PRACTICE ADVISORY[1]

ADJUSTMENT OF STATUS FOR TPS HOLDERS AFTER *SANCHEZ v. MAYORKAS*

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On June 7, 2021, the Supreme Court issued a unanimous decision in *Sanchez v. Mayorkas*, No. 20-315, 2021 U.S. LEXIS 2960 (2021), in which it held that a grant of Temporary Protected Status (TPS) could not be deemed an admission for purposes of adjustment of status. This decision, which impacts TPS recipients who initially entered the United States without inspection, reverses decisions of the Sixth, Eighth, and Ninth Circuits. This practice advisory addresses the scope of the decision, who it impacts, and the narrow range of options remaining for TPS recipients who initially entered without inspection and now seek to adjust to lawful permanent resident status (LPR).

1. What was the issue before the Court?

In *Sanchez*, the Supreme Court addressed whether a TPS recipient who initially entered the United States without inspection is eligible to adjust to LPR status. The petitioner in *Sanchez* entered the United States without inspection in 1997 and later obtained TPS. When he subsequently applied for adjustment of status under 8 U.S.C. § 1255, based upon a petition filed by his employer, U.S. Citizenship and Immigration Services (USCIS) denied his application on the basis that he had not been lawfully admitted into the United States and that his grant of TPS did not confer an inspection and admission as required under §§ 1255(a) and (k).

Specifically, at issue was whether a grant of TPS under 8 U.S.C. § 1254a(f)(4) constituted an admission for purposes of adjustment of status under 8 U.S.C. § 1255. To become an LPR under 8 U.S.C. § 1255, a noncitizen must show that he or she has been "inspected and admitted or paroled into the United States." 8 U.S.C. § 1255(a). Even if that requirement is met, however, an applicant will be barred from adjusting status if he or she previously worked without authorization in the United States or failed to continuously maintain lawful status since entry into the United States. 8 U.S.C. § 1255(c)(2). The only exceptions to this bar are for 1) immediate

[1] This advisory should not be used as a substitute for independent legal advice and decision-making by a lawyer familiar with a client's case. This advisory was authored by NILA attorneys Mary Kenney and Tiffany Lieu. Questions should be directed to info@immigrationlitigation.org.

relatives; 2) special immigrants; or 3) certain employment-based adjustment applicants who satisfy 8 U.S.C. § 1255(k). This latter provision, at issue in *Sanchez*, requires, inter alia, the applicant to demonstrate that he or she is present in the United States "pursuant to a lawful admission." 8 U.S.C. § 1255(k).

Mr. Sanchez argued that, under the TPS statute at 8 U.S.C. § 1254a(f)(4), he should be deemed to have been inspected and admitted for purposes of §§ 1255(a) and (k). In relevant part, 8 U.S.C. § 1254a(f)(4) provides that, "for purposes of adjustment of status under section 1255," a TPS recipient "shall be considered as being in, and maintaining, lawful status as a nonimmigrant." Simply stated, his argument was that, generally, noncitizens must be admitted to obtain nonimmigrant status; thus, for a TPS holder to be "considered"—or deemed—to be in lawful nonimmigrant status, he or she necessarily must be deemed to have been admitted.

2. What did the Court decide?

The Supreme Court held that a grant of TPS does not render an individual who entered without inspection eligible for adjustment to LPR status under 8 U.S.C. § 1255. *Sanchez*, 2021 U.S. LEXIS 2960, at *7. That is, a grant of TPS does not constructively admit an individual who entered unlawfully. *Id.* at *9.

In so deciding, the Court first concluded that § 1254a(f)(4)'s provision that a TPS recipient is "considered as being in, and maintaining, lawful status as a nonimmigrant" does not confer an admission as required for adjustment of status under § 1255 because lawful status and admission are distinct. *Sanchez*, 2021 U.S. LEXIS 2960, at *9. The Court further rejected the noncitizen's argument that there is an "indissoluble relationship" between admission and nonimmigrant status, explaining that an individual may have one but not the other. *Id.* at *10–13. Further, the Court found that the statutory section related to nonimmigrant status, 8 U.S.C. § 1184, does not require an admission as a prerequisite for all nonimmigrant classifications, citing crewmen and victims of crime who are granted U nonimmigrant status as two examples. *Id.* at *12. Finally, the Court pointed to pending legislation that would amend § 1254a(f)(4) to explicitly state than an individual with TPS is considered as having been inspected and admitted to support its holding that the current law—which does not contain such an explicit statement—does not deem a TPS holder to have been admitted. *Id.* at *13–14.

Sanchez reverses decisions in the Sixth, Eighth, and Ninth Circuits,[2] and affirms decisions in Third, Fifth, and Eleventh Circuits.[3]

3. Why was Mr. Sanchez ineligible to adjust based upon his parole entry?

After being granted TPS, Sanchez traveled on and entered the United States pursuant to a grant of advance parole. At that time, USCIS' interpretation of the TPS and adjustment provisions was

[2] *Velasquez v. Barr*, 979 F.3d 572, 578 (8th Cir. 2020); *Ramirez v. Brown*, 852 F.3d 954, 958 (9th Cir. 2017); *Flores v. USCIS*, 718 F.3d 548, 553–54 (6th Cir. 2013).

