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

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Table of Contents

American Immigration Council
1331 G St. N.W.
Washington, DC 20005

Table of Authorities

Cases

American Immigration Council
1331 G St. N.W.
Washington, DC 20005

Statutes

American Immigration Council
1331 G St. N.W.
Washington, DC 20005

Other Authorities

Rules

Regulations

I. INTRODUCTION

Plaintiffs and proposed class members are individuals who entered the United States without inspection and subsequently applied for and were granted Temporary Protected Status (TPS). After years of living in the United States in this lawful—although nonpermanent—status, they seek to adjust their status to become lawful permanent residents (LPRs) based on immigrant visa petitions filed on their behalf by a U.S. citizen spouse, parent, or adult child or employer. However, Defendant U.S. Citizenship and Immigration Services (USCIS) either already has denied or will deny their applications based on a written policy that Plaintiffs and proposed class members contend is unlawful.

At issue in the policy, and in this case, is the language of 8 U.S.C. § 1254a(f)(4), which provides that "for purposes of adjustment of status under [8 U.S.C. § 1255] and change of status under [8 U.S.C. § 1258], the [TPS holder] shall be considered as being in, and maintaining, lawful status as a nonimmigrant." As two courts of appeals have held, through that provision, TPS holders are deemed "inspected and admitted" for purposes of adjustment of status under 8 U.S.C. § 1255. *See Ramirez v. Brown*, 852 F.3d 954 (9th Cir. 2017); *Flores v. U.S. Citizenship & Immigration Services*, 718 F.3d 548 (6th Cir. 2013). Any other interpretation contravenes the TPS statute, 8 U.S.C. § 1254a. Accordingly, the Court should grant summary judgement in favor of Plaintiffs and proposed class members.

II. BACKGROUND ON TPS, ADJUSTMENT OF STATUS, AND NONIMMIGRANTS

A. Temporary Protected Status

Congress enacted the TPS statute in 1990 as a humanitarian program. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990). Pursuant to 8 U.S.C. § 1254a, the Department of Homeland Security (DHS) Secretary may designate a foreign country for TPS due

American Immigration Council
1331 G St. N.W.
Washington, DC 20005

to conditions in the country that temporarily prevent the country's nationals from returning safely, or where the country is unable to handle the return of its nationals adequately. *See* 8 U.S.C. § 1254a(b)(1) (enumerating circumstances for TPS designation). The Secretary has designated countries for TPS following environmental disasters, such as an earthquake or hurricane; epidemics; and ongoing armed conflicts. USCIS, Temporary Protected Status, *Countries Currently Designated for TPS* (June 5, 2018), https://www.uscis.gov/humanitarian/temporary-protected-status.

As of January 1, 2017, ten countries were designated for TPS: El Salvador, Haiti, Honduras, Nepal, Nicaragua, Somalia, South Sudan, Sudan, Syria, and Yemen. *Id*. Several of these first were designated close to or more than two decades ago: Somalia in 1991, Sudan in 1997, Honduras in 1999, Nicaragua in 1999, and El Salvador in 2001. *Id*. DHS designated the other countries within the last eight years. *Id*.

Until 2017, DHS continuously renewed and/or extended the designation of each of these countries following the Secretary's periodic review. *Id*. However, in 2017, the Secretary announced the termination of the TPS designation for Haiti, Nicaragua, and Sudan.[1] In 2018 thus far, the Secretary has announced the termination of the TPS designations for El Salvador, Nepal and Honduras.[2] With respect to each termination, the Secretary deferred the effective date

---

[1] *See* DHS, Acting Secretary Elaine Duke Announcement on Temporary Protected Status for Haiti (Nov. 20, 2017), https://www.dhs.gov/news/2017/11/20/acting-secretary-elaine-duke-announcement-temporary-protected-status-haiti; DHS, Acting Secretary Elaine Duke Announcement on Temporary Protected Status for Nicaragua and Honduras (Nov. 6, 2017), https://www.dhs.gov/news/2017/11/06/acting-secretary-elaine-duke-announcement-temporary-protected-status-nicaragua-and; USCIS, Temporary Protected Status Country Designation: Sudan (May 9, 2018), https://www.uscis.gov/humanitarian/temporary-protected-status/temporary-protected-status-designated-country-sudan.

[2] DHS, Secretary of Homeland Security Kirstjen M. Nielsen Announcement on Temporary Protected Status for El Salvador (Jan. 8, 2018), https://www.dhs.gov/news/2018/01/08/secretary-homeland-security-kirstjen-m-nielsen-

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." *See supra* n.1, Acting Secretary Elaine Duke Announcement on Temporary Protected Status for Nicaragua and Honduras.

Upon initially designating 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 strict eligibility requirements, including demonstrating admissibility to the United States. 8 U.S.C. § 1254a(c)(1)(A)(iii). Thus, any applicant for TPS must submit themselves for inspection and demonstrate that they are admissible or demonstrate that they qualify for a waiver of any applicable ground of admissibility. An applicant is not eligible for TPS, and no waiver is available, if the individual has been convicted of certain crimes, including any felony or two or more misdemeanors, is found to have persecuted others, or is found to be a security threat to the United States. 8 U.S.C. § 1254a(c)(2)(B); 8 C.F.R. § 244.4.

The application process is rigorous, requiring the applicant to submit information regarding, inter alia, any prior criminal history and/or immigration violation. *See* 8 C.F.R. § 244.9; *see also* USCIS, Form I-821, Application for Temporary Protected Status (Apr. 11, 2018), https://www.uscis.gov/i-821. In addition, DHS crosschecks applicants' photographs and fingerprints to verify their criminal and immigration histories. USCIS, Temporary Protected Status, *Application Process* (June 5, 2018), https://www.uscis.gov/humanitarian/temporary-

---

announcement-temporary-protected; DHS, Secretary of Homeland Security Kirstjen M. Nielsen Announcement on Temporary Protected Status for Nepal (April 26, 2018), https://www.dhs.gov/news/2018/04/26/secretary-kirstjen-m-nielsen-announcement-temporary-protected-status-nepal; DHS, Secretary of Homeland Security Kirstjen M. Nielsen Announcement on Temporary Protected Status for Honduras (May 4, 2018), https://www.dhs.gov/news/2018/05/04/secretary-homeland-security-kirstjen-m-nielsen-announcement-temporary-protected.

protected-status. Only after DHS has carefully screened them through the application process and found them admissible (or granted a waiver of inadmissibility) are applicants approved for TPS, generally for a period of eighteen months. *Id.* The Secretary of DHS must review and either terminate or extend and/or redesignate a country for TPS every 6 to 18 months. 8 U.S.C. § 1254a(b)(3)(C). After DHS extends or redesignates a country for TPS, TPS holders from that country must reapply to renew their status, verifying that they continue to satisfy all eligibility requirements. 8 C.F.R. § 244.17; *see also* USCIS, Temporary Protected Status, *Maintaining TPS* (June 5, 2018), https://www.uscis.gov/humanitarian/temporary-protected-status.

