UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

Amado de Jesus MORENO; Nelda Yolanda REYES; Jose CANTARERO ARGUETA; Haydee AVILEZ ROJAS,

Plaintiffs,

v.

Kirstjen NIELSEN, Secretary, U.S. Department of Homeland Security, in her official capacity; U.S. DEPARTMENT OF HOMELAND SECURITY; L. Francis CISSNA, Director, U.S. Citizenship and Immigration Services, in his official capacity; U.S. CITIZENSHIP AND IMMIGRATION SERVICES,

Defendants.

Case No. 1:18-cv-01135 (RRM)

FIRST AMENDED CLASS ACTION COMPLAINT FOR DECLARATORY, INJUNCTIVE, AND MANDAMUS RELIEF

INTRODUCTION

1. Plaintiffs and members of the proposed class (hereinafter Plaintiffs) reside within the jurisdictions of the U.S. Courts of Appeals for the First, Second, Third, Fourth, Fifth, Seventh, Eighth, Tenth, and District of Columbia Circuits. All entered the United States without inspection and subsequently applied for and were granted Temporary Protected Status (TPS). After years of living in the country in this lawful—although nonpermanent—status, they seek to become lawful permanent residents based on visa petitions filed on their behalf. However, their applications have been, or will be, denied due to Defendants' erroneous interpretation of one provision of the TPS statute, 8 U.S.C. § 1254a(f).

2. TPS provides a temporary haven for noncitizens living in the United States when natural disasters or civil strife in their home countries render it unsafe for them to return. Noncitizens

granted TPS by Defendant U.S. Citizenship and Immigration Services (USCIS), a component of Defendant U.S. Department of Homeland Security (DHS), have non-permanent lawful status. While in TPS, beneficiaries are protected from removal and eligible for work authorization.

3. The Secretary of the Department of Homeland Security (DHS) is responsible for designating countries for TPS and for periodically assessing whether to renew or terminate such designations. At the start of 2017, ten countries were designated for TPS. For example, Somalia was designated in 1991, Sudan in 1997, Honduras and Nicaragua in 1999, and El Salvador in 2001, and these designations were continuously renewed until 2017. Over the past year, DHS terminated TPS—i.e. determined that there would be no further renewals of the country's TPS designation—for four countries, subject to deferred effective dates. As a result, TPS will permanently expire for El Salvador, Nicaragua, Sudan, and Haiti between November 2018 and September 2019. Four more designations (Honduras, Nepal, Somalia, and Yemen) are scheduled for review in 2018, and the final two, South Sudan and Syria, will be reviewed in 2019. As a result, Plaintiffs and purported class members are uncertain as to their future status in the United States.

4. During their many years as TPS holders, Plaintiffs and proposed class members have integrated fully into their communities in the United States. They marry, raise U.S. citizen children, purchase homes, work, pursue training and education, and join churches and community groups. As part of the TPS process, they undergo background checks and regular re-registration.

5. Plaintiffs and proposed class members wish to adjust their status to that of lawful permanent residents so that they may continue to make the United States their home, despite the recent or potential termination of their TPS. Each has an approved visa petition filed by a U.S. citizen spouse, adult child, parent, or employer and thus independently qualifies to apply to adjust his or her status

to lawful permanent resident. But for Defendants' erroneous interpretation of 8 U.S.C. § 1254a(f), they would be eligible to do so.

6. To adjust to lawful permanent resident status, Plaintiffs and class members must demonstrate to Defendant USCIS that they were inspected and admitted to the United States. *See* 8 U.S.C. § 1255(a), (k). The TPS statute provides that, for purposes of adjustment of status under § 1255, a TPS holder is "considered as being in, and maintaining, lawful status as a nonimmigrant." 8 U.S.C. § 1255a(f)(4). Two Courts of Appeals have held that, pursuant to the plain language of this statute, a TPS holder is deemed to have been inspected and admitted because he or she is deemed to be in "lawful nonimmigrant status," and an individual in such status necessarily has been inspected and admitted. *Ramirez v. Brown*, 852 F.3d 954 (9th Cir. 2017); *Flores v. USCIS*, 718 F.3d 548 (6th Cir. 2013); *but see Serrano v. U.S. Att'y Gen.*, 655 F.3d 1260 (11th Cir. 2011). Defendants comply with the plain language of the statute when adjudicating the adjustment of status applications of TPS holders residing within the geographic borders of the U.S. Courts of Appeals for the Sixth and Ninth Circuits.

7. In the jurisdictions covered by the proposed class, Defendants have a policy of denying the adjustment of status applications of TPS holders who initially entered without inspection and admission, refusing to give effect to 8 U.S.C. § 1245a(f)(4) and refusing to acknowledge that a grant of TPS constitutes the inspection and admission required to adjust status. Defendants have denied or will deny the adjustment applications of all Plaintiffs and class members pursuant to this policy. Plaintiffs and class members seek declaratory and injunctive relief to remedy Defendants' violation of the statute.

JURISDICTION AND VENUE

8. This case arises under the Immigration and Nationality Act (INA), 8 U.S.C. § 1101 *et seq.*,

the regulations implementing the INA, and the Administrative Procedure Act (APA), 5 U.S.C. § 701 *et seq*.

