



CATHOLIC LEGAL IMMIGRATION NETWORK, INC.

Practice Pointer

Temporary Protected Status: Navigating Removal Proceedings, Dual Nationality, and Asylum¹

March 24, 2021

Under Section 244 of the Immigration and Nationality Act (INA), the Department of Homeland Security (DHS) is authorized to grant Temporary Protected Status (TPS) to eligible nationals² of designated foreign states or parts of such states (or to eligible individuals who have no nationality and who last habitually resided in such designated states)³ upon a finding that such states are experiencing ongoing civil strife, environmental disaster, or certain other extraordinary and temporary conditions.

Since January 2021, new developments have arisen with regard to temporary protections due to conditions abroad. On Jan. 19, 2021, former President Trump issued a directive deferring the removal of eligible Venezuelans pursuant to Deferred Enforced Departure (DED) for 18 months.⁴

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² See 8 CFR § 244 (discussing the eligibility requirements for TPS).

³ For more information on statelessness, please refer to UNHCR's resources: *Handbook on Protection of Stateless Persons*, (2014), [unhcr.org/en-us/protection/statelessness/53b698ab9/handbook-protection-stateless-persons.html](https://www.unhcr.org/en-us/protection/statelessness/53b698ab9/handbook-protection-stateless-persons.html); *UNHCR Representing Stateless Persons Before U.S. Immigration Authorities*, (August 2017), [unhcr.org/uk/59e799e04.pdf](https://www.unhcr.org/uk/59e799e04.pdf).

⁴ Memorandum on Deferred Enforced Departure for Certain Venezuelans, January 19, 2021, trumpwhitehouse.archives.gov/presidential-actions/memorandum-deferred-enforced-departure-certain-venezuelans/. On January 25, 2021, DHS published the directive in the Federal Register. See Deferred Enforced Departure for Certain Venezuelans, 86 Fed. Reg. 6845 (Jan. 19, 2021), [federalregister.gov/documents/2021/01/25/2021-01718/deferred-enforced-departure-for-certain-venezuelans](https://www.federalregister.gov/documents/2021/01/25/2021-01718/deferred-enforced-departure-for-certain-venezuelans).

On March 8, 2021, President Biden’s DHS added Venezuela to the list of countries designated for TPS.⁵ Venezuelans have received TPS because of ongoing mass hunger, malnutrition, crumbling infrastructure, civil unrest, and human rights violations that have plagued Venezuela since 2013 when President Hugo Chavez died and Vice President Nicolas Maduro took power.⁶

On March 12, 2021, DHS designated Burma⁷ for TPS in light of the military coup that began there on Feb. 1, 2021, which has led to continuing violence, pervasive arbitrary detentions, the use of lethal violence against peaceful protesters, and intimidation against Burmese people.⁸ According to the DHS Office of Public Affairs’ announcement of Burma’s TPS designation, “the coup has worsened humanitarian conditions in several areas by limiting access to life-saving assistance, disrupting flights carrying humanitarian and medical aid, and spurring an economic crisis” and “such conditions prevent Burmese nationals and habitual residents from returning safely.”⁹

Despite the welcome news of these additional TPS designations, many Venezuelan nationals, Burmese nationals, and stateless people who last resided in Venezuela or Burma are currently in removal proceedings or face removal proceedings. This practice pointer addresses common questions that arise for practitioners representing TPS-eligible individuals who are in removal proceedings or facing potential removal proceedings, hold dual nationality, or wish to seek asylum.¹⁰ This practice pointer ends with a discussion of Employment Authorization Document options for Venezuelans.

I. Seeking TPS While In Removal Proceedings

A client is in removal proceedings, but eligible for TPS. What is the overall strategy?

The strategy is two-fold: (1) File the TPS application for your client with U.S. Citizenship and Immigration Services (USCIS), and (2) decide on a removal defense strategy that furthers your client’s interests. There is generally not a downside to applying for TPS if the client is eligible for relief in removal proceedings or has an application pending with the Asylum Office.