Individuals with valid TPS cannot be detained or deported 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, and relevant here, "for purposes of adjustment of status under [8 U.S.C. § 1255] and change of status under [8 U.S.C. § 1258], the [TPS holder] shall be considered as being in, and maintaining, lawful status as a nonimmigrant." 8 U.S.C. § 1254a(f)(4).

B. Adjustment of Status

Section 1255 governs the process by which individuals with temporary nonimmigrant status[3] may apply to adjust to LPR status based on their relationship with a U.S. citizen or LPR

---

[3] 8 U.S.C. § 1255 initially provided adjustment of status only for individuals with non-immigrant visas (by definition, temporary visas) who sought to adjust to immigrant visas (permanent lawful residence). Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952). Over time Congress provided additional categories of individuals the opportunity to apply for adjustment. *See, e.g.*, 8 U.S.C. § 1255(i) (allowing adjustment for noncitizens who have no lawful status if a qualifying visa petition was filed by a date specified and other qualifying conditions are met); § 1255(g), (h) (allowing adjustment for noncitizens who qualify as enumerated "special immigrants" under 8 U.S.C. § 1101(a)(27)); § 1255(j) (allowing adjustment for certain informants assisting in the investigation of criminal organizations); § 1255(l) (allowing adjustment for survivors of trafficking who have been granted a T visa); §

family member or an employer within the United States.[4] Adjustment of status allows the applicant to obtain lawful status while remaining in the United States, instead of having to leave the United States to apply for an immigrant visa from a U.S. embassy or consulate abroad, an often-lengthy process which creates additional legal hurdles, including, for some, a bar on returning to the United States for up to ten years. *See* 8 U.S.C. § 1182(a)(9)(B)(i)(II).

To be eligible to adjust, individuals generally must demonstrate that they have been "inspected and admitted or paroled into the United States." 8 U.S.C. § 1255(a). The terms "admitted" and "admission" are defined, in part, as "the lawful entry of the [noncitizen] into the United States after inspection and authorization by an immigration officer." 8 U.S.C. § 1101(a)(13)(A). Analyzing the history and use of these terms in the Immigration and Nationality Act (INA), the Board of Immigration Appeals (BIA) held that Congress "was not providing the exclusive definition for th[e]se terms" in § 1101(a)(13)(A). *Matter of Agour*, 26 I&N Dec. 566, 572 (BIA 2015). Indeed, the adjustment statute itself refers to S, T and U visa holders being admitted in S, T and U status, even though their admission, like a grant to TPS, does not require

---

1255(m) (allowing adjustment for survivors of enumerated violent crimes who have been granted a U visa).

[4] USCIS explains the purpose of the adjustment of status provision as follows:

> Congress created the adjustment of status provisions to enable a foreign national physically present in the United States to become an LPR without incurring the expense and inconvenience of traveling abroad to obtain an immigrant visa. Congress has further modified the adjustment of status provisions to:
> •Promote family unity;
> •Advance economic growth and a robust immigrant labor force;
> •Accommodate humanitarian resettlement; and
> •Ensure national security and public safety.

USCIS, USCIS Policy Manual, Vol. 7, Part A. Chapter 1, § A (May 23, 2018), https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume7-PartA-Chapter1.html.

a "lawful entry" into the United States. *See* 8 U.S.C. § 1255(j), (l), (m).

An applicant for lawful permanent residence also generally must be "eligible to receive an immigrant visa" (based on an approved visa petition filed by a qualifying family member or employer) that is immediately available at the time the time of application. 8 U.S.C. § 1255(a). Applicants also must demonstrate that they are "admissible to the United States," i.e., either not subject to any applicable ground of inadmissibility set forth in 8 U.S.C. § 1182 or eligible for a waiver of any such ground. *Id*. Finally, they must show that they are not barred from adjustment under 8 U.S.C. § 1255(c)(2) for, inter alia, unlawful presence or unauthorized employment or must satisfy an exception to those bars. Immediate relatives of U.S. citizens—such as Plaintiffs Reyes and Avilez Rojas—are exempted from these bars. 8 U.S.C. § 1255(c)(2); *see also* 8 U.S.C. § 1151(b)(2)(A)(i) (defining "immediate relatives" as spouses, parents of adult children, or children of U.S. citizens). Similarly, certain employment-based adjustment applicants, such as Plaintiffs Moreno and Cantarero Argueta, also are exempted if, at the time of filing the adjustment application, they are "present in the United States pursuant to a lawful admission" and meet other requirements. 8 U.S.C. § 1255(k). To be eligible for the exception under § 1255(k), applicants also need to show that, subsequent to their "admission," they have less than 180 days of unlawful presence, unauthorized employment, or other violation of the terms of admission. *Id*. Were the grant of TPS considered an admission, as the statute requires, Plaintiffs Moreno and Cantarero would satisfy this condition.

C. Nonimmigrant Status

There are twenty-two nonimmigrant classifications, with numerous subclassifications. 8 U.S.C. § 1101(a)(15)(A)-(V); *see also* 8 C.F.R. § 214.1(a)(1) (designating subclassifications within the nonimmigrant classifications). TPS is not one of these classifications. *Id*.

American Immigration Council
1331 G St. N.W.
Washington, DC 20005

Nonetheless, as noted above, the TPS statute expressly requires that "for purposes of adjustment of status under [8 U.S.C. § 1255] and change of status under [8 U.S.C. § 1258], the [TPS holder] shall be considered as being in, and maintaining, lawful status as a nonimmigrant." 8 U.S.C. § 1254a(f)(4).

"Being in" nonimmigrant status necessarily requires an admission. All nonimmigrants are admitted in nonimmigrant status. 8 U.S.C. § 1184(a) ("The admission of any [noncitizen] as a nonimmigrant shall be for such time and under such conditions as the Attorney General may by regulations prescribe . . . ."); 8 C.F.R. § 214.1(a)(3) (discussing admission requirements for nonimmigrants). Additionally, only those admitted in nonimmigrant status are permitted to change to another nonimmigrant status. 8 U.S.C. § 1258.

Generally, nonimmigrants are admitted following a two-step application and inspection process. First, the noncitizen must apply for a nonimmigrant visa from a consular officer abroad. 8 U.S.C. §§ 1201(a)(1)(B), 1202(c)–(d). Obtaining a nonimmigrant visa, however, does not guarantee admission. 8 U.S.C. § 1201(h). Instead, the nonimmigrant also must be inspected by DHS officers at a port of entry. 8 U.S.C. § 1201(f); 8 C.F.R. § 214.1(a)(3) ("A nonimmigrant['s] admission to the United States is conditioned on compliance with any [applicable] inspection requirement" in the regulations); 8 C.F.R. § 235.1. Thus, nonimmigrants must "establish[] to the satisfaction of the consular officer, at the time of application for a visa, and the immigration officers, at the time of application for admission, that [they are] entitled to a nonimmigrant status under section 1101(a)(15) of this Title." 8 U.S.C. § 1184(b).