9. Jurisdiction is conferred on this Court pursuant to 28 U.S.C. § 1331, as a civil action arising under the laws of the United States, and the Mandamus and Venue Act of 1962, 28 U.S.C. § 1361. The Court may grant declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201-2202, 5 U.S.C. § 702, and 28 U.S.C. § 1361. The United States has waived its sovereign immunity pursuant to 5 U.S.C. § 702.

10. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(e) because Defendants are officers or employees of the United States, or agencies thereof, acting in their official capacities, a substantial part of the events or omissions giving rise to the claims occurred in this district, and Plaintiff Amado de Jesus Moreno resides in this district, as do many putative class members. In addition, no real property is involved in this action.

PARTIES

11. Plaintiff Amado de Jesus Moreno is a national of El Salvador who entered the United States without inspection in 2000. He was granted TPS in 2001 and has maintained that status ever since. He is eligible to adjust to lawful permanent resident status based upon a visa petition filed by his U.S. employer. Defendant USCIS denied his adjustment application solely based on its erroneous policy that TPS does not constitute a qualifying inspection and admission to the United States. Plaintiff Moreno resides in Brooklyn, New York.

12. Plaintiff Nelda Yolanda Reyes is a national of Honduras who first entered the United Statutes without inspection in the late 1990s. She was granted TPS in 1999 and has maintained that status ever since. She is eligible to adjust to lawful permanent resident status based upon her a visa petition filed by her adult U.S. citizen son. Defendant USCIS denied her adjustment application

solely based on its erroneous policy that TPS does not constitute a qualifying inspection and admission to the United States. Plaintiff Reyes resides in Green Bay, Wisconsin.

13. Plaintiff Jose Cantarero Argueta is a national of Honduras who first entered the United States without inspection in 1997. He was granted TPS in 1999 and has maintained that status ever since. He is eligible to adjust to lawful permanent resident status based upon a visa petition filed by his U.S. employer. Defendant USCIS has notified him of its intent to deny his pending adjustment application solely based on its erroneous policy that TPS does not constitute a qualifying inspection and admission to the United States. Plaintiff Cantarero Argueta resides in Mt. Airy, Maryland.

14. Plaintiff Haydee Avilez Rojas is a national of Honduras who first entered the United States without inspection in 1998. She was granted TPS in 2000 and has maintained that status ever since. She is eligible to adjust to lawful permanent resident status based upon a visa petition filed by her U.S. citizen husband. Plaintiff Rojas anticipates that Defendant USCIS will deny her pending adjustment application based solely on its erroneous policy that TPS does not constitute a qualifying inspection and admission to the United States. Plaintiff Rojas resides in Plainfield, New Jersey.

15. Defendant Kirstjen Nielsen is the Secretary of DHS, an "agency" within the meaning of the APA, 5 U.S.C. § 551(1). In this capacity, she is responsible for the administration of the INA and for overseeing, directing, and supervising all DHS component agencies, including USCIS. She is sued in her official capacity.

16. Defendant DHS is an executive agency of the United States, and an "agency" within the meaning of the APA, 5 U.S.C. § 551(1). Since March 1, 2003, DHS has been the agency responsible for implementing the INA, including provisions relating to TPS and adjustment of status.

17. Defendant L. Francis Cissna is the Director of USCIS, an "agency" within the meaning of the APA, 5 U.S.C. §551(1). In this capacity, he oversees the adjudication of immigration benefits and

establishes and implements governing policies. 6 U.S.C. § 271(a)(3) and (b). He has ultimate responsibility for the adjudication of adjustment of status applications and is sued in his official capacity.

18. Defendant USCIS is a component of DHS, 6 U.S.C. § 271, and an "agency" within the meaning of the APA, 5 U.S.C. § 551(1). USCIS is responsible for adjudicating immigration benefit applications, including applications for TPS and adjustment of status.

FACTUAL ALLEGATIONS

Amado de Jesus Moreno

19. Plaintiff Amado de Jesus Moreno is a 45-year-old noncitizen from El Salvador who first entered the United States without inspection on or about August 2000. In 2001, Defendant USCIS granted him TPS. He has maintained that status for more than sixteen years, renewing it and the attendant employment authorization regularly as required by USCIS.

20. Plaintiff Moreno resides in Brooklyn, New York with his wife and his two U.S. citizen daughters, ages 6 and 12. He also has two sons, currently ages 19 and 24, who reside in El Salvador.

21. In 2011, USCIS granted Plaintiff Moreno advance permission to travel outside of the United States. Upon his return, on or about July 26, 2011, DHS inspected and paroled him into the United States as a TPS holder.

22. Plaintiff Moreno has worked as a telemarketer for Jersey Lynne Farms, a wholesale food distributor, since August 2000. In 2008, his employer began the process of petitioning for a visa for Plaintiff Moreno so that it could promote him to a customer services managerial position upon receipt of lawful permanent resident status. In this managerial position, he would be responsible for supervising four telemarketers, handling complaints, taking orders, and responding to Spanish speaking customers.

23. Jersey Lynne Farms took the first step in the visa application process in June 2008, filing an application for a labor certification with the Department of Labor (DOL). DOL approved this application on August 7, 2012. On or about January 30, 2013, Jersey Lynne Farms took the second step in the process, filing a visa petition with USCIS on Plaintiff Moreno's behalf. USCIS approved this petition on November 13, 2014.

