

Understanding the *CARECEN v. Jaddou* Settlement Agreement Benefitting Certain TPS Beneficiaries with Prior Removal Orders

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Agenda

- Past USCIS policy/practice regarding jurisdiction over adjustment of status for TPS recipients with prior orders who travel on advance parole
- December 2019 policy change
- *CARECEN v. Jaddou* lawsuit
- *CARECEN* settlement agreement (Mar. 21, 2022)
- Other developments re adjustment of status for TPS recipients
- Q&A

Disclaimer

This webinar does not provide legal advice. Instead, this webinar will cover general information that may be useful with the understanding that each case is different and requires individualized assessment by a competent immigration law practitioner.



Previous USCIS Policy and Practice

TPS Recipients with Removal Orders

- Many TPS recipients have been in the United States for decades
- Some received removal orders in deportation or removal proceedings years ago
- Having a removal order is not a bar to TPS
- The TPS statute prohibits the government from actually removing a TPS recipient while they remain in TPS status. INA § 244(a)(1)(A).

How Might TPS Recipients Qualify for Adjustment of Status (AOS)?

- TPS itself does not provide a pathway to AOS
- Many TPS recipients may have a basis to adjust through, *e.g.*, an “immediate relative,” such as a U.S. citizen son or daughter.
- Like other adjustment applicants, must (typically) meet INA § 245(a)’s requirement of having been “inspected and admitted or paroled”
 - Those who entered without inspection could historically fulfill this requirement by authorized travel and return pursuant to TPS statute’s travel provision and USCIS regulation on TPS “advance parole.” INA § 244(f)(3); 8 CFR § 244.15(a)

AOS Jurisdiction Generally – USCIS v. EOIR

USCIS has jurisdiction over AOS applications, unless the applicant “has been placed in deportation proceedings or in removal proceedings (other than as an arriving alien),” in which case the immigration judge (IJ) has exclusive jurisdiction over any AOS application. 8 CFR §§ 1245.2(a)(1)(i), 245.2(a)(1).

- Per USCIS policy, “has been placed in removal proceedings” includes people with unexecuted removal orders but does not include people with executed orders.
- Per INA § 101(g), any noncitizen ordered deported or removed “who has left the United States, shall be considered to have been deported or removed.”
- **Thus, USCIS has jurisdiction over AOS applicants with executed removal orders, but not over AOS applicants with unexecuted removal orders.**

USCIS Previous Policy/Practice re AOS Jurisdiction for TPS Recipients with Orders

- For years, USCIS took jurisdiction over AOS applications filed by TPS beneficiaries who had traveled on advance parole, thereby executing the removal order
- Applicants would file with Form I-212 waiver application to waive inadmissibility under INA § 212(a)(9)(A)



December 2019 USCIS Policy Change

December 20, 2019 USCIS “Policy Alert”

“Effect of Travel Abroad by Temporary Protected Status Beneficiaries with Final Orders of Removal”

- Incorporated into Policy Manual Vol. 7, Pt. A, Ch. 3.D

“[A] TPS beneficiary who obtains USCIS’ authorization to travel abroad temporarily (as evidenced by an advance parole document) and who departs and returns to the United States in accordance with such authorization remains in the same exact immigration status and circumstances as when he or she left the United States. Such travel does not result in the execution of any outstanding removal order to which a TPS beneficiary may be subject.”

Impact of December 2019 Policy Change

- According to USCIS, TPS recipients do not execute outstanding removal orders when they travel and lawfully return, and thus **USCIS will reject jurisdiction over AOS applications filed by these individuals**
- Instead, according to USCIS, the immigration court has jurisdiction over AOS applications of these individuals
- Due to the 2019 policy, in order to access a forum to apply for AOS, these individuals must first prevail on a motion to reopen their removal proceedings filed with the immigration court or BIA
 - The policy essentially blocked their path to AOS and to security and permanency in the United States

Why Did Requiring TPS Recipients to Succeed on Motions to Reopen Effectively Block Their Access to the AOS Process?

- Statutory 90-day deadline to file motion to reopen, post removal order
- Statutory one-motion limit
- Regulatory exceptions to time and number bars largely unavailable during Trump administration
 - Joint motions
 - *Sua sponte* motions

USCIS's Justification for Dec. 2019 Policy: Flawed Interpretation of 1991 Law

Based on a new, restrictive interpretation of a 1991 law, MTINA (Miscellaneous and Technical Immigration and Naturalization Amendments) Section 304(c)(1)(A):

“In the case of [a TPS recipient] whom the Attorney General authorizes to travel abroad temporarily and who returns to the United States in accordance with such authorization . . . **the alien shall be inspected and admitted in the same immigration status the alien had at the time of departure....**”