American Immigration Council
1331 G St. N.W.
Washington, DC 20005

Due to the nature of the S,[5] T,[6] and U[7] nonimmigrant categories, applicants may apply either abroad or from within the United States. As previously noted, admissions may occur absent the "lawful entry" of an individual with a specified visa. In a non-precedent decision, the BIA held that a stateside grant of nonimmigrant U status was an "admission" even though it did not satisfy the statutory definition of the term. *See* Exh. QQ, *Alejandro Garnica Silva*, AXXX-XXX-XXX (BIA June 29, 2017).[8] In so holding, the BIA adopted DHS' argument that to find otherwise would create "absurd results." *See* Exh. RR, Supplemental Brief of U.S. Dep't of Homeland Security, *Alejandro Garnica Silva*, AXXX-XXX-XXX at 13 (BIA May 31, 2016) (arguing against an interpretation that would "exclude certain [noncitizens] in U nonimmigrant status from adjusting status where eligibility is dependent upon the [noncitizen] being physically present for three years since the date of admission as a nonimmigrant in U status"). In so arguing, DHS relied on both statutory language and the absurd results that otherwise would occur absent such an interpretation. *Id*. at 6, 9-12. In *Garnica Silva*, the BIA indicated that the same result would apply to those granted S and T nonimmigrant status. Exh. QQ, *Alejandro Garnica Silva* at 6, 7. It is readily apparent that the statute allows for multiple forms of admission, just as it allows for groups other than the traditional nonimmigrant visa holders to apply for adjustment of status under 8 U.S.C. § 1255.

---

[5] A total of 250 S visas are available each year for noncitizens willing to cooperate with the United States with respect to criminal or terrorist activity. 8 U.S.C. §§ 1101(a)(15)(S); 1184(k).

[6] A T visa is available to certain victims of trafficking who are physically present in the United States, American Samoa, or the Northern Mariana Islands, or are at a port of entry. 8 U.S.C. § 1101(a)(15)(T); *see also* 8 U.S.C. § 1184(o) (outlining additional information about the T visa).

[7] A U visa is available to certain victims of crime that occurred within the United States or its territories or possessions. 8 U.S.C. § 1101(a)(15)(U); *see also* 8 U.S.C. § 1184(p) (outlining additional information about the U visa).

American Immigration Council
1331 G St. N.W.
Washington, DC 20005

D. Relevant Federal Court Decisions

Two Courts of Appeals have held that 8 U.S.C. § 1254a(f)(4) unambiguously requires DHS to find that TPS holders are deemed "inspected and admitted" for purposes of adjustment of status under 8 U.S.C. § 1255. *Ramirez v. Brown*, 852 F.3d 954 (9th Cir. 2017); *Flores v. U.S. Citizenship & Immigration Servs.*, 718 F.3d 548 (6th Cir. 2013). The plaintiffs in both cases had identical legal claims to those of Plaintiffs and proposed class members here: they initially entered without inspection, subsequently were granted TPS, then became eligible to adjust to LPR status based on a qualifying relationship. *Ramirez*, 852 F.3d at 957; *Flores*, 718 F.3d at 550. In both cases, USCIS denied the plaintiffs' adjustment applications solely because they had initially entered without inspection and thus allegedly failed to demonstrate that they had been inspected and admitted as required by § 1255(a). *Ramirez*, 852 F.3d at 957; *Flores*, 718 F.3d at 550. Both Courts of Appeals rejected USCIS' position, holding instead that, because § 1254a(f)(4) expressly deems TPS holders to be in lawful nonimmigrant status specifically for purpose of adjustment of status, the applicant is deemed to have met all requirements for nonimmigrant status, including inspection and admission, and granted relief under the Administrative Procedure Act (APA). *Ramirez*, 852 F.3d at 965; *Flores*, 718 F.3d at 554. At least two district courts have issued similar decisions. *See Medina v. Beers*, 65 F. Supp. 3d 419 (E.D. Pa. 2014); *Bonilla v. Johnson*, 149 F. Supp. 3d 1135 (D. Minn. 2016).

The Eleventh Circuit held the opposite without fully analyzing the interplay of the TPS provision at § 1254a(f)(4) with the adjustment statute at § 1255. *Serrano v. U.S. Att'y Gen.*, 655 F.3d 1260 (11th Cir. 2011). However, both the Sixth and the Ninth Circuits rejected the sparse

---

[8] Although specifically considering whether the grant of a U visa was an admission for purposes of a removal provision, 8 U.S.C. § 1227(a)(2)(A)(i), the BIA also found that it was an admission for purposes of adjustment of status. *Id*. at 7-8.

analysis provided in the Eleventh Circuit's per curium decision. *Ramirez*, 852 F.3d at 959-60; *Flores*, 718 F.3d at 555. To date, no other court of appeals has ruled on the issue and no cases are known to be pending before the courts of appeals.

E. USCIS' Policy

USCIS' written policy states 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. . . . A grant of TPS does not cure a foreign national's entry without inspection or constitute an inspection and admission of the foreign national." USCIS Policy Manual, Vol. 7, Part B, Ch. 2(A)(5).[9] In a footnote, the policy manual acknowledges the Sixth Circuit's decision in *Flores* and provides that the court's holding is limited to applicants living within the jurisdiction of the Sixth Circuit. *Id*. n.56. To date, USCIS has not modified the policy to reflect the Ninth Circuit's ruling in *Ramirez*.[10] In

---

[9] USCIS' policy reads in relevant part:

> 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 [for adjustment of status]. There is no legislative provision or history to suggest that Congress intended that recipients of TPS be eligible for adjustment.
>
> USCIS' approval of TPS confers lawful immigration status on the foreign national, but only for the stipulated time period and so long as the foreign national complies with all TPS requirements. Recipients of TPS must still meet the threshold requirement that a foreign national has been inspected and admitted or inspected and paroled in order to be eligible for adjustment of status. A grant of TPS does not cure a foreign national's entry without inspection or constitute an inspection and admission of the foreign national.

USCIS Policy Manual, Vol. 7, Part B, Ch. 2(A)(5), https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume7-PartB-Chapter2.html (May 23, 2018). This policy references both *Serrano* and much older opinions from the General Counsel of the legacy Immigration and Naturalization Service. *Id*. at n. 58.

[10] Upon information and belief, USCIS is following *Ramirez* with respect to adjustment applicants residing in the states within the Ninth Circuit's jurisdiction.

jurisdictions where USCIS is not obligated to follow a circuit decision, Defendants will apply the policy to deny adjustment of status to TPS holders who initially entered without inspection despite the fact that they subsequently applied for TPS, were subject to a rigorous inspection process, found admissible and granted TPS with its attendant benefits, as defined at § 1254a(f), including that they be deemed in nonimmigrant status for purposes of seeking to adjust status under § 1255.