24. With an approved visa petition, Plaintiff Moreno was able to file an application to adjust his status to that of a lawful permanent resident with USCIS, which he did on or about January 15, 2015. At the same time, he filed an application on behalf of his sons—both of whom were children as defined in 8 U.S.C. § 1101(b)(a) at the time—to allow them to obtain visas as his derivatives.

25. USCIS denied his adjustment of status application on April 7, 2017, finding that Plaintiff Moreno was ineligible for adjustment of status because he had entered without inspection and failed to maintain a lawful status from the date of his entry until his receipt of TPS. Shortly thereafter, Plaintiff Moreno filed a request to reopen the decision, arguing that, because he had been paroled into the United States in 2011, he satisfied the "inspected and admitted or paroled" requirement of 8 U.S.C. § 1255(a). Additionally, he argued that, under 8 U.S.C. § 1255(k), he was exempt from the unlawful presence bar to adjustment found in 8 U.S.C. § 1255(c) because—since his 2011 parole—he had been lawfully present pursuant to TPS and, therefore, had not engaged in unauthorized employment nor violated the terms or conditions of his parole.

26. On July 14, 2017, USCIS denied Plaintiff Moreno's motion to reopen, finding him ineligible for the 8 U.S.C. § 1255(k) exemption to the unlawful presence bar to adjustment because that section applies only if the individual was "admitted" to the United States, and a parole is not an admission. As a result, USCIS indicated that his period of unlawful presence prior to his grant of TPS disqualified him for adjustment of status under 8 U.S.C. § 1255(a) and (c).

27. But for Defendants' unlawful policy Plaintiff Moreno's adjustment application would not have been denied on this basis. Instead, had USCIS treated his grant of TPS as an inspection and admission for purposes of his adjustment of status application, as required by the plain language of the TPS statute, 8 U.S.C. § 1254a(f)(4), the agency would have found that he was eligible for the exemption from the unlawful presence bar to adjustment of status found in § 1255(k) and also for adjustment of status.

28. Plaintiff Moreno was and continues to be harmed by this denial. Without permanent resident status, he has not received the promotion and accompanying pay raise promised by his employer. His sons, as derivatives on his application, have not been able to get in the visa queue and move forward with their own efforts to join their father and family in the United States. Finally, Plaintiff Moreno will lose TPS and the attendant employment authorization in 18 months when the TPS designation for El Salvador is terminated and will be at risk of deportation. Deportation would split his family apart, depriving his minor U.S. citizen children of their father. For all of these reasons, he wishes to have his adjustment application fairly adjudicated in accordance with the law.

Nelda Yolanda Reyes

29. Plaintiff Nelda Yolanda Reyes is a 64-year-old noncitizen from Honduras who first entered the United States without inspection in the late 1990s. She subsequently was granted TPS, valid as of July 7, 1999 and has maintained that status for eighteen years.

30. Plaintiff Reyes resides in Green Bay, Wisconsin. She has resided in the same home for close to ten years. She has five adult children, some of whom are U.S. citizens.

. Plaintiff Reyes' adult U.S. citizen son, who resides near her in Green Bay, Wisconsin, filed a visa petition on her behalf with USCIS on or about October 14, 2015. USCIS has not adjudicated this visa petition yet.

31. Concurrently with her son filing the visa petition, Plaintiff Reyes filed her adjustment of status application with USCIS. On or about November 12, 2015, USCIS sent Plaintiff Reyes a request for evidence establishing that she had been admitted or paroled into the United States. Her attorney responded on February 1, 2016, explaining that her grant of TPS constituted an inspection and admission for purposes of adjustment, in accord with the plain language of 8 U.S.C. § 1254a(f)(4).

32. On September 5, 2015, USCIS denied the adjustment application, stating that Plaintiff Reyes had failed to demonstrate eligibility when she failed to produce evidence that she had been inspected and admitted or paroled into the United States. But for Defendants' unlawful policy, Plaintiff Reyes' adjustment application would not have been denied on this basis. Instead, had USCIS treated her grant of TPS as an inspection and admission for purposes of her adjustment of status application, as required by the plain language of 8 U.S.C. § 1254a(f)(4), the agency would not have found her ineligible for adjustment of status.

33. Plaintiff Reyes was and continues to be harmed by this denial. Because Defendant DHS renewed the TPS designation for Honduras only until July 2018, she faces uncertainty regarding her future protected status. Plaintiff Reyes seeks to become a lawful permanent resident to avoid any future loss of her protected status and to remain near her family in Wisconsin. It is uncertain whether DHS will renew the TPS designation for Honduras in July 2018 or—as has been true with respect to several other TPS designated countries—terminate. Should DHS terminate the TPS designation for Honduras, Plaintiff Reyes will lose her status, face deportation to a country in which she has not resided for close to two decades and be separated from her U.S. citizen children. For all of these reasons, she wishes to have her adjustment application fairly adjudicated in accordance with the law.

Jose Cantarero Argueta

34. Plaintiff Jose Cantarero Argueta is a 40-year-old noncitizen from Honduras who first entered the United States without inspection on or about April 7, 1997. He subsequently was granted TPS in 2000 and has remained in that status for more than 17 years.