MTINA 1991's TPS Travel Provision

What it was understood to mean pre 2019 policy change

- TPS recipient who travels pursuant to TPS statute's travel provision retains protections they had before they traveled
- Such an individual retains their TPS status when they return
- Such an individual is "inspected and admitted" upon return
- Has nothing to do with a removal order's execution, which is governed by INA § 101(g)

What USCIS claims it means pursuant to 2019 policy change

- TPS recipient "resumes the exact same immigration status and circumstances as when he or she left the United States."
- For example, continues to be a TPS recipient "in removal proceedings" with an outstanding, unexecuted final removal order
- A-textual interpretation of "same immigration status" to mean "exact same . . . circumstances"

Subsequent USCIS Policy Change Stemming from Same Flawed Legal Interpretation: *Z-R-Z-C-*

Matter of Z-R-Z-C-, Adopted Decision 2020-02 (AAO Aug. 20, 2020):

- TPS recipient who travels with DHS authorization “resumes the same immigration status the alien had at the time of departure,” meaning that if they were present without inspection and admission or parole at time of departure, they continue to be present without inspection and admission or parole when they return
 - No longer deemed to satisfy INA § 245(a) requirement of having been inspected and admitted or paroled
- Policy only applies prospectively to travel after Aug. 20, 2020, recognizing reliance interests

***CARECEN v. Jaddou* Lawsuit**

***CARECEN v. Jaddou*, No. 20-02363 (D.D.C.)**

- Filed August 26, 2020, by nonprofit CARECEN and seven individual plaintiffs
- Individual plaintiffs were TPS recipients from El Salvador and Haiti with prior removal orders who had traveled on advance parole and were beneficiaries of immediate relative petitions
- Challenged Dec. 2019 USCIS policy blocking USCIS jurisdiction over their AOS applications
 - Did not challenge Z-R-Z-C-

CARECEN: Legal Challenges to Dec. 2019 Policy

1. Issued by unlawfully appointed official—purported acting USCIS director Ken Cuccinelli (*see L.M.-M. v. Cuccinelli*, 442 F. Supp. 3d 1 (D.D.C. 2020))
2. Contrary to plain language of INA § 101(g)
3. Arbitrary and capricious: failed to acknowledge reversal in policy, provided no reasoned explanation for change, failed to consider reliance interests
4. Enacted without required notice and comment
5. Discriminated on basis of race; motivated by racial animus

***CARECEN* Timeline**

- Aug. 26, 2020: Ps file complaint
- Oct. 21, 2020: Ps file motion for preliminary injunction or expedited summary judgment in the alternative
- Nov. 13, 2020: Judge denies PI without prejudice
- Dec. 4, 2020: Gov't files motion to dismiss
- Post Biden inauguration: parties begin settlement discussions; district court litigation stayed
- Mar. 21, 2022: settlement agreement entered between CARECEN and Defendants



The *CARECEN* Settlement Agreement

Overview

- Creates a new prosecutorial discretion policy under which ICE OPLA will generally agree to join motions to reopen and dismiss the removal proceedings of certain TPS beneficiaries with prior removal orders who traveled on advance parole and are AOS eligible
 - This gives USCIS jurisdiction over the AOS application
- Policy will remain in effect until at least January 19, 2025

Eligibility Criteria

1. Not an enforcement priority*
2. Currently possesses TPS
3. Has a removal, deportation, or exclusion order issued by EOIR or predecessor INS
4. Traveled on advance parole since the order was issued
5. Is otherwise *prima facie* eligible to file AOS application with USCIS, including those with pending or approved I-130 “immediate relative” visa petitions who meet INA § 245(a)’s “inspected and admitted or paroled” requirement pursuant to USCIS policy, if seeking to adjust under § 245(a)

Hypo 1

Maria from El Salvador has lived in the United States since early 1996. INS placed her in deportation proceedings after she crossed the border and the IJ eventually administratively closed her proceedings. In 1997, she gave birth to a son. In 2001, she received TPS. When Maria's son turned 21 in 2018, he immediately petitioned for her. USCIS approved the I-130 six months later and, in late 2018, Maria traveled on advance parole to El Salvador.

Can Maria benefit from the CARECEN Settlement Agreement?

Hypo 2

Jean from Haiti has TPS and is married to a U.S. citizen. However, he entered EWI and has an order of removal from 2012. Jean traveled on advance parole on September 4, 2020. Jean's U.S. citizen wife filed an I-130 for him in December 2020 that remains pending.

Can Jean benefit from the the CARECEN Settlement Agreement now?

Could Jean benefit from the CARECEN Settlement Agreement in the future?

Hypo 3

Batsa, from Nepal, unsuccessfully applied for asylum. In 2015, the IJ issued a removal order and Batsa did not appeal choosing instead to apply for newly announced TPS. Batsa was concerned about applying for TPS because he had a misdemeanor conviction, but he disclosed this conviction and everything worked out. Batsa traveled on advance parole in 2018. In 2019, he married a U.S. citizen, who then filed an I-130 for him. The I-130 was approved in 2020.