III. ARGUMENT

A. Summary Judgment Standard

Summary judgment is warranted where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party bears the burden of demonstrating that he or she is entitled to summary judgment. *White v. Prof'l Claims Bureau, Inc.*, 284 F. Supp. 3d 351, 357 (E.D.N.Y. 2018). "Once the moving party has met its burden, the opposing party 'must do more than simply show that there is some metaphysical doubt as to the material facts . . .. [T]he nonmoving party must come forward with specific facts showing that there is a genuine issue for trial.'" *Id*. (quoting *Caldarola v. Calabrese*, 298 F.3d 156, 160 (2d Cir. 2002)) (alteration in original).

B. Plaintiffs Assert Three Distinct Claims

Plaintiffs brought this lawsuit to challenge Defendants' policy pursuant to which USCIS adjudicators will deny the adjustment applications of all TPS holders who initially entered the United States without inspection, unless they reside within the jurisdiction of the Sixth or Ninth Circuit Court of Appeals, in which USCIS is obligated to follow circuit law. *See* USCIS Policy Manual, Vol. 7, Part B, Ch. 2(A)(5). They seek an order declaring that the policy is unlawful and enjoining Defendants from applying it to them or proposed class members. Dkt. 12 at 24, ¶¶

American Immigration Council
1331 G St. N.W.
Washington, DC 20005

c-f. Plaintiffs and proposed class members whose applications USCIS already has denied pursuant to the policy also seek an order compelling Defendants to reopen and readjudicate their applications under the proper interpretation of the law. Dkt. 12 at 24, ¶ g.

In support of this relief, Plaintiffs pled three distinct claims: An APA claim under 5 U.S.C. § 706(2); an APA claim under 5 U.S.C. § 706(1); and a Mandamus claim, 28 U.S.C. § 1361. Pursuant to the APA, "'final agency action for which there is no other adequate remedy in a court [is] subject to judicial review,' at the behest of '[a] person . . . adversely affected or aggrieved by agency action.'" *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 n. 4 (1986) (quoting 5 U.S.C. §§ 702, 704) (alterations in original); *see also Sharkey v. Quarantillo*, 541 F.3d 75, 84 (2d Cir. 2008) (same). Under the APA, this Court can "compel agency action unlawfully withheld or unreasonably delayed," 5 U.S.C. § 706(1), and set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). *See, e.g.*, *Ramirez*, 852 F.3d 954 (reviewing under the APA USCIS' interpretation of 8 U.S.C. § 1254a to improperly bar adjustment of status); *Flores*, 718 F.3d 548 (same); *Haitian Ctrs. Council v. Sale*, 823 F. Supp. 1028, 1046 (E.D.N.Y. 1993) (recognizing that "[a]gency actions that do not fall within the scope of a statutory delegation of authority are ultra vires and must be invalidated by reviewing courts" under the APA).

Furthermore, this Court can grant Plaintiffs and proposed class members mandamus relief. *See* 28 U.S.C. § 1361 (providing authority "to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff"); *Richards v. Napolitano*, 642 F. Supp. 2d 118, 133-134 (E.D.N.Y. 2009) (granting mandamus relief in the form of reopening an adjustment application where USCIS' denial of the application was not "in accordance with law"); *Pierre v. McElroy*, 200 F. Supp. 2d 251, 253 (S.D.N.Y. 2001) (requiring

American Immigration Council
1331 G St. N.W.
Washington, DC 20005

immigration agency to perform its duties where "Congress has granted plaintiff a clear right and provided for a concomitant duty on the part of the [agency]").

Like the Plaintiffs in *Ramirez* and *Flores*, all Plaintiffs have standing to challenge Defendants' policy as set forth in the USCIS Policy Manual and to seek injunctive and declaratory relief from its application—whether past or imminent—to their cases. *Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983) (holding that a showing of a "real and immediate" threat of future injury will establish standing for injunctive relief); *Knife Rights, Inc. v. Vance*, 802 F.3d 377, 385-87 (2d Cir. 2015) (finding that three plaintiffs had standing because each established a credible threat of future harm). USCIS already has denied the applications of Plaintiffs Moreno and Reyes, and thus there can be no dispute as to their standing. Because this policy is applied to all adjustment applicants who are TPS holders who initially entered without inspection, other than those residing within the Sixth or Ninth Circuits, USCIS will apply the policy to deny Plaintiff Cantarero Argueta's and Plaintiff Avilez Rojas' applications. In short, each has suffered or faces a "concrete and particularized" injury that is "actual or imminent" as a direct result of the challenged policy; additionally, it is "likely" that this injury will be remedied by a favorable decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992) (quotations omitted).

In sum, Defendants have not acted in accordance with the law and have unlawfully withheld agency action by refusing to lawfully adjudicate Plaintiffs' adjustment of status applications in accordance with the statutes and by refusing to find that their grant of TPS was an inspection and admission for purposes of adjustment of status.

1. Count One—Administrative Procedure Act, 5 U.S.C. § 701 et seq.

Plaintiffs' first claim is brought under the APA, 5 U.S.C. § 701 *et seq.*, and alleges that "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." Dkt. 12 ¶ 82; *see also id.* ¶¶ 78-83. As stated, this claim falls squarely under 5 U.S.C. § 706(2)(A), which states that a "reviewing court shall . . . hold unlawful and set aside agency action, findings and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise *not in accordance with law*." (Emphasis added).

Plaintiffs repeat throughout the Amended Complaint their allegation that Defendants' policy violates the plain meaning of the statute. *See*, *e.g.*, Dkt. 12 ¶ 1 (alleging that Plaintiffs' and putative class members' "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)"); ¶¶ 6-7 (detailing Defendants' violation of § 1254a(f)(4) and stating, "Plaintiffs and class members seek declaratory and injunctive relief to remedy Defendants' violation of the statute"); ¶¶ 27-28 (detailing how Plaintiff Moreno's adjustment application was denied as a result of Defendants' "unlawful policy" and specifying that he "wishes to have his adjustment application fairly adjudicated in accordance with the law"); ¶¶ 32-33 (same with respect to Plaintiff Reyes); ¶¶ 39-40 (alleging that "[b]ut 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" and asserting that Plaintiff Cantarero Argueta "wishes to have his adjustment application fairly adjudicated in accordance with the law"); ¶¶ 44-45 (same with respect to Plaintiff Avilez Rojas).[11]

Plaintiffs challenge a final agency action, as required by the APA. The final agency

---

[11] In *Sharkey*, 541 F.3d at 83, the plaintiff cited 5 U.S.C. §§ 702 and 706 in support of her claims, without referencing specific subsections. As here, however, she also described the agency action that was challenged and the relief she sought. From this, the court readily ascertained that her request that the court find the agency's action unlawful was made pursuant to § 706(2), while her request that the court compel USCIS to provide her proof of her LPR status was made under § 706(1). *Id.*

American Immigration Council
1331 G St. N.W.
Washington, DC 20005

action challenged here is the policy of USCIS. *See* USCIS Policy Manual, Vol. 7, Part B, Ch. 2(A)(5). Defendants do not dispute that, pursuant to this written policy, a grant of TPS does not constitute an inspection and admission for purposes of adjustment of status under 8 U.S.C. § 1255 or that USCIS' adjudicators must deny all applications filed by Plaintiffs or proposed class members that depend on the TPS grant to demonstrate an inspection and admission.

