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Legal Sidebar

Federal District Court Enjoins the Department of Homeland Security from Terminating Temporary Protected Status

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Update: In February 2019, several months after this Sidebar was originally published, a lawsuit was filed in the U.S. District Court for the Northern District of California, challenging the Department of Homeland Security's (DHS) decisions to end Temporary Protected Status (TPS) designations for Nepal and Honduras. Like the plaintiffs in Ramos v. Nielsen*, the plaintiffs in the new lawsuit (*Bhattarai v. Nielsen*) argued that DHS's decisions to end the TPS designations for Nepal and Honduras inexplicably departed from the agency's longstanding policies governing TPS determinations, and that the agency's actions were motivated by racial and national origin discrimination. On March 12, 2019, the federal district court granted the parties' stipulated request to stay the proceedings pending adjudication of the Government's appeal of the court's preliminary injunction issued in* Ramos v. Nielsen*. Further, the Government has agreed not to terminate the TPS designations for Nepal and Honduras pending resolution of that appeal. Therefore, absent a superseding court order, TPS beneficiaries from Nepal and Honduras will generally be permitted to remain and work in the United States pending the outcome of* Ramos*.*

The original post from November 9, 2018, is below.

Certain non-U.S. nationals (aliens) who otherwise might be subject to removal from the United States are permitted to stay and work here when their countries are designated for Temporary Protected Status (TPS). TPS is a designation that may be granted by the Department of Homeland Security (DHS) to countries experiencing unstable or dangerous conditions due to armed conflict, natural disaster, or other extraordinary circumstances. In the past year, DHS announced the termination of TPS designations for Sudan, Nicaragua, Haiti, El Salvador, Nepal and Honduras. The agency's decisions affect more than 300,000 TPS beneficiaries who may no longer be authorized to remain in the United States upon the effective termination date of their countries' TPS designations. Several lawsuits have challenged DHS's decisions on various constitutional and statutory grounds. Recently, in *Ramos v. Nielsen*, a federal district court issued a preliminary injunction enjoining DHS from terminating the TPS designations for Sudan, Nicaragua, Haiti, and El Salvador. While the federal government has appealed that decision, TPS

beneficiaries from those countries may remain and work in the United States pending the outcome of the case.

Background

Under Section 244 of the Immigration and Nationality Act (INA), DHS in consultation with the State Department may designate 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 thereafter. On the other hand, 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 Section 244(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 will revert to the same immigration status they had before TPS (unless that status had 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). Further discussion about TPS relief and the TPS designation terminations can be found in this CRS Report and Legal Sidebar.

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 grace periods for each country before the terminations would become effective.

The District Court's Decision Granting a Preliminary Injunction

In *Ramos v. Nielsen*, nine TPS beneficiaries and their five U.S. citizen children (plaintiffs) 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 the agency's decisions violated the Administrative Procedure Act (APA) and their constitutional right to equal protection. The plaintiffs requested the federal district court enjoin DHS "from implementing or enforcing the decisions to terminate the TPS designations for El Salvador, Nicaragua, Haiti, and Sudan."

In response, the Department of Justice (DOJ) filed a motion to dismiss arguing that INA Section 244(b)(5) precluded the court from reviewing DHS's TPS terminations. The court denied the motion, reasoning that INA Section 244(b)(5) did not bar judicial review of the "general policies or practices" employed in deciding whether to terminate a country's TPS designation, and that the jurisdictional provision did not foreclose constitutional challenges to DHS's TPS decisions.

Subsequently, in October 2018, the court issued a preliminary injunction enjoining DHS from terminating the TPS designations for Sudan, Nicaragua, Haiti, and El Salvador pending the outcome of the litigation. In its order, the court determined that the plaintiffs likely would suffer irreparable injury absent a preliminary injunction given their established ties to the United States and the potentially unsafe conditions in their home countries, and that a preliminary injunction would serve the public interest. The court also concluded that the balance of hardships "tips decidedly" in the plaintiffs' favor because any

harm to the government was "strongly outweighed by the harm to [the plaintiffs] and their communities should a preliminary injunction not issue."

The court also ruled that the plaintiffs had shown serious questions or a likelihood of success on the merits of their claims to warrant a preliminary injunction. With respect to their APA claim, the plaintiffs had argued that DHS adopted a different approach to assessing whether to continue TPS with respect to Sudan, Nicaragua, Haiti, and El Salvador than it had in the past. Specifically, they claimed that DHS now only considered whether the original basis for a country's TPS designation had continued, without examining more recent events in the country that might warrant a TPS designation. The plaintiffs argued that DHS's new practice violated the APA because "it represented a sudden and unexplained departure from decades of decision-making practices and ordinary procedures."

The court observed that, under the APA's "arbitrary and capricious" standard, an agency may not change its "practices or policies" without providing a reasoned explanation. The court determined that this requirement applied not only to formal rules or policies, but also to any "shift in agency practice" that is implied from the agency's conduct. The court determined that, based on internal emails and other correspondence, DHS had "made a deliberate choice to base the TPS decision solely on whether the originating conditions or conditions directly related thereto persisted, regardless of other current conditions [in the TPS country] no matter how bad, and that this was a clear departure from prior administration practice." The court rejected the DOJ's argument that "variations in how different [DHS] Secretaries render their fact-intensive TPS determinations do not trigger any APA procedural requirements," reasoning that these "variations" amounted to a "change in DHS process and policy." The court concluded that, because DHS provided no explanation or justification for this "substantial and consequential change in practice," serious questions went to the merits of the plaintiffs' APA claim and they were likely to succeed on that claim.