⁵ Designation of Venezuela for Temporary Protected Status and Implementation of Employment Authorization for Venezuelans Covered by Deferred Enforced Departure, 86 Fed. Reg. 13574 (Mar. 9, 2021), [federalregister.gov/documents/2021/03/09/2021-04951/designation-of-venezuela-for-temporary-protected-status-and-implementation-of-employment](https://www.federalregister.gov/documents/2021/03/09/2021-04951/designation-of-venezuela-for-temporary-protected-status-and-implementation-of-employment). For more information about Venezuelan TPS and DED, please refer to ILRC’s resource *TPS for Venezuela: An Overview*, (March 2021) [ilrc.org/sites/default/files/resources/tps_for_venezuela_march_2021.pdf](https://www.ilrc.org/sites/default/files/resources/tps_for_venezuela_march_2021.pdf).

⁶ CLINIC, *Lives in the Balance: Why TPS Is Needed for Venezuela Now*, (Apr. 14, 2020)

[cliniclegal.org/resources/humanitarian-relief/lives-balance-why-tps-needed-venezuela-now](https://www.cliniclegal.org/resources/humanitarian-relief/lives-balance-why-tps-needed-venezuela-now).

⁷ Burma is also known as Myanmar. *Myanmar, Burma and Why the Different Names Matter*. PBS NEWSHOUR, Feb. 3, 2021, [pbs.org/newshour/world/myanmar-burma-and-why-the-different-names-matter](https://www.pbs.org/newshour/world/myanmar-burma-and-why-the-different-names-matter).

⁸ Secretary Mayorkas Designates Burma for Temporary Protected Status (Mar. 12, 2021),

[dhs.gov/news/2021/03/12/secretary-mayorkas-designates-burma-temporary-protected-status](https://www.dhs.gov/news/2021/03/12/secretary-mayorkas-designates-burma-temporary-protected-status).

⁹ *Id.*

¹⁰ For more information on TPS and DED generally, please refer to CLINIC’s TPS and DED materials available at [cliniclegal.org/issues/temporary-protected-status-tps-and-deferred-enforced-departure-ded](https://www.cliniclegal.org/issues/temporary-protected-status-tps-and-deferred-enforced-departure-ded).

If the client is in removal proceedings, what agency has initial jurisdiction over the TPS application?

USCIS. The regulations direct that a first time TPS applicant must file the application with USCIS.¹¹ For those in pending proceedings¹² before the immigration judge (IJ) or Board of Immigration Appeals (BIA) at the time a foreign state is designated for TPS, the regulations state that “the alien shall be given written notice concerning Temporary Protected Status” and “shall have the opportunity to submit an application for Temporary Protected Status to [USCIS]” unless the Notice to Appear (NTA) establishes that the applicant is alien ineligible for TPS.¹³ Similarly, USCIS also has jurisdiction over applications filed by those in removal proceedings who are eligible for late-initial TPS registration.¹⁴

When does an IJ have jurisdiction over a TPS application?

If USCIS denies the initial TPS application,¹⁵ the TPS applicant is entitled to *de novo* review¹⁶ of the TPS application by the IJ in two scenarios:

1. Following a USCIS Denial and issuance of an NTA: If USCIS denies the initial TPS application and the noncitizen is placed in removal proceedings, they have a right to a *de novo* determination by the IJ of their TPS eligibility.¹⁷ The regulations state that, if USCIS denies an initial TPS application on a basis that constitutes a ground for deportability or inadmissibility, the denial decision “shall include an NTA setting forth such ground(s).”¹⁸ If

¹¹ See 8 CFR § 1244.7(a) (“An application for Temporary Protected Status shall be filed with the director having jurisdiction over the applicant's place of residence.”).

¹² While 8 CFR § 1244.7(d) discusses “a pending deportation or exclusion proceeding before the immigration judge,” *Matter of Lopez-Aldana*, 25 I&N Dec. 49 (BIA 2009), makes clear that “deportation and exclusion proceeding[s]” includes removal proceedings.