Two conditions are required for finality under the APA, 5 U.S.C. § 704: the action must be the "consummation of the agency's decision-making process" and it "must be one by which rights or obligations have been determined or from which legal consequences flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (quotations omitted). Defendants' policy satisfies this test. First, it reflects the consummation of Defendants' decision-making process, and, second, it is a policy pursuant to which the rights of TPS holders—including all Plaintiffs and proposed class members—are decided. *See Salazar v. King*, 822 F.3d 61, 82 (2d Cir. 2016) (quoting standard set forth in *Bennett*). The Supreme Court has interpreted the finality requirement in a "pragmatic way." *Fed. Trade Comm. v. Standard Oil Co. of Cal.*, 449 U.S. 232, 239 (1980) (quotation omitted).

Additionally, Plaintiffs and proposed class members are adversely affected by the fact that Defendants' actions are not in accordance with the law—pursuant to Defendants' unlawful policy, they are unable to adjust to LPR status, despite their statutory eligibility to do so. *See supra* Section II.E. But even beyond the basic legal wrong of Defendants' misapplication of the immigration statutes, Plaintiffs and proposed class members face a variety of harms due to Defendants' policy. The majority face imminent loss of their legal status, without a meaningful opportunity to pursue the alternative lawful immigration status for which they are statutorily eligible. *See supra* at 2-3 (discussing the termination of TPS for six countries over the past

American Immigration Council
1331 G St. N.W.
Washington, DC 20005

year).

Moreover, without the ability to adjust to LPR status, Plaintiffs and proposed class members will lose their work authorization when their TPS terminates. As a result, individuals like Plaintiff Moreno and Plaintiff Cantarero Argueta will lose their jobs and remain unable to secure other work and thus will be left without the means to support themselves and their families. *See, e.g.*, Amended Motion for Class Certification (hereinafter, MCC), Exh. AA ¶¶ 9-10; MCC, Exh. CC ¶ 11. Others, like Plaintiff Avilez Rojas, will lose eligibility for the Social Security Retirement income based on their prior work that provides their sole support during retirement. *See* 42 U.S.C. § 402(y); MCC, Exh. DD ¶¶ 7-9, 13.

Finally, Plaintiffs have no other adequate remedy available to them in any court. *See, e.g.*, *Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988) (noting that APA review is not available only where "Congress has provided special and adequate review procedures") (quotation omitted); *Sharkey*, 541 F.3d at 90 n.14 (finding review procedures for individuals ordered removed an insufficient alternative remedy for noncitizen who had not been ordered removed).

2. Count Two—Administrative Procedure Act, 5 U.S.C. § 706(1)

Plaintiffs' second claim seeks to compel "agency action unlawfully withheld" under 5 U.S.C. § 706(1). Dkt. 12 ¶ 85. It alleges that Defendants have a duty to correctly apply § 1254a(f)(4) when adjudicating their adjustment applications by finding that the grant of TPS constitutes an inspection and admission for purposes of 8 U.S.C. § 1255; that Defendants have a policy of refusing to make this finding; and that, as a result, Plaintiffs and proposed class members are deprived "of a lawful adjudication of their adjustment of status applications . . . ." Dkt. 12 ¶ 89; *see also id.* ¶¶ 84-92.

Defendants' duty is a mandatory one, as all federal officials are required to follow the

American Immigration Council
1331 G St. N.W.
Washington, DC 20005

law. *See, e.g., Meyers and Meyers, Inc. v. U.S. Postal Service*, 527 F.2d 1252, 1261 (2d Cir. 1975) (noting that, with respect to a claim that a federal official violated governing regulations, "[i]t is, of course, a tautology that a federal official cannot have discretion to behave unconstitutionally or outside the scope of his delegated authority"); *Richards*, 642 F. Supp. 2d at 134 ("There is no dispute that defendants owe a 'clear nondiscretionary duty' to plaintiff to adjudicate her [visa] petition and [adjustment of status] application in accordance with law.").

Plaintiffs seek an order compelling Defendants to find that, pursuant to Congress' instruction that TPS holders be considered in nonimmigrant status for purposes of adjustment of status under § 1255, Plaintiffs were inspected and admitted for purposes of § 1255 when they were granted TPS. Accordingly, Defendants must reopen and readjudicate the applications of Plaintiffs and proposed class members that were denied pursuant to Defendants' unlawful policy. Dkt. 12 at 24, ¶¶ e, f, g; *see also Richards*, 642 F. Supp. 2d at 133-34.

Defendants would place Plaintiffs in a catch-22—first asserting that a suit is precluded before an adjustment application is decided because it is not yet ripe and then arguing that, subsequent to a denial of adjustment, the case is moot. Dkt. 22 at 2-3. These arguments are inconsistent and would make it impossible for any individual to ever sue over the denial of a government benefit. More importantly, they are wrong. The claims of Plaintiffs and proposed class members whose applications have been denied are not moot. Each filed this suit specifically to remedy the unlawful denial and thus ask the Court to order Defendants to reopen and readjudicate their cases, applying the proper interpretation of § 1254a(f)(4). *Accord Richards*, 642 F. Supp. 2d at 133-34. Additionally, the claims of the plaintiffs and proposed class members whose applications have not yet been decided are ripe for review. *Sharkey*, 541 F.3d at 89-90.

American Immigration Council
1331 G St. N.W.
Washington, DC 20005

3. Count Three—Mandamus Act, 28 U.S.C. § 1361[12]

Plaintiffs' third claim is for mandamus relief, seeking "to compel a federal official or agency to perform a duty." Dkt. 12 ¶ 94. Specifically, Plaintiffs allege that, through their policy, Defendants violate their "duty to find that a current TPS holder has been 'inspected and admitted' when adjudicating an adjustment of status application." *Id.* ¶ 96. Plaintiffs allege that they have a clear right to have the law correctly applied in their cases, that Defendants have a nondiscretionary duty to act, and that there is no other adequate remedy at law. *Id.* ¶¶ 93-101. Addressing a similar issue in the class action *City of New York v. Heckler*, the Second Circuit affirmed that the district court had mandamus jurisdiction to order the Social Security Administration (SSA) to reopen cases that were denied under an agency policy which misapplied the statute and regulations and to order SSA to reinstate benefits to claimants until their eligibility could be determined properly. 742 F.2d 729, 740 (2d Cir. 1984), *aff'd on other grounds*, 476 U.S. 467 (1986); *see also Richards*, 642 F. Supp. 2d at 133-34.

