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Legal Sidebar

Ninth Circuit Decision Allows Termination of Temporary Protected Status for Sudan, Nicaragua, and El Salvador to Go Forward

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Certain non-U.S. nationals (aliens) who otherwise might be subject to removal from the United States may stay and work here when the Department of Homeland Security (DHS) designates their countries for Temporary Protected Status (TPS) because of unstable or dangerous conditions in those countries. In 2017 and 2018, DHS announced the termination of TPS designations for Sudan, Nicaragua, Haiti, El Salvador, Nepal, and Honduras. The agency's decisions affect more than 400,000 TPS beneficiaries from those six countries who may no longer be authorized to remain in the United States upon the effective termination date of the countries' TPS designations. Several lawsuits have challenged DHS's decisions on various constitutional and statutory grounds. Recently, in *Ramos v. Wolf*, the U.S. Court of Appeals for the Ninth Circuit reversed a lower court's preliminary injunction enjoining DHS from ending the TPS designations for four of those countries—Sudan, Nicaragua, Haiti, and El Salvador. A separate challenge to the termination of the TPS designations for Honduras and Nepal remains pending in federal district court. The Ninth Circuit decision does not affect a separate injunction by a court outside the Ninth Circuit barring the termination of the TPS designation for Haiti. This Legal Sidebar examines the Ninth Circuit's decision and the implications that decision may have for TPS recipients.

Background

Under § 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. But 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

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designation. INA § 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 are to revert to the same immigration status they had before TPS (unless that status has 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).

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 wind-down periods for each country before the terminations would become effective.

Preliminary Injunction in *Ramos v. Wolf* and Related Litigation

In *Ramos v. Wolf*, nine TPS beneficiaries and their five U.S. citizen children 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, in terminating the TPS designations, DHS only considered whether the original country conditions warranting those designations had continued, without examining more recent events in those countries. The plaintiffs argued that DHS's actions violated the Administrative Procedure Act (APA) because they "represented a sudden and unexplained departure from decades of decision-making practices and ordinary procedures." The plaintiffs also argued that DHS's decision to terminate TPS violated their constitutional right to equal protection because it was "motivated in significant part by racial and national-origin animus."

In October 2018, the district court issued a preliminary injunction barring DHS from terminating the TPS designations for Sudan, Nicaragua, Haiti, and El Salvador pending the outcome of the litigation. Previously, the court had rejected the government's contention that INA § 244(b)(5) barred judicial review of DHS's TPS terminations, reasoning that the statute did not bar review of the "general policies or practices" employed in deciding whether to end a TPS designation, and that the jurisdictional provision did not foreclose constitutional challenges. In its October 2018 order, the court determined that, given DHS's failure to explain its "change in practice" of only considering the original country conditions when making a TPS determination, plaintiffs had shown serious questions or a likelihood of success on the merits of their APA claim. The court also ruled that the plaintiffs raised serious questions on their equal protection claim based on evidence that race may have been a "motivating factor" in the TPS designation decisions. The court cited statements reportedly made by President Trump that "expressed animus against non-white, non-European immigrants," and other evidence suggesting that the DHS Secretary may have been "influenced" by President Trump and administration officials.

While the *Ramos* lawsuit was pending, a group of plaintiffs in *Bhattarai v. Wolf* challenged DHS's termination of TPS designations for Honduras and Nepal in the U.S. District Court for the Northern District of California. In March 2019, following the *Ramos* injunction, the court in *Bhattarai* stayed the proceedings pending adjudication of the government's appeal in *Ramos*. Further, the government agreed not to terminate the TPS designations for Nepal and Honduras pending resolution of that appeal.

Additionally, in *Saget v. Trump*, a group of plaintiffs filed a lawsuit in the U.S. District Court for the Eastern District of New York challenging DHS's termination of Haiti's TPS designation. In April 2019, the court issued a preliminary injunction enjoining DHS from terminating Haiti's TPS designation, largely on the same grounds that the *Ramos* court relied on in issuing an injunction.

The Ninth Circuit's Decision in *Ramos v. Wolf*

The government appealed the preliminary injunction in *Ramos v. Wolf* to the Ninth Circuit. On September 14, 2020, the Ninth Circuit, in a split decision, reversed and vacated the injunction. In the majority opinion authored by Judge Callahan, the court held that INA § 244(b)(5) barred judicial review of the plaintiffs' APA challenge to DHS's decision to terminate the TPS designations for Sudan, Nicaragua, Haiti, and El Salvador. Recognizing the DHS Secretary's "broad and unique" discretion over TPS designations, the court read § 244(b)(5) as barring review of the Secretary's "country-specific TPS determinations," but not "general collateral challenges to unconstitutional practices and policies used by the agency" in reaching those determinations. According to the court, the Secretary's unreviewable TPS determinations include the substantive "considerations and reasoning" underlying those determinations, such as an assessment of country conditions. The court construed the plaintiffs' arguments about DHS's failure to consider intervening events in a country when making TPS determinations as "essentially an attack on the substantive considerations underlying the Secretary's specific TPS determinations, over which the statute prohibits judicial review."

The court rejected the plaintiffs' claim that INA § 244(b)(5) did not bar judicial review because they challenged DHS's new "agency practice" of ignoring intervening events rather than the TPS determination itself. The court reasoned that the plaintiffs' claim "depends on a review and comparison of the substantive merits of the Secretary's specific TPS terminations, which is generally barred by [§ 244(b)(5)]." Thus, the plaintiffs did not seek to challenge an agency policy that was "collateral to, and distinct from" the DHS Secretary's TPS determinations. Because the plaintiffs' claim "fundamentally attacks the Secretary's specific TPS determinations," there was no jurisdiction to review those decisions.