Can Batsa benefit from the CARECEN Settlement Agreement?

What if Batsa calls you tomorrow to disclose a new arrest?

How to Request Prosecutorial Discretion Under the CARECEN Settlement

- ICE OPLA will publish in various languages on its website instructions on how to submit requests for joint motions under the *CARECEN* settlement and how to contact ICE OPLA in these cases. OPLA will also:
 - Establish internal points of contact at each OPLA office for these requests
 - Issue internal implementation guidance
- While the settlement agreement says that eligible noncitizens should use existing ICE OPLA PD request process, OPLA will soon issue separate guidance for these motions
- Template JMTR & D attached to settlement agreement
 - If noncitizen is represented, OPLA will work with legal representative to file JMTR & D with relevant court
- OPLA's target processing time: 90-120 days from date request submitted

Settlement Provisions for Pro Se Individuals

- CARECEN will create and disseminate informational notices and “do it yourself packages” for pro se individuals
- USCIS and OPLA will post information on their websites regarding DOJ-recognized pro bono legal services providers
- OPLA website will state that there is no fee for seeking PD and link to websites discussing UPIL
- OPLA will generally file JMTR & D with immigration court in cases of pro se individuals, unless the noncitizen indicates that they prefer and are able to do so.

What Happens After the IJ Grants the JMTR & D?

- Noncitizen can file an AOS application with USCIS
- If previous AOS application with USCIS was denied for lack of jurisdiction, can either file new AOS application or move to reopen denied AOS application with USCIS (Form I-290B).
- Special USCIS reopening process whereby USCIS will accept untimely motions in these cases:
 - Follow usual procedures, using Form I-290B
 - Write “TPS Removal Order” at top of first page
 - If already in litigation, work through gov’t counsel

Who Can I Contact If I Am Having Trouble with Any Part of the CARECEN Process?

- Check for updates on [Democracy Forward's case page](#) as well as on [CARECEN's website](#)
- Please share problems on the NIPNLG listserv so that we can determine if the problem is systemic
- If you are in litigation on this issue, work through the government's representative in the litigation (see Paragraph 9 of the settlement agreement)



Other Developments Regarding AOS for TPS Recipients

***Sanchez v. Mayorkas*, 141 S. Ct. 1809 (2021)**

- Grant of TPS not an “admission” for purposes of INA § 245
 - Reversed contrary decisions in Sixth, Eighth, and Ninth Circuits
- Did not address eligibility for AOS under INA § 245(a) of TPS recipients who travel on advance parole. *Id.* at 1813 n.4.

Pending Challenge to *Z-R-Z-C-*:

***Gomez v. Jaddou*, No. 21-09203 (S.D.N.Y.)**

- Filed Nov. 8, 2021
- Challenges *Z-R-Z-C-* as contrary to plain meaning of INA and in violation of agency regulations

Proposed class:

All individuals with TPS whose initial entries into the United States were without inspection; who, after being granted TPS, traveled abroad with authorization from USCIS after August 20, 2020, and were permitted to reenter the United States; who have applied or will apply with USCIS for [AOS] as immediate relatives; and whose applications USCIS has denied or will deny based on its policy that a post-August 20, 2020 entry into the United States by a TPS holder pursuant to authorized travel is neither an admission nor a parole into the United States, as set forth in *Matter of Z-R-Z-C*.

Other Litigation Challenging USCIS's Jurisdiction Policy

- Putative class action, *Commandant v. Rinehart*, No. 20-23730 (S.D. Fla.) challenging USCIS jurisdiction policy and arguing that plaintiffs' travel executed their removal orders
 - District court dismissed for lack of jurisdiction
 - On appeal at Eleventh Circuit; oral argument today
- Many individual APA actions challenging USCIS rejection of AOS jurisdiction, under 101(g) theory, "arriving alien" theory, or both
 - *E.g. Mancía v. Mayorkas*, No. 20-01492, 2021 WL 1192952 (N.D. Ga. Mar. 30, 2021) ("arriving alien"); *Michel v. Mayorkas*, No. 20-10885, 2021 WL 797810 (D. Mass. Mar. 2, 2021) ("arriving alien"); *Martinez v. Wolf*, No. 20-23838 (S.D. Fla. Sept. 29, 2021) ("arriving alien"; executed order). *But see, e.g., Duarte v. Mayorkas*, 27 F.4th 1044 (5th Cir. 2022) (not "arriving alien," did not execute order)

Future of These Trump-Era Policies?

- Advocates have called on the Biden administration to reverse these Trump-era policies (Dec. 2019 policy and *Z-R-Z-C* decision) that limit the ability of TPS recipients to adjust status
- Practitioners can also consider bringing their challenges to USCIS's jurisdiction policy through federal court litigation
 - This may be a particularly useful option to consider if OPLA declines to join a motion to reopen or declines to continue the *CARECEN* policy after January 19, 2025

Q&A