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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Amid Circuit Split, BIA Says TPS Does Not Equal Admissibility

By **Jennifer Doherty**

Law360 (November 23, 2020, 10:07 PM EST) -- The Board of Immigration Appeals took sides in a deep circuit split over temporary protected status Monday when it ordered an immigration judge to resume removal proceedings against a Salvadoran man whose TPS ended in 2012.

In a unanimous decision authored by Appellate Immigration Judge Keith E. Hunsucker, the panel undid the lower-court order blocking the U.S. Department of Homeland Security's efforts to deport Roberto Carlos Padilla Rodriguez, who entered the U.S. without authorization in 1999 and was granted TPS four years later. The panel also prohibited any more courts from finding that by granting TPS, the U.S. government had admitted an individual to the country, regardless of his or her immigration status before receiving protected status.

Leaning on the Ninth Circuit's **decision** in Ramirez v. Brown, which interpreted a section of the Immigration and Nationality Act relating to TPS, the immigration judge in Padilla Rodriguez's case determined that the government had granted him admission to the U.S. when it gave him TPS, eliminating DHS' case for finding him inadmissible based on his unlawful entry.

"That reliance was misplaced," Judge Hunsucker said, emphasizing that the Ramirez case centered on a TPS that was still in effect and an immigrant seeking to change his status, not avoid deportation.

Moreover, the panel disagreed with the Ninth Circuit's determination that TPS recipients were "inspected and admitted" to the U.S. and therefore eligible to adjust their immigration status — a position which is shared by the Sixth and **Eighth** Circuits and opposed by the Third and Eleventh.

Nothing the split, the panel said that the correct reading was U.S. Citizenship and Immigration Services Administrative Appeals Office's **interpretation**.

"The AAO explained that the best reading of the statute is that Congress intended to protect aliens who maintained a lawful immigration status prior to acquiring TPS from becoming ineligible for adjustment of status if their lawful status expired while they remained in the United States in TPS," the panel said.

Mary Kenney, deputy director of the National Immigration Litigation Alliance, who has worked on cases on either side of the deep circuit split over TPS' impact on admissibility, chided the board for abdicating its responsibility to interpret the law, calling the panel's order "very badly reasoned" in a call with Law360 Monday.

"Ultimately that's their responsibility, and that requires a more nuanced analysis than just saying this is what USCIS found, and so we're going to follow it," she said.

The board's decision will not affect TPS recipients within the circuits that have already interpreted the INA's TPS provision.

The most likely path to rectifying the split is a petition for certiorari currently pending before the U.S. Supreme Court. Jose Santos Sanchez and Sonia Gonzalez, El Salvadoran TPS recipients themselves, lost their bids the change their immigration status in the Third Circuit, but have taken their fight for

lawful permanent residence to the high court.

The government's response is due Dec. 9.

Deputy Chief Appellate Immigration Judge Garry D. Malphrus and Temporary Appellate Immigration Judge Marcos Gemoets also sat on the panel.

Representatives for the U.S. Department of Justice did not immediately respond to a request for comment Monday.

Roberto Carlos Padilla Rodriguez represented himself.

DHS is represented by its own Kevin Primo Laroza.

The case is Matter of Roberto Carlos Padilla Rodriguez, Respondent, case number 28 I&N Dec. 164 (BIA 2020), before the Board of Immigration Appeals.

--Editing by Peter Rozovsky.

Correction: A previous version of this article included an incorrect professional title for Mary Kenney. The error has been corrected.

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