35. Plaintiff Cantarero Argueta resides in Mt. Airy, Maryland with his wife and his two U.S. citizen children, ages 14 and 15.

36. In 2014, USCIS granted Plaintiff Cantarero Argueta advance permission to travel outside of the United States. Upon his return, on or about March 9, 2014, he was paroled into the United States as a TPS holder.

37. Plaintiff Cantarero Argueta is the primary wage earner in his family. He has worked as kitchen manager since 2006, with two different employers. On or about November 13, 2014, his then employer, Unlimited Ventures, took the first step in the visa application process for him, filing an application for a labor certification with DOL. DOL approved this application on April 23, 2015. Unlimited Ventures then filed a visa petition on his behalf with USCIS on July 31, 2015. At the same time, Plaintiff Cantarero Argueta filed an application for adjustment of status with USCIS. USCIS approved the visa petition on April 11, 2016.

38. While Plaintiff Cantarero Argueta's adjustment application was pending, Unlimited Ventures sold the company, and Plaintiff Cantarero Argueta returned to full-time employment with his prior employer, MJJ Enterprises. He subsequently filed the necessary paperwork regarding this change in employment with USCIS, thus demonstrating his continuing eligibility to adjust status based upon the approved visa petition filed by Unlimited Ventures. He remains employed as a kitchen manager by MJJ Enterprises.

39. On February 9, 2018, USCIS sent Plaintiff Cantarero Argueta a Notice of Intent to Deny his

adjustment application because his parole in 2014 is not an admission, and without an admission he is not eligible for a waiver of the bar to adjustment for unlawful presence under § 1255(k). Plaintiff Cantarero Argueta intends to respond to this Notice by explaining that he was inspected and admitted when he was granted TPS and, therefore, is eligible for the § 1255(k) waiver. Nevertheless, Plaintiff Cantarero Argueta anticipates that his adjustment application will be denied based on USCIS' policy of not treating a grant of TPS as an inspection and admission for purposes of adjustment. But for Defendants' unlawful policy, Plaintiff Cantarero Argueta would be found eligible both for the exemption from the unlawful presence bar to adjustment of status found in § 1255(k) and also for adjustment of status.

40. Plaintiff Cantarero Argueta will be harmed when USCIS denies his adjustment application. Because Defendant DHS renewed TPS for Honduras only until July 2018, he faces uncertainty regarding his future status within the United States. He seeks to become a lawful permanent resident to avoid any future loss of his protected status and to ensure that he can remain in the United States with his family. It is uncertain whether DHS will renew the TPS designation for Honduras in July 2018 or—as has been true with respect to several other TPS designated countries—terminate. Should DHS terminate the TPS designation for Honduras, Plaintiff Cantarero Argueta will lose his status and face deportation to a country in which he has not resided for over 20 years. Deportation would split his family apart, depriving his minor U.S. citizen children of their father, the primary wage earner for the family. For all of these reasons, he wishes to have his adjustment application fairly adjudicated in accordance with the law.

Haydee Avilez Rojas

41. Plaintiff Haydee Avilez Rojas is a 64-year-old noncitizen from Honduras who first entered the United States without inspection on or about May 1998. On or about February 9, 2000, USCIS

granted her TPS. She has maintained that status for 18 years, renewing it and the attendant employment authorization as required by USCIS.

42. Plaintiff Avilez Rojas, who is retired, resides in Plainfield, New Jersey with her 70-year-old U.S. citizen husband, Rigoberto Samayoa. She has lived at the same address for more than 15 years. She has three adult children. Both she and her husband have medical problems. Plaintiff Avilez Rojas suffers from high blood pressure and her husband has had to have two prostate surgeries.

43. Plaintiff Avilez Rojas's husband filed a visa petition on her behalf with USCIS on or about February 15, 2017. USCIS approved this petition on September 13, 2017.

44. On or about February 15, 2018, Plaintiff Avilez Rojas filed her adjustment of status application by mailing it to USCIS. Although USCIS has not yet adjudicated the application, Plaintiff Avilez Rojas anticipates that it will be denied based on USCIS' policy of not treating a grant of TPS as an inspection and admission for purposes of adjustment. But for Defendants' unlawful policy, Plaintiff Avilez Rojas would be found eligible for adjustment of status.

45. Plaintiff Avilez Rojas will be harmed when USCIS denies her adjustment application. Because Defendant DHS renewed TPS for Honduras only until July 2018, she faces uncertainty regarding her future status within the United States. She seeks to become a lawful permanent resident to avoid any future loss of her protected status and to ensure that she can remain in the United States with her elderly husband. It is uncertain whether DHS will renew the TPS designation for Honduras in July 2018 or—as has been true with respect to several other TPS designated countries—terminate. Should DHS terminate the TPS designation for Honduras, Plaintiff Avilez Rojas will lose her status and face deportation to a country in which she has not resided for close to two decades. Deportation would split her family apart. Given her age and her high blood pressure, she will be unable to support herself in Honduras. Furthermore, Plaintiff Avilez Rojas's U.S.

citizen husband, who has had two prostate surgeries, will suffer extreme hardship if Plaintiff Avilez Rojas is deported. For all of these reasons, he wishes to have his adjustment application fairly adjudicated in accordance with the law.