¹³ 8 CFR §§ 244.7(d), 1244.7(d)

¹⁴ 8 CFR §§ 244.2(f)(2), 1244.2(f)(2); see also *Matter of Echeverria*, 25 I&N Dec. 512 (BIA 2011) (providing a history of the late-initial TPS registration provisions).

¹⁵ As the Biden administration continues to re-designate countries for TPS protection, note that if USCIS denied the initial TPS application for abandoning the process, which commonly arises after failing to respond to a Request for Evidence or a Notice of Intent to Deny, practitioners can seek reopening of the initial TPS application from USCIS pursuant to 8 CFR § 103.5(a)(2). Pursuant to 8 C.F.R. § 103.5(a)(5), USCIS may, as a matter of discretion, accept a late motion to reopen a proceeding if an applicant demonstrates that the delay in filing the motion was reasonable and beyond his or her control. See e.g. *In Re: Applicant*. [Identifying Information Redacted By Agency] 2007 WL 5359185, at *1 (treating an appeal of a decision to deny Salvadoran TPS for failure to respond to an RFE as a motion to reopen, granting the motion, and approving the TPS application).

¹⁶ *Lopez-Aldana*, 25 I&N Dec. 49 (BIA 2009).

¹⁷ See 8 CFR §§ 244.18(b); 1244.18(b); 8 CFR §§ 244.10(c)(2), 1244.10(c)(2); see also *Lopez-Aldana*, 25 I&N Dec. 49 (holding that an applicant for TPS may seek *de novo* review by an IJ in removal proceedings, regardless of whether all appeal rights before USCIS have been exhausted); *Matter of Figueroa*, 25 I&N Dec. 596 (BIA 2011) (holding that when a respondent renews the TPS application in removal proceedings, the IJ may consider material and relevant evidence, regardless of whether the evidence was previously considered in proceedings before the USCIS).

¹⁸ 8 CFR §§ 244.10(c)(1), 1244.10(c)(1).

USCIS issues¹⁹ an NTA with a TPS denial, the applicant may not appeal the denial to the USCIS Administrative Appeals Office (AAO) as they would otherwise be entitled to do under the regulations at 8 CFR § 103.3.²⁰ In fact, if DHS files the NTA with an immigration court while an appeal is pending before the AAO, the AAO will dismiss the appeal.²¹ The TPS applicant — now a respondent in removal proceedings — may renew the TPS application before the IJ.²² If the IJ denies TPS, the respondent may appeal the denial to the BIA.²³

2. Following a USCIS AAO Dismissal: If USCIS denies TPS without issuing an NTA, the applicant's subsequent appeal to the AAO is dismissed, and USCIS issues an NTA, the noncitizen has a right to a *de novo* determination by the IJ of their TPS eligibility.²⁴

If USCIS grants TPS, how does a grant of TPS affect the client's existing removal order?

Having a removal order is not a bar to TPS eligibility. If TPS is granted, the statute prohibits DHS from removing the individual while they have TPS,²⁵ but the grant of TPS does not eliminate the removal order. Consequently, if a person's TPS expires or their TPS renewal application is denied, DHS could execute the existing removal order.²⁶

If USCIS grants TPS, how does a grant of TPS affect the client's previously administratively closed removal proceedings?

Either party may move to re-calendar an administratively closed case at any time, including if USCIS denies the initial TPS application or if the AAO dismisses the appeal.

If USCIS grants TPS, how does having TPS affect ongoing removal proceedings?

If USCIS grants TPS, an IJ will generally not terminate proceedings because the Department of Justice's position is that TPS does not render a respondent admitted and therefore the INA § 212(a)(6)(A)(i) ground of inadmissibility stands.²⁷ As a result, if the client wishes to pursue permanent relief, like asylum, before the IJ, the grant of TPS does not prevent the client from continuing to pursue that relief.

¹⁹ While 8 CFR § 244.10(c)(2) and 8 CFR § 1244.10(c)(2) state that the AAO loses jurisdiction when USCIS "issues" an NTA, 8 C.F.R. § 1003.14(a) states that removal proceedings do not commence unless and until the NTA is filed with the immigration court.

