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Legal Sidebar

Supreme Court: Unlawful Entrants with Temporary Protected Status Cannot Adjust to Lawful Permanent Resident Status

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Certain non-U.S. nationals (aliens, as the term is used in the Immigration and Nationality Act [INA]) who are physically present in the United States may adjust to lawful permanent resident (LPR) status if they meet certain requirements. Among other things, an applicant for adjustment of status generally must have been "inspected and admitted or paroled" into the United States by immigration authorities. For some time, courts disagreed over whether aliens who unlawfully entered the United States without inspection, but later received Temporary Protected Status (TPS), have been "inspected and admitted" to qualify for adjustment. In *Sanchez v. Mayorkas*, the Supreme Court, in a unanimous opinion, held that the grant of TPS does not enable an unlawful entrant to pursue adjustment of status. This Legal Sidebar examines the Supreme Court's decision and its implications for unlawful entrants who seek to pursue LPR status.

Legal Background

INA § 245(a) authorizes the Secretary of Homeland Security to adjust the status of the beneficiary of an approved immigrant visa petition (e.g., an immediate relative petition filed by a U.S. citizen spouse) to that of an LPR. To qualify, an applicant generally must meet certain requirements, including having been "inspected and admitted or paroled" into the United States. Apart from these requirements, INA § 245(c) bars certain classes of aliens from adjusting status, including those who engaged in unauthorized employment in the United States, and those who failed "to maintain continuously a lawful status" since entering the country. The § 245(c) bar does not apply to some categories of applicants, including "immediate relatives" (e.g., a spouse) of petitioning U.S. citizens, "special immigrants" (e.g., certain abused or abandoned juveniles), aliens whose visa petitions were filed on or before April 30, 2001, and some employment-based applicants present in the United States "pursuant to a lawful admission."

A separate provision, INA § 244, authorizes the Secretary of Homeland Security (in consultation with the State Department) to designate a country for TPS if persons from that country cannot safely return because of specified conditions (e.g., an armed conflict or natural disaster). An alien from a country designated for TPS may remain and work in the United States for the period in which the TPS designation

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is in effect, even if the alien had entered the United States unlawfully, so long as the alien meets certain criteria. A TPS recipient, however, does not have a dedicated pathway to LPR status based on the grant of TPS alone. Instead, a TPS holder must independently qualify for an immigrant visa and meet the other requirements for adjustment of status specified under INA § 245(a).

INA § 244(f)(4) provides that, for purposes of adjustment of status, a TPS holder "shall be considered as being in, and maintaining, lawful status as a nonimmigrant" during the period in which the alien has TPS. A nonimmigrant is an alien admitted temporarily to the United States for a specified purpose (e.g., a temporary visitor). The Department of Homeland Security's U.S. Citizenship and Immigration Services (USCIS) has interpreted § 244(f)(4) to mean that a TPS holder who entered the United States lawfully, and would otherwise accrue unlawful presence in the United States *during* the TPS period were it not for having TPS (e.g., because the period of stay authorized by a nonimmigrant visa expired), is exempt from INA § 245(c)'s bar to adjustment for aliens who failed to maintain lawful status. According to USCIS, however, INA § 244(f)(4) cures no *prior* period of unlawful status before the grant of TPS for purposes of the § 245(c) bar.

An adjustment applicant must also show that the applicant had been "inspected and admitted or paroled" into the United States. INA § 244(f)(4) is silent on whether a TPS holder is considered to be "inspected and admitted" for purposes of adjustment of status. USCIS has taken the position that § 244(f)(4)'s reference to "lawful status" does not mean that a grant of TPS constitutes an "admission." Prior to the Supreme Court's decision in *Sanchez*, federal courts had split over whether aliens granted TPS are "inspected and admitted" for purposes of adjustment of status, even if they unlawfully entered the United States. Some lower courts construed § 244(f)(4)'s reference to "lawful status as a nonimmigrant" to mean that a TPS holder is necessarily inspected and admitted to the United States. Other courts disagreed, reasoning that "lawful status" is distinct from "admission," which refers to an authorized *entry* into the United States.

Procedural History in *Sanchez v. Mayorkas*

Jose Santos Sanchez, a native and citizen of El Salvador, entered the United States without inspection in 1997. In 2001, shortly after El Salvador was designated for TPS, Sanchez applied for and received TPS and maintained that status since then. In 2014, Sanchez applied for adjustment of status based on an employment-based visa petition. USCIS determined that Sanchez was ineligible for adjustment because he was never "inspected and admitted" to the United States as required under INA § 245(a). USCIS also determined that Sanchez was barred from adjustment under INA § 245(c) because he had engaged in unauthorized employment before receiving TPS, and did not qualify for the exception for employment-based applicants present in the United States "pursuant to a lawful admission." Sanchez challenged USCIS's decision in the U.S. District Court for the District of New Jersey. The court ruled for Sanchez, reasoning that INA § 244(f)(4)'s language that a TPS recipient "shall be considered" to have "lawful status as a nonimmigrant" for purposes of adjustment of status required treating TPS recipients as though they had been "inspected and admitted."

The U.S. Court of Appeals for the Third Circuit reversed. The court rejected the argument that, by having "lawful status as a nonimmigrant," a TPS recipient is necessarily "inspected and admitted." The court noted that obtaining "lawful status" is different than "admission," defined in the INA as "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." The court observed that while "admission often accompanies a grant of lawful status, it does not follow that a grant of lawful status is an admission." The court thus held that a grant of TPS does not constitute an admission for purposes of adjustment of status. Sanchez petitioned for review of the Third Circuit's decision before the Supreme Court.

