - Public charge grounds;
- Section 212(a)(5) of the Act - Labor certifications for certain immigrants;
- Section 212(a)(6)(A) of the Act - Aliens present without admission or parole (EWI);
- Section 212(a)(6)(D) of the Act - Stowaways;
- Section 212(a)(6)(G) of the Act - Student Visa Violators;
- Section 212(a)(7) of the Act - Documentation requirements (immigrants and nonimmigrants);
- Section 212(a)(9)(A) of the Act - Certain aliens previously removed;
- Section 212(a)(9)(B) of the Act - Aliens unlawfully present; and
- Section 212(a)(9)(C) of the Act - Aliens unlawfully present after previous immigration violations.

☞ 3. *AFM* Chapter 40.9.2(a)(8), Benefits That May Be Available Despite Inadmissibility under Sections 212(a)(9)(B)(i)(I), (B)(i)(II), or (C)(i)(I) of the Act, is revised to read:²

(8) Benefits That May Be Available Despite Inadmissibility under Section 212(a)(9)(B)(i)(I), (B)(i)(II), or (C)(i)(I) of the Act.

AFM Chapter 40.9.2(c) specifies forms of relief from inadmissibility under Section 212(a)(9)(B)(i)(II) and (C)(i)(I) (“Waivers”) of the Act. Even without a waiver, aliens who are subject to these grounds of inadmissibility may still obtain certain benefits as outlined below if otherwise eligible.

(A) Under Sections 212(a)(9)(B)(i)(I) or (II) of the Act.

An alien who is inadmissible under section 212(a)(9)(B)(i) of the Act may apply for and receive, if eligible, a grant of:

- Registry under section 249 of the Act;
- Adjustment of status under section 202 of NACARA;
- Adjustment of status under section 902 of HRIFA;
- Adjustment of status under section 245(h) of the Act;
- Change to V nonimmigrant status under 8 CFR 214.15 (but the alien may need a waiver to obtain adjustment of status to LPR after having acquired V nonimmigrant status);
- LPR status pursuant to the LIFE Legalization Provision: A Legalization applicant under section 1104 of the LIFE Act may travel with authorization during the pendency of the application without triggering inadmissibility under section 212(a)(9)(B) of the Act. See 8 CFR 245a.13(e)(5); and/or
- Temporary Protected Status, consistent with section 244(a)(5) of the Act. See *AFM* Chapter 38.1(e)(13).

² This part amends *AFM* content discussing inadmissibility based on unlawful presence under INA, section 212(a)(9)(B) and (C)(i)(I) of the Act. However, TPS can also not be denied if the individual is inadmissible for unlawful reentry after prior removal under INA sections 212(a)(9)(A) and 212(a)(9)(C)(i)(II). There is currently no *AFM* section addressing these inadmissibility grounds.

(B) Under Section 212(a)(9)(C)(i)(I) of the Act.

An alien who is inadmissible under section 212(a)(9)(C)(i)(I) of the Act may apply for and receive, if eligible:

- A grant of registry under section 249 of the Act; and/or
- Temporary Protected Status, consistent with section 244(a)(5) of the Act. See Chapter 38.1(e)(13).

☞ 4. *AFM* Chapter 40.9.2(b)(1)(F)(iii), Aliens Granted Temporary Protected Status (TPS) Pursuant to Section 244 of the Act, is amended to read:

(iii) Aliens Granted Temporary Protected Status (TPS) pursuant to Section 244 of the Act.

If an alien's TPS application has been granted, the alien is deemed to be in lawful nonimmigrant status for the duration of the grant for purposes of adjustment of status and change of status. See section 244(f)(4) of the Act; see also *AFM* Chapter 40.9.2(b)(3)(G) for the effect of a violation of TPS status on the accrual of unlawful presence, and for the effect of a pending TPS application on the accrual of unlawful presence.

A grant of TPS does not, however, cure any unlawful presence that may have accrued before the grant of TPS. If the alien was present without inspection and admission or parole, the alien remains an alien who has not been inspected and admitted or paroled, despite the grant of TPS. See *INS General Counsel Opinion*, 91-27, March 4, 1991.

Therefore, if before TPS is granted, the applicant had previously accrued unlawful presence sufficient to trigger the bars, and the applicant travels outside the United States after having obtained advance parole, his or her departure triggers the bars for purposes of an adjustment or change of status application; that is, the individual may still be ineligible to adjust or change status. If eligible, the adjustment applicant may qualify for a waiver of the unlawful presence ground of inadmissibility under section 212(a)(9)(B)(v) of the Act.

Depending on the basis upon which the alien is seeking adjustment, he or she may also be subject to the requirements in section 245(c) of the Act regarding continuous maintenance of lawful status since entry and certain other requirements. Applicants for adjustment of status must still meet all the applicable requirements for adjustment.

- ☞ 5. 40.9.2(c)(1)(D), TPS Applicants, is removed.
- ☞ 6. 40.9.2(c)(2)(C), TPS Applicants, is removed.
- ☞ 7. The **AFM Transmittal Memoranda** button is revised by adding, in numerical order, the following entry:

AD11-15 [INSERT DATE	Chapters 38.1(e)(1), 40.9.2(a)(8), 40.9.2(b)(1)(F)(iii), 40.9.2(c)(1)(D), and 40.9.2(c)(2)(C)	Provides guidance regarding the exemption of TPS applicants from any of the inadmissibility grounds noted above, but does not affect the inadmissibility grounds for any other immigration benefit application for which the alien must establish admissibility and where the specific ground applies. It also does not relieve the applicant from any other ground of TPS ineligibility outside the scope of section 212(a) of the Act, see section 244(c) of the Act; 8 CFR 244.2–244.4; and 244.6-244.9.
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Use

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Any questions about this PM should be directed to HQ Service Center Operations or the Office of Policy and Strategy through appropriate channels.