²⁰ 8 CFR § 244.10(c)(2).

²¹ 8 CFR §§ 244.18(b), 1244.18(b).

²² 8 CFR §§ 244.11, 1244.11.

²³ *Id.*

²⁴ 8 CFR § 244.10(c); see also *Matter of Barrientos*, 24 I&N Dec. 100 (BIA 2007).

²⁵ INA § 244(c)(1)–(2).

²⁶ While Venezuelan TPS applicants await a decision on their TPS applications, those who qualify for Deferred Enforced are protected against removal through and including July 20, 2022.

²⁷ See *Matter of Sosa Ventura*, 25 I&N Dec. 391 (BIA 2010).

While the U.S. courts of appeals for the Sixth, Eighth, and Ninth Circuits consider TPS to be a valid “admission,”²⁸ the BIA has narrowed the applicability of these holdings. In *Matter of Padilla Rodriguez*, 28 I&N Dec. 164 (BIA 2020), the BIA held that only those with valid TPS and seeking to establish adjustment of status eligibility are considered to be “admitted.” Therefore, a respondent in removal proceedings within these jurisdictions who obtains TPS may seek termination for the purpose of pursuing adjustment of status. Otherwise, if the respondent is not in valid TPS status and pursuing adjustment of status, they are inadmissible under INA § 212(a)(6)(A)(i).

Practitioners are hopeful that new Immigration and Customs Enforcement (ICE) leadership will mean a return to a more reasonable exercise of prosecutorial discretion by ICE Office of the Principal Legal Advisor (OPLA) attorneys, but ICE OPLA has not yet issued any public information about returning to the regular use of discretion such as through joining motions to administratively close or dismiss removal proceedings.²⁹ While IJs outside of the Fourth Circuit³⁰ and the Seventh Circuit³¹ may be precluded by *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018), from administratively closing removal proceedings, practitioners could nonetheless move for administrative closure³² to preserve the issue for appeal. If DHS does not join a motion to dismiss, IJs will lack authority to dismiss removal proceedings for those with TPS, pursuant to *Matter of Sosa Ventura*, 25 I&N Dec. 391 (BIA 2010).

II. Implications of Dual Nationality

The client is a dual national of the TPS-designated country and another country. How will the client’s dual nationality affect the TPS application?

The current TPS application, Form I-821, directs the applicant to list all countries of citizenship or nationality that apply. While being a dual national does not prevent an applicant from meeting the nationality requirement for TPS,³³ it may nonetheless lead to a Request for Evidence (RFE) or a denial of the TPS application. USCIS may also issue an RFE or deny the TPS application based on a finding of firm resettlement in the non-TPS designated country.

²⁸ *Velasquez v. Barr*, 979 F.3d 572 (8th Cir. 2020); *Ramirez v. Brown*, 852 F.3d 954 (9th Cir. 2017); *Flores v. USCIS*, 718 F.3d 548 (6th Cir. 2013). The U.S. Supreme Court granted certiorari in *Sanchez v. Mayorkas*, No. 20-315, ___ S. Ct. ___, 2021 WL 77237 (Mem.) (Jan. 8, 2021), and will decide whether a grant of TPS qualifies as an “inspection and admission” pursuant to INA § 245(a).

²⁹ In the past, INS directed government attorneys to agree to administrative closure where a noncitizen was *prima facie* eligible for TPS or DED. See, e.g., Memorandum from Dea Carpenter, INS Deputy Gen. Counsel, HQCOU 120/12.2-P, *Administrative Closure When Alien is Prima Facie Eligible for TPS or DED* (Feb. 7, 2002).

³⁰ See *Zuniga Romero v. Barr*, 937 F.3d 282 (4th Cir. 2019) (overturning *Matter of Castro-Tum*).

³¹ See *Meza Morales v. Barr*, 973 F.3d 656 (7th Cir. 2020) (overturning *Matter of Castro-Tum*).