BACKGROUND

46. This case involves noncitizens who have maintained lawful Temporary Protected Status for years—in many cases, close to two decades—and who, during this time, established close relationships with U.S. citizens and businesses. Relying upon these relationships, they now seek to become lawful permanent residents pursuant to the adjustment of status statute, 8 U.S.C. § 1255. At issue in this case is the interplay between that statute and the TPS statute, 8 U.S.C. § 1254a(f)(4).

Temporary Protected Status

47. Congress enacted the TPS statute in 1990 as a humanitarian program. Pursuant to 8 U.S.C. § 1254a(b), the DHS Secretary may designate a foreign country for TPS due to conditions in the country that temporarily prevent its nationals from returning safely, or in certain circumstances, where the country is unable to handle the return of its nationals adequately. USCIS may grant TPS to nationals of the designated countries who meet specific eligibility criteria, including presence in the United States at the time of designation.

48. The Secretary has designated countries for TPS following environmental disasters, such as an earthquake or hurricane; epidemics; and ongoing armed conflicts, such as civil wars. On January 1, 2017, ten countries were designated for TPS: El Salvador, Haiti, Honduras, Nepal, Nicaragua, Somalia, South Sudan, Sudan, Syria, and Yemen. Several of these were first designated close to or more than two decades ago: Somalia, 1991; Sudan, 1997; Honduras, 1999; Nicaragua, 1999; and El Salvador, 2001. The others were designated within the last seven years. *See* Temporary Protected Status, https://www.uscis.gov/humanitarian/temporary-protected-status (last visited February 20,

2018).

49. Until 2017, the designations of each of these countries were extended continuously following the Secretary's periodic review. In 2017, Defendant Nielsen's predecessor announced the termination of the TPS designation for three countries—Haiti, Nicaragua, and Sudan. On January 9, 2018, Defendant Nielsen announced the termination of the TPS designation for El Salvador. With respect to each termination, the Secretary deferred the effective date for between 12 to 18 months "to provide time for individuals with TPS to seek an alternative lawful immigration status in the United States, if eligible, or, if necessary, arrange for their departure." Press Release, Department of Homeland Security, Acting Secretary Elaine Duke Announcement on Temporary Protected Status for Nicaragua And Honduras (Nov. 6, 2017), *available at* https://www.dhs.gov/news/2017/11/06/acting-secretary-elaine-duke-announcement-temporary-protected-status-nicaragua-and; *see also* Press Release, Department of Homeland Security, Secretary of Homeland Security Kirstjen M. Nielsen Announcement on Temporary Protected Status for El Salvador (Jan. 8, 2018), *available at* https://www.dhs.gov/news/2018/01/08/secretary-homeland-security-kirstjen-m-nielsen-announcement-temporary-protected.

50. The Secretary will decide whether to terminate the designation of all other countries except South Sudan and Syria in 2018, and a decision as to those remaining two countries in 2019. Given the Trump Administration's hostility to the TPS program, all countries with TPS designation are at risk of termination. *See, e.g.*, Nick Miroff and David Nakamura, *200,000 Salvadorans may be forced to leave the U.S. as Trump ends immigration protection*, Washington Post, Jan. 8, 2018 (reporting that "Trump administration officials have repeatedly said they considered the TPS program an example of American immigration policy gone awry . . .").

51. Upon initial designation of a country for TPS, DHS issues a notice advising nationals of that

country of a period in which they may apply for TPS if they meet certain eligibility requirements, including continuous presence in the United States since the date of the designation, continuous residence in the United States since a date specified in the DHS notice, and being admissible to the United States. With respect to the admissibility requirement, certain grounds of inadmissibility are waived by statute and others may be waived at the discretion of DHS. 8 U.S.C. § 1254a(c)(1), (2). Individuals convicted of certain crimes or found to be a security risk are not eligible for TPS. 8 U.S.C. § 1254a(c)(2)(B).

52. The application process is a rigorous one. Defendants screen applicants' biometrics, admissibility, and general eligibility for TPS. Only after applicants have been thoroughly screened are they approved for TPS.

53. TPS provides temporary lawful status to beneficiaries. Pursuant to the statute, the Secretary of DHS must review and either terminate or re-designate TPS designations every 6 to 18 months. 8 U.S.C. § 1254a(b)(3)(C). TPS holders must reapply after each re-designation to renew their status, verifying that they continue to satisfy all eligibility requirements.

54. While noncitizens' TPS is in effect, they cannot be removed from the United States or detained by DHS for lack of immigration status, are entitled to employment authorization, and may travel abroad with the prior consent of DHS. 8 U.S.C. § 1254a(a)(1), (d)(4), (f)(3).

. Additionally, the TPS statute specifies that "for purposes of adjustment of status under [8 U.S.C. § 1245] and change of status under [8 U.S.C. § 1258], the [noncitizen] shall be considered as being in, and maintaining, lawful status as a nonimmigrant." 8 U.S.C. § 1254a(f)(4).