As with Count Two, Defendants' duty is a mandatory one. Additionally, as discussed *supra*, there is no other adequate remedy available at law. *See supra* at 16.[13]

---

[12] Plaintiffs inadvertently labeled this third claim "Count Two" rather than "Count Three." Notwithstanding this typographic error, this third claim is distinct from the second claim.

[13] The Supreme Court has recognized that a mandamus action can "in essence, [be] one to 'compel agency action unlawfully withheld,' or alternatively, to 'hold unlawful and set aside agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Japan Whaling Ass'n*, 478 U.S. at 230 n.4 (quoting 5 U.S.C. § 706(1), (2)(A)); *see also Indep. Mining Co. v. Babbitt*, 105 F.3d 502, 507 (9th Cir. 1997). Thus, while the Second Circuit has affirmed the dismissal of a mandamus claim which "duplicate[s]" a surviving APA claim, *see Sharkey*, 541 F.3d at 93, courts may recognize a mandamus claim in the alternative to an APA claim. *See, e.g., Villa v. U.S. Dep't of Homeland Security*, 607 F. Supp. 2d 359, 366 (N.D.N.Y. 2009) ("Alternatively, the Court finds that if subject matter jurisdiction is not available under the APA, the Court would have mandamus jurisdiction.").

American Immigration Council
1331 G St. N.W.
Washington, DC 20005

C. The Plain Language of 8 U.S.C. § 1254a(f)(4) Requires that TPS Holders Be Considered as Having Been Inspected and Admitted as Nonimmigrants for Purposes of Adjustment of Status under 8 U.S.C. § 1255

Through 8 U.S.C. § 1254a(f)(4), Congress expressly authorized persons with TPS to adjust to LPR status, if they are otherwise independently eligible for an immigrant visa, i.e., have an immediate relative who is a U.S. citizen or an employer qualified to petition for them. 8 U.S.C. § 1254a(f)(4). *See Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) ("[T]he starting point for interpreting a statute is the language of the statute itself.").

Subsection 1254a(f)(4) specifies that TPS recipients "shall be considered as being in, and maintaining, lawful status as a nonimmigrant" for purposes of adjustment under § 1255. All but one of the courts to have interpreted § 1254a(f)(4) found its language to unambiguously require that TPS holders be considered as being inspected and admitted as nonimmigrants for purposes of adjustment of status. *Ramirez*, 852 F.3d at 958; *Flores*, 718 F.3d at 551-52; *Bonilla*, 149 F. Supp. 3d at 1138-39; *Medina*, 65 F. Supp. 3d at 428-29, 436. *But see Serrano*, 655 F.3d at 1265.

1. Inspection and admission is a prerequisite for being "in" nonimmigrant status

Significantly, § 1254a(f)(4) mandates—by use of the word "shall"—that the TPS recipient be considered as both "being in" and "maintaining" nonimmigrant status. Each of these phrases must be given meaning, in accord with the "cardinal principle of statutory construction" that "no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (quotation omitted); *see also State St. Bank & Trust Co. v. Salovaara*, 326 F.3d 130, 139 (2d Cir. 2003) ("It is well-settled that courts should avoid statutory interpretations that render provisions superfluous . . . .").

Because an individual must be inspected and admitted in order to "be[] in" nonimmigrant status, 8 U.S.C. § 1254a(f)(4); *see also supra* Section II.C, Defendants' interpretation fails to

give independent meaning to the phrase "being in." Both the statute and the implementing regulations require that only an individual who has been "admitted" can hold nonimmigrant status. In a section entitled "Admission of Nonimmigrants," the statute directs that "[t]he admission of any [noncitizen] as a nonimmigrant shall be for such time and under such conditions as the Attorney General may by regulation prescribe." 8 U.S.C. § 1184(a)(1). The implementing regulations address the timing of and conditions placed on the admission of a nonimmigrant. 8 C.F.R. §§ 214.1, 214.2. Specifically, these regulations mandate that a "nonimmigrant['s] . . . *admission* to the United States is conditioned on compliance with any *inspection* requirement . . . ." 8 C.F.R. § 214.1(a)(3)(i) (emphases added). Consequently, "being in" nonimmigrant status requires as a precondition that the individual have been inspected and admitted. *Ramirez*, 852 F.3d at 960 ("In other words, by the very nature of obtaining lawful nonimmigrant status, the [noncitizen] goes through inspection and is deemed 'admitted.'"); *Flores*, 718 F.3d at 554 (finding that a TPS holder satisfies the inspection and admission requirement for adjustment "because he is considered [as] being in lawful nonimmigrant status"); *Medina*, 65 F. Supp. 3d at 430 ("Under the immigration laws, the process obtaining of 'nonimmigrant' status requires the 'admission' of the [noncitizen]."); *Bonilla*, 149 F. Supp. 3d at 1140 (same).

As discussed above, an adjustment applicant who is in "unlawful immigration status" generally is barred from adjusting to LPR status. 8 U.S.C. § 1255(c)(2). Significantly, the regulations define "lawful immigration status" for purposes of this provision as specifically including noncitizens "*admitted* to the United States *in nonimmigrant status*." 8 C.F.R. § 245.1(d)(1)(ii) (emphases added). This definition confirms that an individual must first be "admitted" in order to "be[] in" nonimmigrant status.

An interpretation of § 1254a(f)(4) as applying only to those previously admitted in a nonimmigrant status would render the phrase "being in" superfluous. Because these individuals were "in" nonimmigrant status when admitted regardless of their subsequent TPS applications, Congress' specification that TPS holders are to be considered to be "maintaining" nonimmigrant status would be sufficient. *See State St. Bank & Trust Co.*, 326 F.3d at 139 (cautioning against statutory interpretations that would render provisions superfluous). Similarly, Defendants' interpretation does not account for Congress' reference to the "change of status" provision, 8 U.S.C. § 1258, in § 1254a(f)(4). Section 1258, which pertains to a change from one nonimmigrant classification to another, specifically applies to individuals seeking to change their nonimmigrant status after being "lawfully admitted to the United States as a nonimmigrant." If "being in" nonimmigrant status did not encompass an admission, § 1254a(f)(4) would not meaningfully provide TPS holders with the ability to change status under § 1258. That is, a TPS holder could not change from one lawful status to another if he or she were not considered as having been "admitted." And, as discussed *supra*, if the provision applied only to those already in nonimmigrant status at the time of their grant of TPS, the term "being in" would be rendered superfluous. In short, for purposes of both adjustment of status and change of status, "being in" lawful nonimmigrant status necessitates that the individual was "admitted" in that status.

Moreover, as the Ninth Circuit recognized, "in practice, too, the application and approval process for securing TPS shares many of the main attributes of the usual 'admission' process for nonimmigrants." *Ramirez*, 852 F.3d at 960. Both statuses involve an in-depth application and review process—entailing extensive identity, criminal background, and admissibility screening. *See supra* Section II.A. "That the TPS application is subject to a rigorous process comparable to

any other admission process further confirms that a[noncitizen] approved for TPS has been 'admitted.'" *Ramirez*, 852 F.3d at 960.