³² The practitioner could argue in the motion to administratively close that if DHS does not timely respond to the motion, the IJ should deem the motion unopposed. See Immigration Court Practice Manual Chapter 3.1(b) (Delivery and Receipt) (last updated Dec. 28, 2020).

³³ USCIS, Questions and Answers, Designation of Syria for Temporary Protected Status, at 2 (Mar. 29, 2012) Page 2 uscis.gov/sites/default/files/document/questions-and-answers/TPS_Syria_QAs_03-29-12.pdf. [Hereinafter “Syria Q and As”].

How does USCIS determine if a dual national TPS applicant is a national of the non-TPS designated country?

In *Matter of Ognibene*, 18 I&N Dec. 425 (BIA 1983), the BIA reviewed the case of a dual Italian and Canadian national seeking treaty investor status and concluded that although dual nationality may exist, a person may claim only one nationality at a time for immigration matters within the United States.³⁴ Despite the BIA's decision in *Matter of Ognibene*, the INS General Counsel's Office issued a 1992 Legal Opinion providing guidance on the eligibility of dual nationals for TPS benefits and noting that the existence of dual nationality would not strictly preclude an individual from satisfying the nationality requirement for TPS.³⁵ The Legal Opinion concluded that the Service may approve the TPS application in its discretion despite an applicant's dual nationality.³⁶ However, even if the dual national TPS applicant is able to overcome the "operative nationality" test, they may still receive an RFE seeking evidence that they did not firmly resettle in another country, as firm resettlement is a separate statutory bar to TPS. As recently as 2011,³⁷ the AAO has denied many TPS applications for dual citizens, using the conduct-based analysis applied in *Matter of Ognibene* to determine the person's "operative nationality" and despite recognizing their discretion pursuant to the INS General Counsel's Office 1992 Legal Opinion. In conducting this analysis, the AAO has looked at which passport the TPS applicant used to enter the United States, considered what nationality the individual claimed when apprehended by immigration authorities, and analyzed the citizenship and nationality laws of the relevant countries.³⁸

³⁴ The AAO cites to this 1992 INS General Counsel's Office Legal Opinion throughout its unpublished decisions dealing with dual nationals. See, e.g., *In Re: Applicant*: [Identifying Information Redacted By Agency] 2011 WL 7790573 (citing Genco Op. No 84-22 (INS) (July 13, 1984) ("The nationality claimed or established by the nonimmigrant alien when he enters the United States must be regarded as his sole nationality for the duration of his stay in the United States. [Emphasis added]."). This unpublished AAO decision is also available here: uscis.gov/sites/default/files/err/M1%20-%20Application%20for%20Temporary%20Protective%20Status/Decisions_Issued_in_2011/May112011_08M1244.pdf.

³⁵ See Genco Op. No 92-34 (INS) (August 7, 1992). However, while the AAO seems to apply *Matter of Ognibene* to dual nationals in various contexts, the AAO did not follow the "operative nationality" reasoning in *Ognibene* in an unpublished decision assessing eligibility for Cuban Adjustment Act (CAA) of 1966 adjustment. 80 No. 5 Interpreter Releases 156. In that case, the applicant was a Cuban national through birth and a Venezuelan citizen who entered the United States on a Venezuelan passport. In withdrawing the denial and approving the adjustment application, the AAO noted that the CAA requires that the applicant be a native or citizen of Cuba and being born in Cuba suffices for proving that the applicant is a native of Cuba.

³⁶ *Id.*

³⁷ The author did not find any post-2011 unpublished AAO decisions discussing TPS and dual nationals that also cite to *Matter of Ognibene*.