Adjustment of Status

55. Adjustment of status is the mechanism by which an eligible noncitizen who is present in the United States applies for lawful permanent resident status based on a relationship to a U.S. citizen

family member or employer. Adjustment of status allows applicants to apply to obtain lawful status while remaining in the United States, instead of requiring them to first return to their home countries and apply for immigrant visas from a U.S. embassy or consulate abroad, which is often a lengthy application process.

56. In general, to apply for adjustment of status, an individual must demonstrate that he or she has been "inspected and admitted or paroled into the United States." 8 U.S.C. § 1255(a). Additionally, an adjustment applicant must demonstrate that he or she is eligible to receive an immigrant visa (based on the qualifying relationship) and has an immigrant visa immediately available at the time the individual files an adjustment application. 8 U.S.C. § 1255(a). Finally, the applicant must demonstrate admissibility to the United States; i.e., that he or she either is not subject to an enumerated ground of inadmissibility set forth in 8 U.S.C. § 1182 or qualifies for a waiver of any such ground. *Id*.

57. With exceptions relevant here, an otherwise eligible individual is barred from adjusting if, inter alia, he or she has worked in the United States without authorization, is in unlawful immigration status on the date of filing an adjustment application or has failed to maintain continuously a lawful status since entry into the United States. 8 U.S.C. § 1255(c)(2).

58. Certain individuals are not subject to the § 1255(c)(2) bar to adjustment, including: (a) "immediate relatives," defined as the children and spouses of U.S. citizens and the parents of U.S. citizens provided the citizen son or daughter is at least 21 years old, *see* 8 U.S.C. § 1151(b)(2)(A)(i); and (b) employment-based visa beneficiaries who: (i) are present in the United States pursuant to a lawful admission on the date of filing the adjustment application; and (ii) after such lawful admission, have not, for an aggregate period of more than 180 days, failed to maintain continuous lawful status, engaged in unauthorized employment, or otherwise violated the terms of admission. 8

U.S.C. §§ 1255(c)(2), (k).

Intersection of TPS and Adjustment of Status

59. Two Courts of Appeals have held that 8 U.S.C. § 1254a(f)(4) unambiguously requires that TPS holders are deemed "inspected and admitted" for purposes of adjustment of status under 8 U.S.C. § 1255(a). *Ramirez v. Brown*, 852 F.3d 954 (9th Cir. 2017); *Flores v. USCIS*, 718 F.3d 548 (6th Cir. 2013). The plaintiffs in both cases and Plaintiffs and proposed class members here share identical facts: they initially entered without inspection, subsequently were granted TPS, and then became eligible to adjust to lawful permanent resident status based on a qualifying relationship. In both *Ramirez* and *Flores*, USCIS denied the plaintiffs' adjustment applications solely because they allegedly failed to demonstrate that they had been inspected and admitted as required by 8 U.S.C. § 1255(a). Both circuit courts rejected USCIS' position, holding instead that, because the TPS statute specifically deems the TPS holder to be in lawful nonimmigrant status for purposes of adjustment of status, the beneficiary is deemed to have met all requirements for nonimmigrant status, including inspection and admission. In a per curiam decision, the Eleventh Circuit held the opposite, ultimately deferring to USCIS without fully analyzing the interplay of the two statutory provisions. *Serrano v. U.S. Att'y Gen.*, 655 F.3d 1260 (11th Cir. 2011).

60. To date, no other Court of Appeals has ruled on the issue, and, on information and belief, no cases are known to be pending.

61. Two district courts followed the lead of the Sixth Circuit; in both cases, Defendants either failed to appeal or withdrew their appeal. *Bonilla v. Johnson*, 149 F. Supp. 3d 1135 (D. Minn. 2016); *Medina v. Beers*, 65 F. Supp. 3d 419 (E.D. Pa. 2014). Another district court extended the Ninth Circuit's holding in *Ramirez v. Brown*; Defendants initially appealed but then withdrew their appeal of this decision. *Figueroa v. Rodriguez*, No. 16-8218 PA, 2017 U.S. Dist. LEXIS 128120

(C.D. Cal. Aug. 10, 2017).

62. USCIS has a written policy rejecting the plain language of the statute, as interpreted by the Sixth and Ninth Circuits and district courts discussed *supra*. In that policy, USCIS declares that "[a] foreign national who enters the United States without inspection and subsequently is granted temporary protected status (TPS) does not meet the inspected and admitted or inspected and paroled requirement." USCIS Policy Manual, Vol. 7, Part B, Ch. 2(A)(5) (Aug. 23, 2017), *available at* https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume7-PartB-Chapter2.html. In a footnote, the policy manual acknowledges that the Sixth Circuit has ruled to the contrary, but clarifies that that court's holding will only be given effect in the cases of applicants living within the Sixth Circuit. *Id*. n.56.

63. As a direct consequence of Defendants' policy, the applications of all Plaintiffs and proposed class members who otherwise qualify for adjustment of status have been or will be denied by Defendant USCIS.

CLASS ALLEGATIONS

64. Plaintiffs bring this action on behalf of themselves and all others who are similarly situated pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(2). A class action is proper because this action involves questions of law and fact common to the classes, the class is so numerous that joinder of all members is impractical, Plaintiffs' claims are typical of the claims of the class, Plaintiffs will fairly and adequately protect the interests of the respective class, and Defendants have acted on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate with respect to the class as a whole.