Notably, the only court that concluded that a grant of TPS does not satisfy the requirement of inspection and admission for purposes of adjustment did so in a brief per curiam decision without carefully analyzing the language of § 1254a(f)(4). *Serrano*, 655 F.3d at 1264-66. The plaintiff in that case erroneously argued that he did "not have to meet § 1255(a)'s eligibility requirement" because of his grant of TPS, *id.* at 1263, and "that § 1254a(f)(4) alters the 'inspected and admitted or paroled' limitation on eligibility for adjustment of status. . . ." *Id.* at 1265. As a result, the court focused its attention on the "plain language of *§ 1255(a)*," the adjustment statute, concluding that § 1254a(f)(4) "does not change § 1255(a)'s threshold requirement that [an applicant] is eligible for adjustment of status only if he was initially inspected and admitted or paroled." *Id.* (emphasis added). Because it failed altogether to consider what Congress meant by the key terms in § 1254a(f)(4), it did not address whether this provision required a finding that a TPS holder be deemed to have been inspected and admitted for purposes of adjustment under § 1255.

2. Section 1254a(f)(4) mandates only that the TPS holder be "considered" to be in nonimmigrant status, not to hold nonimmigrant status in fact

Congress' use of the term "considered" is also significant. Subsection 1254a(f)(4) does not say that a TPS recipient "*is*" in, and maintaining, nonimmigrant status—only that he or she "shall *be considered* as being in, and maintaining," nonimmigrant status. 8 U.S.C. § 1254a(f)(4) (emphasis added). Congress did not create a new nonimmigrant classification for TPS recipients. *Cf.* 8 U.S.C. § 1101(a)(15) (listing all nonimmigrant classifications and not including TPS as a nonimmigrant classification). Instead, by using the term "considered," Congress

created a legal fiction: that a TPS holder is to be treated as if he or she is a nonimmigrant even though a grant of TPS does not satisfy all the requirements for any one of the nonimmigrant classifications. *See* 8 U.S.C. § 1101(a)(15); 8 C.F.R. § 214.1 *et seq.*[14] Admission is just one of these many requirements—one that is a prerequisite for *all* the nonimmigrant classifications. *See supra* Section II.C.

The use of the term "consider" as a means to indicate that something should be deemed to be other than what it is, is not unique to this provision of the INA. For example, 8 U.S.C. § 1152(b)(3) identifies circumstances in which a noncitizen born in the United States "shall *be considered* as having been born in a country of which he is a citizen or subject." (Emphasis added). Clearly, an individual cannot be born in two different countries; by using the phrase "be considered," Congress made known its intent to create a legal fiction—to treat the person's birthplace legally as something other than what it was. Similarly, 8 U.S.C. § 1101(g) states that a noncitizen under a final order of deportation or removal who has left the United States "shall be considered to have been deported or removed in furtherance of law" regardless of the location to which he departed or the sources of funding which paid for this departure. Again, Congress made clear through use of this term, that such a departure would be deemed a deportation or removal regardless of the actual circumstances. *See also* 8 U.S.C. §§ 1151(b)(2)(A)(i) (specifying circumstances in which the spouse of a deceased U.S. citizen will "be considered" to remain an immediate relative), 1182(a)(5)(B) (setting forth when noncitizens physicians shall "be considered" to have passed certain medical examinations), 1182(p) (specifying when wages

[14] A noncitizen can hold both TPS and a nonimmigrant status simultaneously. 8 U.S.C. § 1254a(a)(5). TPS holders who independently have a nonimmigrant status would not need to rely on § 1254a(f)(4) to demonstrate that they are in and maintaining nonimmigrant status.

for noncitizen professional athletes "shall be considered" as not affecting the wages of U.S. citizens).

Still another example is found in a former provision of the Immigration and Nationality Act (INA) which stated that "[f]or the purposes of this section, an order of deportation heretofore or hereafter entered against a[noncitizen] in legal detention or confinement . . . *shall be considered as being* made as of the moment he is released from such detention or confinement, and not prior thereto." 8 U.S.C. § 1252(c) (1992) (emphasis added). In *Arifa-Mensan v. United States*, this Court denied the plaintiff's request for an order directing immigration officials to immediately deport him pursuant to an order of deportation issued on an earlier date, holding that the order of deportation would only be effective on the date that his term of imprisonment ended. No. CV-92-5426, 1992 U.S. Dist. LEXIS 18676 at *2 (E.D.N.Y. Nov. 20, 1992) (unpublished).

Here, Congress created a legal fiction when it mandated that, for purposes of adjustment of status, a TPS recipient shall be "considered as being in, and maintaining, lawful status as a nonimmigrant." A TPS holder is not, in fact, in nonimmigrant status. Consequently, to benefit from § 1254a(f)(4), TPS holders do not need to demonstrate that they are eligible for nonimmigrant status—which would require satisfying all prerequisites for one of the nonimmigrant classifications created in 8 U.S.C. § 1101(a)(15). For the same reason, TPS holders need not demonstrate that they were inspected and admitted *as* a nonimmigrant. Rather, the statute clarifies that the inspection and determination of admissibility in the TPS process requires that a TPS holder must be "considered" as having been admitted in nonimmigrant status as required by § 1254a(f)(4), because an inspection and admission is a prerequisite for being in nonimmigrant status.

American Immigration Council
1331 G St. N.W.
Washington, DC 20005

D. Congressional Intent Supports the Plain Meaning of 8 U.S.C. § 1254a(f)(4)

Defendants' policy also violates the congressional intent behind § 1254a, an ameliorative statute aimed at relieving eligible persons from designated countries of the burden of returning to the natural disaster or catastrophe that triggered the TPS designation. *See Gozlon-Peretz v. United States*, 498 U.S. 395, 407 (1991) ("In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy.") (quotation omitted); *Rosenberg v. Fleuti*, 374 U.S. 449, 461–62 (1963) ("Such a holding would be inconsistent with the general purpose of Congress in enacting § 101(a)(13) to ameliorate the severe effects of the strict 'entry' doctrine."); *Duarte-Ceri v. Holder*, 630 F.3d 83, 89 (2d Cir. 2010) ("In the immigration context, there is a long-standing presumption to construe 'any lingering ambiguities' in favor of the petitioner.") (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987)).

Congress' phrasing in § 1254a(f)(4)—that a TPS holder "shall be considered as being in, and maintaining, lawful status as a nonimmigrant" for purposes of adjustment of status—corresponds directly with the adjustment provision at § 1255, entitled "Adjustment of status of nonimmigrant to that of person admitted for permanent residence." Given the express language in § 1254a(f)(4) that "for purposes of adjustment" under § 1255, TPS recipients "shall be considered as being in, and maintaining, lawful status as a nonimmigrant," it is clear that Congress intended them to be eligible to apply for "[a]djustment of status of nonimmigrant to that of a person admitted for lawful permanent resident," as § 1255 is titled. As the Ninth Circuit explained:

> [Section 1255's] heading is not without significance, as it uses language that directly links the adjustment statute to the TPS statute and § 1254a(f)(4)'s phrasing of "lawful status as a nonimmigrant." This language and structure signal that Congress contemplated that TPS recipients, via their treatment as lawful

nonimmigrants, would be able to make use of § 1255.