³⁸ See, e.g., *In Re: Applicant*: [Identifying Information Redacted By Agency] 2004 WL 3487459, at *1 (holding that the applicant was ineligible for Salvadoran TPS because the applicant last entered the United States as a visitor at Houston, Texas as confirmed by the admission stamp in his Canadian passport and, as such, he asserted his Canadian citizenship when he presented himself for inspection); *In Re: Applicant*: [Identifying Information Redacted By Agency] 2007 WL 5326985, at *2 (holding that the applicant was ineligible for Salvadoran TPS where the applicant stated in a sworn statement before United States Border Patrol officers that he was born in Mexico, was a citizen of Mexico, and both of

How does USCIS analyze firm resettlement for a TPS applicant?

Referencing INA § 208(b)(2)(A), the INA states that a noncitizen who was firmly resettled in another country prior to arriving in the United States is not eligible for TPS.³⁹ The regulations state that a noncitizen is “considered to be firmly resettled if, prior to arrival in the United States, he or she *entered into another country with, or while in that country received, an offer of permanent resident status, citizenship, or some other type of permanent resettlement. . .*”⁴⁰

Pursuant to the regulations, simply having a passport from the non-TPS country without an entry into the non-TPS-country does not meet the definition of firm resettlement. The plain language of the regulations requires that the TPS applicant actually “entered into another country.”⁴¹ Therefore, if a dual national TPS applicant never entered the other country and simply holds a passport from the non-TPS designated country, these facts should not give rise to a firm resettlement finding.

Even if the dual national TPS applicant did enter the non-TPS designated country, the TPS applicant may still be able to establish that they are not subject to the firm resettlement bar. The regulations provide for two exceptions to the firm resettlement bar:⁴²

- No Significant Ties. If the TPS applicant’s entry into that country was a necessary consequence of his or her flight from the conditions in the TPS country, they remained in that country only as long as was necessary to arrange onward travel, and they did not establish significant ties in that country; or
- Restrictive Conditions. If the conditions in the non-TPS country were so substantially and consciously restricted by the authority of the country that they was not in fact resettled.

USCIS guidance helps assess how the agency applies the firm resettlement bar. Pursuant to the March 29, 2012 USCIS Questions and Answers on “Designation of Syria for Temporary Protected Status,” USCIS determines whether the firm resettlement bar applies on a case-by-case basis. TPS applicants may submit evidence regarding when and how they obtained their non-TPS citizenship, the nature of their family and other ties to the non-TPS country, whether they have lived in the other country, when and how long they lived in that country, dates of visits to the non-TPS country of

his parents were citizens of Mexico and records indicated he was a Mexican citizen); *In Re: Applicant*: [Identifying Information Redacted By Agency] 2007 WL 5328169, at *1 (holding that the applicant for Salvadoran TPS was ineligible because the record — a statement to the United States Border Patrol — showed that he was a Guatemalan national); *In Re: Applicant*: [Identifying Information Redacted By Agency] 2012 WL 8503706 (analyzing Haiti’s nationality laws), at *3; *In Re: Applicant*: [Identifying Information Redacted By Agency] 2011 WL 7790299, at *1 (assessing the citizenship laws of both the Bahamas and Haiti).

³⁹ INA § 244(c)(2)(B)(ii).

⁴⁰ 8 CFR § 1208.15 (emphases added).

⁴¹ *Id.*

⁴² 8 CFR § 1208.15.

citizenship, and any other information that the applicant believes may be relevant to the firm resettlement issue.⁴³

Unpublished AAO decisions are also instructive on what qualifies as firm resettlement in the TPS context. In one case, the AAO determined that “the establishment of a business operation by the applicant’s father, as well as her attendance at computer and language school [for over two years], all give additional weight to the fact that the applicant and her family had established unrestricted residence in Thailand.”⁴⁴ In another case, the AAO deemed the eight-year duration of the applicant’s unrestricted residence in Ethiopia as sufficient firm resettlement in that country and, although the testimony during removal proceedings was replete with discrepancies, it was clear from the record that the applicant had “resided in Ethiopia for a significant length of time and entered the United States with an Ethiopian passport.”⁴⁵

Lastly, recent RFEs provide insight into the firm resettlement bar. For example, in a November 2017 RFE issued to a dual national applicant for Haitian TPS,⁴⁶ USCIS requested that the applicant explain:

- The reasons for being in the other country;
- Why they left that country;
- Whether they had the same privileges provided to other persons who lived permanently in the country; and
- Any other reasons why they did not consider themselves to have been firmly resettled in the country.