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65. Plaintiffs seek to represent the following class:

> All individuals with TPS who reside within the geographic boundaries of the Courts of Appeals for the First, Second, Third, Fourth, Fifth, Seventh, Eighth, Tenth, and District of Columbia Circuits; whose initial entries into the United States were without inspection; who have applied or will apply for adjustment of status to lawful permanent residence with USCIS; and whose adjustment applications have been or will be denied on the basis of USCIS' policy that TPS does not constitute an admission for purposes of adjusting status under 8 U.S.C. § 1255.

66. Plaintiffs Moreno, Reyes, Cantarero Argueta, and Avilez Rojas seek to represent this class. The class is so numerous that joinder of all members is impracticable. Plaintiffs are not aware of the precise number of potential class members because Defendants have sole possession of the information needed to identify such persons. Upon information and belief, there are hundreds of individuals who currently hold TPS and are eligible to adjust status, but whose applications USCIS has denied or will deny claiming they were not inspected and admitted or paroled into the United States.

67. A question of law common to the proposed class predominates over any questions affecting only the individually named Plaintiffs, namely: whether USCIS' policy of finding TPS holders ineligible for adjustment of status under 8 U.S.C. § 1255(a) violates the INA and its implementing regulations, and the APA. Like proposed class members who USCIS has found or will find ineligible for adjustment of status under § 1255(a), Plaintiffs' applications have been denied based on this policy.

68. Plaintiffs' claims are typical of the claims of the proposed class. Plaintiffs all entered the United States without inspection, subsequently were granted TPS and continue to hold that status, have applied for adjustment of status, and have been or will be denied adjustment by USCIS for the purported reason that they were not inspected and admitted or paroled.

69. Plaintiffs will fairly and adequately protect the interests of the proposed class members

because they seek relief on behalf of the class as a whole and have no interest antagonistic to other class members.

70. Plaintiffs are represented by competent counsel with extensive experience in complex class actions and immigration law.

71. Defendants have acted on grounds generally applicable to the proposed class, thereby making appropriate final declaratory and injunctive relief.

DECLARATORY AND INJUNCTIVE RELIEF ALLEGATIONS

72. An actual and substantial controversy exists between the proposed classes and Defendants as to their respective legal rights and duties. Plaintiffs contend that Defendants' actions violate Plaintiffs' rights and the rights of the proposed class.

73. Defendants' misinterpretation of the TPS and adjustment of status provisions of the INA and corresponding policy of denying the adjustment applications of TPS holders for the alleged lack of an inspection and admission, notwithstanding their receipt of TPS, has caused and will continue to cause irreparable injury to Plaintiffs and proposed class members. Plaintiffs and proposed class members have been denied, or are at risk of being denied, lawful permanent resident status solely on the basis of alleged statutory ineligibility in violation of the INA.

74. Plaintiffs have no adequate remedy at law. They do not seek a favorable exercise of USCIS' discretion to grant their adjustment of status applications, but instead seek an order declaring USCIS' policy unlawful and prohibiting USCIS from applying it.

75. There are no administrative remedies that Plaintiffs are required to exhaust. *Darby v. Cisneros*, 509 U.S. 137 (1993).

76. Under 5 U.S.C. §§ 702 and 704, Plaintiffs and proposed class members have suffered a "legal wrong" and have been "adversely affected or aggrieved" by agency action for which there is

no other adequate remedy in a court of law.

77. Based on the foregoing, the Court should grant declaratory and injunctive relief under 28 U.S.C. §§ 2201-2202, 5 U.S.C. § 702, and 28 U.S.C. § 1361.

CAUSES OF ACTION

COUNT ONE
(Violation of the Immigration and Nationality Act and the Administrative Procedure Act)

78. All the foregoing allegations are repeated and realleged as though fully set forth herein.

79. The INA deems a TPS holder to be in lawful status as a nonimmigrant for purposes of adjustment of status. 8 U.S.C. § 1254a(f)(4). Accordingly, all TPS holders are deemed to have been inspected and admitted and to have maintained lawful nonimmigrant status for purposes of adjusting status under 8 U.S.C. § 1255(a).

80. Defendants properly apply 8 U.S.C. §§ 1254a(f)(4) and 1255(a) when, by "consider[ing]" a TPS holder "as being in, and maintaining, lawful status as a nonimmigrant" pursuant to 8 U.S.C. § 1255a(f)(4), they find that the grant of TPS satisfies the "inspected and admitted" requirement of 8 U.S.C. § 1255(a).

81. Defendants have a policy of refusing to find that a grant of TPS constitutes an "inspection and admission" for purposes of adjustment of status and, pursuant to this policy, deny adjustment applications of current TPS holders who were not "inspected and admitted" other than through the grant of TPS. Defendants' policy applies to all TPS holders who reside within the geographic boundaries of the Courts of Appeals for the First, Second, Third, Fourth, Fifth, Seventh, Eighth, Tenth, and District of Columbia Circuits.

82. Defendants violate the plain meaning of 8 U.S.C. § 1254a(f)(4) when they deny an adjustment application of a TPS holder because the beneficiary has not been inspected and admitted for purposes of adjustment of status.