The Ninth Circuit, however, addressed the plaintiffs' equal protection claim, reasoning that INA § 244(b)(5) did not foreclose "colorable constitutional claims." First, the court rejected the government's argument that the equal protection claim should be analyzed under the deferential "rational basis" standard employed by the Supreme Court in *Trump v. Hawaii*. There, the Supreme Court upheld a Presidential Proclamation barring the entry of certain nationals of mainly Muslim-majority countries, concluding that it was rationally related to legitimate national security concerns. The Ninth Circuit concluded that a less deferential standard applied here because, unlike the aliens in *Trump v. Hawaii*, TPS recipients have entered the United States and oftentimes remained in the country for many years, and the Executive's administration of the TPS program raised less national security implications than the proclamation at issue in *Hawaii*. The court thus applied the standard adopted by the Supreme Court in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, which looks to whether a discriminatory purpose was "a motivating factor" behind a challenged decision.

The Ninth Circuit held that the plaintiffs failed to present serious questions on the merits of their claim that the TPS terminations were influenced by the President's "animus against non-white, non-European immigrants." The court determined there was a "glaring lack of evidence" linking the President's alleged discriminatory intent to the specific TPS terminations. For example, the court noted, although the President had made "offensive and disparaging" statements about immigrants, there was no evidence that these statements "played any role in the TPS decision-making process." Additionally, in the court's view, the fact that White House officials had sought to influence the TPS determinations did not in itself show that the President's alleged racial animus was a motivating factor, given the expectation that executive officials "conform their decisions to the administration's policies." Finally, the court held, the fact that the TPS terminations affected non-European countries with mainly "non-white" populations did not establish

racial animus either, because virtually all countries designated for TPS have that characteristic, and so any TPS termination would disproportionately impact such countries.

In addition to joining the panel opinion, Judge Nelson wrote a concurring opinion arguing that the lower court also erred by requiring the government to present evidence outside the administrative record, and that the court should have limited the scope of the injunction to cover only individuals who were a party to the case, rather than issuing a "universal" injunction that applied nationwide. In a dissenting opinion, Judge Christen argued that INA § 244(b)(5) did not bar judicial review of the plaintiffs' challenge to the DHS Secretary's "changed practice" of ignoring intervening country conditions when making a TPS determination, reasoning that plaintiffs sought to challenge the "the process used to make TPS termination decisions, not the decisions themselves." Judge Christen thus argued that plaintiffs were likely to succeed on their APA claim to warrant an injunction, and declined to consider their equal protection claim.

Implications for TPS Recipients

The Ninth Circuit's decision in *Ramos* allows DHS to proceed with terminating the TPS designations for El Salvador, Nicaragua, and Sudan. But the separate court injunction in *Saget v. Trump* outside the Ninth Circuit continues to bar the agency from terminating *Haiti's* TPS designation. Thus, despite the *Ramos* ruling, Haitian TPS recipients retain their TPS relief status and are not subject to removal. (The government's appeal of the *Saget* injunction is pending before the Second Circuit.)

The *Ramos* decision, however, could have significant consequences for TPS recipients from El Salvador, Nicaragua, and Sudan. Given the Ninth Circuit's ruling, TPS recipients from those countries may become subject to removal once their TPS expires (unless they acquired some other lawful immigration status that remains valid). Additionally, the *Ramos* ruling could impact TPS recipients from Nepal and Honduras, whose countries' TPS termination decisions were separately challenged in *Bhattarai v. Wolf*. In that case, the court had stayed the proceedings pending adjudication of the government's appeal in *Ramos*. Because of the Ninth Circuit's ruling, TPS recipients from Nepal and Honduras could now become subject to removal. All told, the *Ramos* decision potentially renders about 347,000 TPS recipients removable upon the effective termination date of their countries' TPS designations.

Yet TPS recipients from El Salvador, Nicaragua, Sudan, Nepal, and Honduras will not immediately lose their authorization to remain in the United States. Previously, DHS's U.S. Citizenship and Immigration Services announced that, if the government prevailed on appeal in *Ramos*, the TPS terminations for Honduras, Nepal, Nicaragua, and Sudan would take effect no earlier than 120 days from issuance of the Ninth Circuit's mandate (i.e., the date the court's decision becomes final); and for El Salvador, no earlier than 365 days after the mandate. Under the Federal Rules of Appellate Procedure, the mandate issues 7 days after the time for filing a petition for rehearing expires (which is 45 days after the Ninth Circuit's decision in a civil case involving the United States), or 7 days after an order denying a petition for rehearing (whichever is later). Thus, the TPS terminations for Honduras, Nepal, Nicaragua, and Sudan likely would not go into effect until at least March 2021; and for El Salvador, not until at least November 2021.

Meanwhile, the *Ramos* plaintiffs could petition for panel rehearing or rehearing *en banc* in the Ninth Circuit. Or they could petition for review before the Supreme Court, and request a stay of the Ninth Circuit's ruling pending disposition of that petition. The plaintiffs could also file in the Ninth Circuit a motion to stay the mandate pending the Supreme Court's consideration of their petition.

Finally, while any TPS-related litigation continues, Congress may consider legislative options for TPS recipients. For example, the American Dream and Promise Act of 2019 (H.R. 6), which passed the House in 2019, would allow certain nationals of countries designated for TPS to pursue adjustment of status to lawful permanent resident (LPR). A number of other bills introduced in the 116th Congress would impact TPS recipients, including by extending TPS country designations, adding new countries to those

designated for TPS (e.g., Venezuela), prohibiting federal funds from being used to remove TPS recipients, and allowing TPS recipients who have lived in the United States for several years to adjust to LPR status.

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