In that case, the dual national TPS applicant successfully responded to the RFE by explaining that they identified as LGBTQ and their life was severely restricted in the non-TPS country because the government of that country did not grant full rights to members of the LGBTQ community.

TPS applicants may also be able to prove their lack of privileges compared to other permanent residents by virtue of the well-documented ill treatment by the non-TPS country society. For example, South American countries that have absorbed a large number of Venezuelan nationals have seen their societies resort to xenophobia and violence against Venezuelans in ways that suggest that Venezuelans lived in dangerous and, ultimately, restrictive conditions.⁴⁷

⁴³ Syria Q and As, *supra* note 30.

⁴⁴ *In Re: Applicant*. [Identifying Information Redacted By Agency] 2004 WL 2897475, at *2.

⁴⁵ *In Re: Applicant*. [Identifying Information Redacted By Agency] 2004 WL 3487650, at *5.

⁴⁶ RFE issued November 2017 (on file with the author and attached in redacted form as Appendix).

⁴⁷ See, e.g., Jan Borman, *Xenophobia towards Venezuelans on the rise in Peru*, New Frame, Feb. 27, 2020, newframe.com/xenophobia-towards-venezuelans-on-the-rise-in-peru/; Matthew Bristow and Jim Wyss, *Attacks and Insults Greet Venezuelans Fleeing a Ruined Homeland*, Bloomberg, Jan. 25, 2021, [bloomberg.com/news/articles/2021-01-25/attacks-and-insults-greet-venezuelans-fleeing-a-ruined-homeland](https://www.bloomberg.com/news/articles/2021-01-25/attacks-and-insults-greet-venezuelans-fleeing-a-ruined-homeland); John

Should the client apply for TPS despite being a dual national?

Again, being a dual national does not prevent an applicant from meeting the nationality requirement for TPS and the firm resettlement assessment is very fact-specific. Dual national TPS applicants should consider if it is in their best interest to apply for TPS and, if so, answer the question regarding country or countries of citizenship or nationality truthfully to prevent a future misrepresentation allegation and then prepare for an RFE.

III. Asylum Considerations

If the client is a dual national, what are some considerations for the asylum claim before the IJ?

A TPS-eligible dual national client may want to pursue TPS and asylum simultaneously. The analysis of dual nationality is different under asylum law than for establishing TPS eligibility. As noted above, it is difficult but not impossible to obtain TPS despite being a dual national given that, unlike asylum, “TPS is not a provision designed to create a general right to remain in the United States” and that “[w]hether to grant TPS to an eligible alien is a matter entrusted to administrative discretion.”⁴⁸ Conversely, if an asylum seeker is a citizen of two countries, they are generally not eligible for asylum in the United States unless they can demonstrate a fear of persecution in each country of citizenship. Even if the asylum seeker has never traveled to the country of dual citizenship, the claim for asylum will be barred.⁴⁹ While a dual citizen asylum seeker may prevail in a claim for withholding of removal to the country where they fear persecution, the U.S. government can nonetheless remove the individual to the other country of citizenship.

If a dual national client wishes to proceed with asylum, the practitioner should discuss the possibility of the IJ ordering them removed to the non-TPS designated country and how that IJ order of removal to the non-TPS designated country could affect the pending or approved TPS. If the client maintains TPS, then the client would be protected from enforcement of the order of removal to any country. However, if USCIS were to rely on that IJ order of removal to deny or withdraw the client’s TPS grant, the client would lose protection from removal and could be physically removed to the non-TPS designated country. The practitioner should ensure that the client would be willing to go to that country in such a scenario.

Ultimately, the dual national client should understand the implications of pursuing asylum while simultaneously pursuing TPS, including the importance of providing a consistent factual record to both USCIS in support of the TPS application and to the IJ in support of the asylum application.