The Supreme Court's Decision

On June 7, 2021, the Supreme Court held that the grant of TPS does not satisfy the lawful admission requirement for adjustment of status. In a unanimous opinion authored by Justice Kagan, the Court first observed that INA § 245(a) plainly requires an adjustment applicant to have been "inspected and admitted or paroled into the United States." The Court described a separate provision, INA § 245(k), as allowing employment-based visa beneficiaries to pursue adjustment despite having accrued unlawful presence or engaged in unauthorized employment only if the alien is present in the United States "pursuant to a lawful admission." Noting that Sanchez never claimed that he has been lawfully admitted "without aid from the TPS provision," the Court determined that "[a] straightforward application of [INA § 245] thus supports the Government's decision to deny him LPR status."

The Court held that the fact that Sanchez was granted TPS did not make him eligible for adjustment of status. The Court reasoned that, although under INA § 244(f)(4), a TPS recipient is considered to have lawful nonimmigrant "status," that provision does not enable a TPS recipient to meet INA § 245's separate requirement of being "admitted" because lawful status and admission "are distinct concepts in immigration law." While lawful status may be conferred upon entry into the United States or sometime after entry, the Court explained, an admission requires a physical entry after inspection and authorization by an immigration officer. According to the Court, "because a grant of TPS does not come with a ticket of admission, it does not eliminate the disqualifying effect of an unlawful entry."

The Court rejected Sanchez's argument that nonimmigrant status necessarily involves an admission to the United States because "one cannot obtain lawful nonimmigrant status without admission." The Court recognized that, under INA provisions regulating the process for admitting aliens, most aliens acquire nonimmigrant status through an admission. Still, the Court observed, nothing in the INA provides that admission is necessarily a prerequisite for nonimmigrant status. In fact, the Court noted, under the INA some aliens can receive nonimmigrant status without being admitted (e.g., qualifying alien crewmen arriving in the United States; certain crime victims who had entered the country unlawfully). Without "an indissoluble link" between nonimmigrant status and admission, the Court concluded, "there is no reason to view the TPS provision's conferral of nonimmigrant status as also a conferral of admission."

The Court thus held that INA § 245 generally requires a lawful admission before an applicant can obtain LPR status, and that the grant of TPS does not constitute an admission. The Court thus affirmed the denial of Sanchez's adjustment application.

Implications of the Court's Decision and Legislative Options

Sanchez clarified that an adjustment applicant generally must have been inspected and admitted into the United States, and that the grant of TPS does not qualify as an "admission." Given the Court's ruling, aliens who unlawfully entered the United States without inspection by immigration authorities, and who later received TPS, generally will remain ineligible for adjustment of status. Because many aliens with TPS entered the United States without inspection, the Court's decision potentially could mean that they will be unable to adjust status.

Despite the Court's ruling, it is possible that some TPS recipients have a separate foothold in the United States that enables them to pursue adjustment, even if their grant of TPS does not. For example, aliens who first entered the United States without inspection, but were later permitted to travel abroad and return to the United States (e.g., using an "advance parole" document) are considered to be "inspected and admitted or paroled" for adjustment purposes if they had departed and returned to the United States before

August 20, 2020 (such aliens could still be barred from adjustment under INA § 245(c) if they had accrued unlawful presence in the United States before being granted TPS, but this bar does not apply to immediate relatives of U.S. citizens, among other classes of aliens). Under INA § 245(i), a very small (and decreasing) category of aliens who unlawfully entered the United States may pursue adjustment if they were the beneficiaries of visa petitions filed on or before April 30, 2001; or if they were "grandfathered derivative beneficiaries" who were the spouses or children (defined as unmarried and under 21 years of age) of the alien beneficiary when the qualifying visa petition was filed. Under INA § 245(m), aliens who obtained "U" nonimmigrant status as the victims of certain enumerated crimes, including those who had entered the United States unlawfully, may apply for adjustment if they meet applicable requirements. Additionally, under the Violence Against Women Act, some aliens battered or subjected to extreme cruelty by a U.S. citizen or LPR spouse or parent may adjust status, even if they were never lawfully admitted into the United States.

A TPS recipient who is otherwise barred from adjustment could potentially apply for certain other forms of relief from removal that lead to LPR status. For instance, an alien who fears persecution in his or her country may apply for asylum, and if the application is granted, the alien may pursue LPR status after one year (the asylum application generally must be filed within one year of the alien's arrival in the United States, but exceptions exist for changed or extraordinary circumstances). Additionally, certain long-term residents of the United States who are placed in formal removal proceedings may seek cancellation of removal and adjust to LPR status if they meet certain requirements (e.g., showing that removal would lead to "exceptional and extremely unusual hardship" to a qualifying relative).

Finally, as the Supreme Court indicated, Congress may clarify whether TPS recipients can apply for adjustment of status. In the 117th Congress, the U.S. Citizenship Act (S. 348, H.R. 1177), the American Dream and Promise Act of 2021 (H.R. 6), and the SECURE Act (S. 306) would provide that a person granted TPS be considered to be "inspected and admitted" for establishing eligibility for adjustment. The U.S. Citizenship Act would also exempt TPS recipients from INA § 245(c)'s bars to adjustment, including for accrual of unlawful presence and unauthorized employment. These bills would also allow current TPS holders to adjust to LPR status even without having to qualify independently for an immigrant visa petition (as generally required under INA § 245(a)), if they meet specified criteria (e.g., showing continuous physical presence in the United States for a certain period).

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