[3] *Sanchez v. Sec'y DHS*, 967 F.3d 242, 245 (3d Cir. 2020); *Nolasco v. Crockett*, 978 F.3d 955, 959 (5th Cir. 2020); *Serrano v. U.S. Att'y Gen.*, 655 F.3d 1260, 1265–66 (11th Cir. 2011).

that an entry on TPS-related parole satisfied the "inspected and . . . paroled" requirement of § 1255(a).[4] However, because he was applying for adjustment based on his employment, he also had to satisfy the "lawful admission" requirement of § 1255(k) in order to avoid the bar on adjustment due to his unlawful status and unauthorized work prior to his grant of TPS. Because a grant of parole is not an admission, his parole entry was not sufficient for this purpose. *See Sanchez*, 2021 U.S. LEXIS 2960, at *8 n.4 (noting that Mr. Sanchez never claimed that his entry on parole made him eligible to adjust, "probably because the argument could not have mattered" given his need to also satisfy § 1255(k)).

4. Are all TPS holders precluded from adjusting status under *Sanchez*?

No. The *Sanchez* decision impacts only those TPS holders who entered without inspection; it does not apply to any TPS holder who was inspected and admitted to the United States such as, for example, someone who initially was admitted on a nonimmigrant visa and subsequently obtained TPS. Such individuals have the necessary lawful admission required by § 1255(a) and, for employment-based adjustment applicants, § 1255(k). Of course, they will need to satisfy all other requirements for adjustment and be able to demonstrate that they are not barred from adjusting under § 1255(c)(2), including, if necessary, that they satisfy the other requirements of § 1255(k).

5. What impact will the decision have on applications that currently are pending before USCIS or an immigration judge within the jurisdictions of the Sixth, Eighth, or Ninth Circuits?

The *Sanchez* Court's interpretation of the TPS provision, § 1254a(f)(4), now must be followed by USCIS and the immigration courts in all cases in the United States. Prior to this, both USCIS and the immigration courts were applying *Flores*, *Velasquez*, and *Ramirez*—decisions from the Sixth, Eighth, and Ninth Circuits, respectively—to applications filed by those living within the jurisdictions of these courts. Because each of these courts held that, under § 1254a(f)(4), a grant of TPS was deemed an admission for adjustment of status, applicants within those circuits were succeeding with adjustment applications notwithstanding an initial entry without inspection. Now, however, all pending adjustment applications within those circuits will be adjudicated under *Sanchez*.

6. What, if any, impact will the decision have on already approved adjustment of status applications in the Sixth, Eighth, or Ninth Circuits?

Although there is no guarantee, it appears unlikely that the government USCIS will attempt to rescind the LPR status of anyone granted that status pursuant to the decisions in the Sixth, Eighth, and Ninth Circuits. Under 8 U.S.C. § 1256, USCIS has the authority to rescind an individual's LPR status within five years of their adjustment if "it shall appear to the satisfaction of the Attorney General that the person was not in fact eligible for such adjustment of status." 8

[4] For a discussion of USCIS' current policy on whether a TPS recipient's travel on advance parole satisfies § 1255(a), *see* Question 8, *infra*.

U.S.C. § 1256(a); *see also* 8 C.F.R. § 246.[5] When a rescission occurs, the person "shall thereupon be subject to all provisions of [the Immigration and Nationality Act] to the same extent as if the adjustment of status had not been made."8 U.S.C. § 1256(a). Because *Sanchez* reversed *Flores*, *Velasquez*, and *Ramirez*, it is possible that the government could consider individuals who, within the past five years, were granted adjustment of status pursuant to those cases as ineligible for such adjustment and thus subject to rescission under § 1256. However, were this to happen, there are arguments that such a retroactive application of *Sanchez* would impermissibly disrupt the finality of the administrative decision granting adjustment.

It also is possible that, when a person granted LPR status under *Flores*, *Velasquez*, or *Ramirez* subsequently applies for naturalization, USCIS could deny the application based on a finding that the grant of LPR status was not lawful. *See* 8 U.S.C. §§ 1427(a), 1429; 8 C.F.R. § 316.2(a)(2). The same arguments for countering a rescission of the LPR status would apply in this context. Moreover, any such denial of naturalization would be counter to USCIS' own policy. In Volume 12, Part D, Chapter 2.c of its online Policy Manual,[6] USCIS states that, unless the controlling law provides otherwise, a person who was lawfully admitted for permanent residence under the law applicable at the time is considered to have lawfully acquired that status when subsequently applying for naturalization even if, due to a change in the law, he or she would be ineligible for LPR status at the time of naturalization. In fact, p§ractitioners can argue that this same analysis should apply to rebut any attempt by the government to rescind an individual's LPR status based upon an allegation that the TPS holder was not eligible for LPR status due to the Supreme Court's current interpretation of the TPS statute.

7. Did the Court address the issue of whether a TPS recipient can adjust status based on an entry pursuant to TPS-related advance parole?

No. The Court specifically stated that it was expressing "no view" on whether a TPS recipient who entered the United States based upon a grant of advance parole is eligible to adjust absent any other bar. *Sanchez*, 2021 U.S. LEXIS 2960, at *8 n.4.

8. What options remain for TPS recipients who are eligible to adjust status but for having initially entered without inspection?

On July 1, 2022, USCIS adopted a new policy pursuant to which TPS holders who travel abroad with advance authorization after that date will be found to have been "inspected and admitted" and thus will satisfy 8 U.S.C. 1255(a) notwithstanding an earlier entry without inspection. For more on this new policy and when USCIS will apply it retroactively, *see* Frequently Asked Questions: Recission of Matter of Z-R-Z-C-, https://immigrationlitigation.org/wp-content/uploads/2022/08/ZRCZ-Rescisson-FAQ.pdf.

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[5] For example, in *Estrada v. Holder*, 604 F.3d 402, 403 (7th Cir. 2010), INS rescinded a noncitizen's LPR status because it believed that he had obtained that status through fraud.

[6] *See* Policy Manual, https://www.uscis.gov/policy-manual/volume-12-part-d-chapter-2 (last visited June 21, 2021).