The court also addressed the plaintiffs' contention that DHS violated their constitutional right to equal protection because the agency's decisions to end TPS were allegedly "motivated in significant part by racial and national-origin animus." Specifically, the plaintiffs contended that President Trump "along with other officials in his administration, have repeatedly expressed racially discriminatory and anti-immigrant sentiments." The court determined that "a discriminatory purpose was a motivating factor in the decisions to terminate the TPS designations" based on statements reportedly made by President Trump that, in the court's view, "expressed animus against non-white, non-European immigrants." The court also cited other evidence suggesting that the DHS Secretary may have been "influenced" by President Trump and administration officials, and that race may have been a "motivating factor" in the decision to terminate the four countries' TPS designations. The court thus decided that the plaintiffs raised serious questions going to the merits of their equal protection claim.

Notably, the court rejected the DOJ's argument that, in considering the equal protection claim, the court should apply the deferential standard employed by the Supreme Court in *Trump v. Hawaii*. In that case, the Supreme Court considered the constitutionality of a Presidential Proclamation that barred the entry of certain nationals of predominantly Muslim countries whose information-sharing procedures were believed to raise national security risks. The plaintiffs in *Trump* had argued that the proclamation discriminated against Muslims, and cited statements made by President Trump to support their claim. Applying a "rational basis" standard, the Court limited its review of the proclamation to determining whether it was plausibly related to a legitimate government objective. The Court determined that the proclamation was expressly grounded in legitimate national security concerns, and rejected the plaintiffs' constitutional challenge.

The district court in *Ramos* declined to apply this deferential standard because the court concluded (1) there was no indication that DHS's decisions to terminate the TPS designations rested on national security or foreign policy grounds; (2) unlike the aliens in *Trump v. Hawaii*, the TPS beneficiaries are already

within the United States and have greater constitutional protections than aliens seeking initial entry; and (3) the decisions to terminate the TPS designations were not made "pursuant to a very broad grant of statutory discretion," as had been the case with the statutory support undergirding the Presidential Proclamation. Further, the *Ramos* court ruled that, even if the deferential standard applied, the "substantial extrinsic evidence" plaintiffs provided still raised serious questions as to whether the TPS terminations were rationally related to a legitimate, non-discriminatory justification.

Impact of the District Court's Decision

The TPS designations for Sudan, Nicaragua, Haiti, and El Salvador were scheduled to expire between November 2018 and September 2019. In light of the district court's decision in *Ramos*, DHS may not terminate those TPS designations while the litigation remains pending in that case. Furthermore, U.S. Citizenship and Immigration Services, the agency component within DHS that adjudicates applications for immigration-related benefits, has issued a *Federal Register* notice announcing the extension of TPS relief and employment authorization for TPS beneficiaries affected by the district court's order. Therefore, absent a superseding court order, TPS beneficiaries from Sudan, Nicaragua, Haiti, and El Salvador will generally be permitted to remain and work in the United States pending the outcome of *Ramos*. The district court's order, however, extends only to TPS beneficiaries from those countries. As discussed above, DHS has also announced the termination of TPS designations for Nepal and Honduras, and no court order has been issued to halt those terminations.

In the meantime, the DOJ has appealed the district court's decision to the U.S. Court of Appeals for the Ninth Circuit. The case renews questions concerning the extent to which courts may review agency action on matters where Congress generally has entrusted the agency with broad discretion. Although the INA authorizes DHS to determine whether a country should be designated for TPS, and expressly bars judicial review of that determination, the district court ruled that it may consider the "general policies or practices" guiding the agency's decision, as well as any constitutional challenges to that decision. To the extent the court has jurisdiction, the district court's decision also prompts questions as to whether the APA requires a reasoned explanation for *any* change in agency practice that may inform the agency's decision, or whether there are limits to judicial examination of such changes. Reviewing courts may consider, for example, whether a DHS Secretary's manner of assessing the conditions in a TPS-designated country constitutes an agency policy subject to judicial review, or whether, as the government argued, such assessments simply reflect "variations in how different [DHS] Secretaries render their fact-intensive TPS determinations."

With respect to constitutional claims, the district court's decision raises a broader question: what types of immigration decisions are governed by the deferential standard of review adopted by the Supreme Court in *Trump v. Hawaii*? While the *Trump* Court applied this standard in considering the President's authority to *exclude* aliens from the United States, *Ramos* concerns the government's authority to terminate benefits for aliens inside the United States, including some who have lived in the country for many years. Reviewing courts may consider whether *Trump's* deferential standard should only be employed for agency actions that are rooted in national security concerns or that restrict the entry of aliens into the United States; or whether, as the government argued in *Ramos*, that standard should be applied "expansively" to other decisions that implicate the government's broad power over immigration—including the "fact-sensitive" decision whether to designate a country for TPS. Further, *Ramos* revisits a question that had been raised, but not definitively answered, in *Trump*—to what extent may courts probe beyond the Executive's official pronouncements to determine whether a decision has a discriminatory purpose?

While the Ninth Circuit, and perhaps the Supreme Court, may decide some of these questions in assessing the scope of DHS's TPS authority, a number of bills have been introduced in Congress (e.g., H.R.3440, H.R.3647, H.R.6696, H.R.4750, H.R.4956, H.R.1014, H.R.4253,

H.R.4184) over the past two years that would allow current TPS beneficiaries to remain in the United States for certain periods of time, or to adjust to lawful permanent resident status. While the litigation concerning DHS's TPS designation terminations continues, Congress may consider such legislation and other options in the months ahead.

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