83. Plaintiffs bring this claim pursuant to the Administrative Procedure Act, 5 U.S.C. § 701, *et seq*.

COUNT TWO
(Violation of the Administrative Procedure Act)

84. All the foregoing allegations are repeated and realleged as though fully set forth herein.

85. Section 706(1) of Title 5 provides that a reviewing court shall compel agency action unlawfully withheld. 5 U.S.C. § 706(1).

86. Plaintiffs and proposed class members have a statutory right to have Defendants follow the statutory language and find that their status as TPS beneficiaries as having been "inspected and admitted" for purposes of adjustment of status under 8 U.S.C. § 1255(a). *See* U.S.C. §§ 1254a(f)(4).

87. Defendants have a duty to find that a current TPS beneficiary has been "inspected and admitted" when adjudicating an adjustment of status application.

88. Defendants comply with this duty when adjudicating adjustment applications of TPS beneficiaries living within the jurisdictions of the Sixth and the Ninth Courts of Appeals.

89. Defendants have a policy of refusing to find that a grant of TPS constitutes an "inspection and admission" for purposes of adjustment of status and, pursuant to this policy, deny adjustment applications of current TPS holders who were not "inspected and admitted" independent of their grant of TPS. Defendants policy applies to all individuals in TPS status who reside within the geographic boundaries of the Courts of Appeals for the First, Second, Third, Fourth, Fifth, Seventh, Eighth, Tenth, and District of Columbia Circuits. Defendants' policy deprives Plaintiffs and proposed class members of a lawful adjudication of their adjustment of status applications in violation of the APA.

90. Defendants' policy harms Plaintiffs and class members.

91. There are no other adequate available remedies.

92. Defendants' policy is in excess of its statutory authority and its actions in denying the adjustment applications of Plaintiffs and proposed class members is contrary to law in violation of the Administrative Procedure Act.

COUNT TWO
(Petition for Mandamus, 28 U.S.C. § 1361)

93. All the foregoing allegations are repeated and realleged as though fully set forth herein.

94. Mandamus is available to compel a federal official or agency to perform a duty if: (1) there is a clear right to the relief requested; (2) defendant has a clear, non-discretionary duty to act; and (3) there is no other adequate remedy available. *See* 28 U.S.C. § 1361.

95. Plaintiffs and proposed class members have a statutory right to have Defendants treat them as having been "inspected and admitted" for purposes of adjustment of status under 8 U.S.C. § 1255(a) by virtue of a grant of TPS. *See* 8 U.S.C. § 1254a(f)(4).

96. Defendants have a duty to find that a current TPS holder has been "inspected and admitted" when adjudicating an adjustment of status application.

97. Defendants comply with this duty when adjudicating adjustment applications of TPS holders living within the jurisdictions of the Sixth and Ninth Circuit Courts of Appeals.

98. Defendants have a policy of refusing to find that a grant of TPS constitutes an "inspection and admission" for purposes of adjustment of status and, pursuant to this policy, deny adjustment applications of current TPS holders who were not "inspected and admitted" independent of their grant of TPS. Defendants' policy applies to all TPS holders who reside within the geographic boundaries of the Courts of Appeals for the First, Second, Third, Fourth, Fifth, Seventh, Eighth, Tenth, and District of Columbia Circuits.

99. Defendants' policy deprives Plaintiffs and proposed class members of a lawful adjudication

of their adjustment of status applications in violation of the INA and APA.

100. Defendants' policy harms Plaintiffs and class members.

101. There are no other adequate available remedies.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully pray for this Court to:

a. Assume jurisdiction over this matter;

b. Certify the case as class action as proposed herein and in the accompanying motion for class certification;

c. Declare that Defendants' policy of refusing to find that a grant of TPS constitutes an "inspection and admission" for purposes of adjustment of status and all adjustment decisions issued based upon that policy are contrary to 8 U.S.C. § 1254a(f)(4);

d. Declare that all Plaintiffs and proposed class members have been "inspected and admitted" for purposes of 8 U.S.C. § 1255(a) pursuant to their grant of TPS;

e. Order Defendants to immediately cease applying their policy that a grant of TPS does not constitute an "inspection and admission" for purposes of 8 U.S.C. § 1254a(f)(4);

f. Order Defendants to find that, pursuant to 8 U.S.C. § 1254a(f)(4), Plaintiffs and proposed class members were "inspected and admitted" for purposes of their adjustment of status applications;

g. Order Defendants to reopen and reconsider the adjustment applications of Plaintiffs and any class members whose applications were denied based on an alleged lack of an inspection and admission, and to re-adjudicate those applications pursuant to the new policy;

h. Award Plaintiffs reasonable attorneys' fees under the Equal Access to Justice Act, and any other applicable statute or regulation; and

i. Grant such further relief as the Court deems just, equitable, and appropriate.

Respectfully submitted,

s/ *Trina Realmuto*
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Attorneys for Plaintiffs

* Application for *pro hac vice* admission pending
** Motion for admission pending

March 26, 2018

CERTIFICATE OF SERVICE

I, Trina Realmuto, hereby certify that I electronically filed the foregoing via the Court's CM/ECF system on March 26, 2018, which will send notice of filing to all counsel of record registered with the system.

Executed in Boston, Massachusetts.

s/ *Trina Realmuto*
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