Ramirez, 852 F.3d at 961 (citing *Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998)); *see also Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989) ("[T]he words of a statute must be read in their context and with a view to their place in the overall statutory scheme."); *United States v. Aguilar*, 585 F.3d 652, 657 (2d Cir. 2009) (reviewing the statutory text as well as the "placement and purpose" of the text "in the statutory scheme") (quotation omitted).

Moreover, this interpretation is consistent with the intent and purpose of the TPS statute. Defendants' policy fails to give effect to the comprehensive statutory scheme whereby Congress provided mechanisms to ensure persons found eligible for TPS were not forced to return to their home countries. The TPS designation is based on the existence of a humanitarian crisis in the person's country of origin. *See* 8 U.S.C. § 1254a(b). Under Defendants' policy, Plaintiffs and proposed class members would have to depart the United States, obtain a visa abroad, and then return to the United States in order to be inspected and admitted, a bizarre proposition given that the TPS statute is intended to protect noncitizens—even those *without* the basis for becoming lawful permanent residents—from being required to return to countries suffering the effects of severe strife or natural disasters. *See Ramirez*, 852 F.3d at 964 ("Such processing usually takes place in the [noncitizen]'s home country—in this case, the country that the Attorney General has deemed unsafe . . . ."). It would be inconsistent with the statute's purpose to assume that Congress would protect applicants for TPS—the majority without any lawful status—from having to return to their countries of origin, only to require them to leave the United States after they had been inspected, found admissible and granted temporary lawful status, sometimes for years, during which time they had become eligible for LPR status based on their relationships to U.S. citizen family members or employers.

American Immigration Council
1331 G St. N.W.
Washington, DC 20005

Similarly, Defendants' interpretation is illogical in that it would require those individuals with strong ties to the United States to depart and thus face separation from their families, homes and employers. *See Flores*, 718 F.3d at 555-56 ("Under the Government's interpretation, [the plaintiff] would have to leave the United States, be readmitted, and then go through the immigration process all over again. This is simply a waste of energy, time, government resources, and will have negative effects on his family—United States citizens.").

Consistent with Congress' intent to ensure that individuals are not forced to return to their country of origin where a natural disaster, war or other crisis event initiated the TPS designation, Congress created a path for those who now qualify for an immigrant visa to apply for such status from within the United States, rather than forcing them to leave the country to apply through consular processing abroad. The plain language of the statutes, as interpreted by both the Sixth and the Ninth Circuits, fits with the humanitarian purposes of TPS. The statutory language of § 1254a(f)(4) demonstrates Congress' concern for providing relief; rather than forcing people to return to the catastrophic conditions in their countries of origin, Congress provided a path to apply for LPR status from within the United States.

E. Defendants' Policy Creates Absurd Results

Courts must avoid statutory interpretations that produce absurd results or ones that are unreasonable because they are "plainly at variance with the policy of the legislation as a whole." *United States v. American Trucking Ass'ns*, 310 U.S. 534, 543 (1940) (quoting *Ozawa v. United States*, 260 U.S. 178, 194 (1922)); *see also Chranoski v. Ashcroft*, 327 F.3d 188, 196 (2d Cir. 2003) (rejecting "the government's invitation to ignore the plain meaning" of a statutory term because it failed to demonstrate that the plain meaning was absurd, futile or unreasonable) (citing *Am. Trucking Ass'ns*, 310 U.S. at 543). Here, Plaintiffs' interpretation accords with the

plain meaning of the statute and produces neither an absurd nor unreasonable result. In contrast, Defendants' interpretation as manifested in its policy not only ignores certain words in the statute but produces an absurd result at odds with the purpose of § 1254a(f)(4).

Congress afforded TPS holders the right to travel outside of the United States, restricted only by the requirement that they obtain prior consent from DHS. 8 U.S.C. § 1254a(f)(3). A TPS holder who wishes to travel abroad may obtain advance consent from USCIS by filing an application for "advance parole." 8 C.F.R. § 244.15(a); *see also* USCIS, Form I-131, Application for Travel Document (Apr. 11, 2018), https://www.uscis.gov/i-131. When granted advance parole, the TPS holder may travel outside of the United States and upon return, is inspected and paroled into the United States.[15] Defendants acknowledge this entry into the United States satisfies the requirement in § 1255(a) that an individual seeking to adjust status has been inspected and either admitted *or* paroled.

Consequently, a TPS holder who initially entered without inspection—and thus, under Defendants' policy, is ineligible to adjust under § 1255(a)—can cure this ineligibility by traveling abroad for any reason. In fact, USCIS' policy specifically recognizes this. It states that:

> [i]f a foreign national under TPS departs the United States and is admitted or paroled upon return to a port of entry, the foreign national meets the inspected and admitted or inspected and paroled requirement provided the inspection and parole occurred before he or she filed an adjustment application. . . . For purposes of adjustment eligibility, it does not matter whether the TPS beneficiary was admitted or paroled. In either situation, once the foreign national is inspected at a port of entry and permitted to enter to the United States, the foreign national meets the inspected and admitted or inspected and paroled requirement.

---

[15] "Parole" is a means by which an immigration officer may permit the temporary entry of a noncitizen into the United States without granting the individual admission. *See* 8 U.S.C. § 1182(d)(5).

USCIS Policy Manual, Vol. 7, Part B, Ch. 2(A)(5). It is absurd to conclude that Congress would have intended, on the one hand, to withhold the benefit of § 1254a(f)(4) to TPS holders who entered without inspection, but on the other hand, allow those same TPS holders to benefit from § 1254a(f)(4) simply by traveling abroad after they have been granted TPS. Defendants' restrictive interpretation produces an absurd result.

IV. CONCLUSION

For the foregoing reasons, the Court should grant this motion and enter the attached proposed order enjoining USCIS' unlawful policy in future adjudications and remedying past adjudications denied based on the policy.

Dated June 12, 2018

Respectfully submitted,

/s/ Trina Realmuto
Trina Realmuto, TR3684
Kristin Macleod-Ball, KM1640
American Immigration Council
100 Summer Street, 23rd Floor
Boston, MA 02110
(857) 305-3600
trealmuto@immcouncil.org
kmacleod-ball@immcouncil.org

/s/ Mary A. Kenney
American Immigration Council
1331 G St., NW
Washington, DC 20005
(202) 507-7512
mkenney@immcouncil.org

/s/ Matt Adams
Leila Kang
Northwest Immigrant Rights Project
615 Second Avenue, Suite 400
Seattle, WA 98104
(206) 957-8611
matt@nwirp.org
leila@nwirp.org

Attorneys for Plaintiffs