Otis, *Large Venezuelan Migration Sparks Xenophobic Backlash In Colombia*, NPR News, Dec. 29, 2020, [npr.org/2020/12/29/949548865/large-venezuelan-migration-sparks-xenophobic-backlash-in-colombia](https://www.npr.org/2020/12/29/949548865/large-venezuelan-migration-sparks-xenophobic-backlash-in-colombia)

⁴⁸ See Genco Op. No 92-34 (INS) (August 7, 1992).

⁴⁹ *Matter of B-R-*, 26 I&N Dec. 119 (BIA 2013) (finding dual citizen of Venezuela and Spain ineligible for asylum).

What are some strategic considerations if the client is pursuing asylum before the IJ?

Whether or not a TPS-eligible respondent chooses to continue to pursue an asylum claim before the IJ will depend on considerations specific to the individual's asylum claim and case. Some respondents who are applying for TPS or were granted TPS may seek to slow down or end the removal proceedings, despite being eligible for asylum. Options for slowing or ending the proceedings will depend on how DHS chooses to exercise prosecutorial discretion under the current presidential administration, as discussed above.

In deciding whether a TPS applicant should actively pursue asylum at the earliest opportunity or whether to seek to postpone proceedings before the court, the asylum applicant should consider several questions:

- Legal Counsel
 - If the client does not proceed with asylum now, who would represent them in an asylum application in immigration court in the future, if it becomes necessary?
 - Does the client need advice on how to find new competent counsel if current counsel cannot represent them on the asylum claim in the future?
- Asylum Claim⁵⁰
 - If the client has not yet filed the I-589, when is the one-year filing deadline and how can counsel ensure the client meets this deadline?
 - If the claim is based on political opinion, will the passage of time improve political or other conditions such that it is better to have the asylum claim adjudicated quickly?
 - Are there family members abroad, in harm's way, on whose behalf the client could file a Form I-730, Asylee Relative Petition, if asylum were granted?
 - If the claim is based on domestic violence or a family relationship, what is the current state of particular social group, and other, asylum law? Is there a possibility that having the case adjudicated at a later date may mean that the law binding the IJ will have improved?
- Testimony
 - How will the passage of time affect the client's memory and ability to testify credibly?
 - Would the client benefit from ongoing therapy before having to testify about past persecution?
- Discretion
 - If the client has more time to get acclimated in the United States, will the client be able to accumulate positive equities?

⁵⁰ According to the DHS Office of Immigration Statistics Office of Strategy, Policy, and Plans, the three leading countries of nationality of persons granted affirmative or defensive asylum in 2019 were China (16 percent), Venezuela (15 percent), and El Salvador (6.9 percent), dhs.gov/sites/default/files/publications/immigrationstatistics/yearbook/2019/refugee_and_asylee_2019.pdf.

- Immigration Judge
 - If the IJ's asylum grant rate is low, what are the chances that the client's case may be assigned to a different IJ if the client postpones seeking asylum?

If a Venezuelan client is pursuing asylum before the Asylum Office, does it matter to the Asylum Office if the client has DED or TPS?

Yes. If the Asylum Office denies the asylum application of an individual who is considered not to be in valid status under 8 CFR § 208.14(c)(2),⁵¹ USCIS will issue an NTA and refer the case to the IJ, but USCIS will not refer a denied case to immigration court if the applicant has valid status. If an applicant has been granted TPS, the Asylum Office considers them to be in valid status. Conversely, DED is not considered to be a valid immigrant status, nonimmigrant status, or TPS under 8 CFR § 208.14(c)(2).⁵²

If the asylum applicant is in lawful status and the Asylum Office does not believe the applicant has demonstrated eligibility for asylum, the Asylum Office will issue a Notice of Intent to Deny (NOID), providing the asylum applicant 10 days, plus 6 days for mailing (a total of 16 days), to rebut the reasons for the proposed denial.⁵³ The Asylum Office then considers the rebuttal argument and/or evidence before it issues a final decision.⁵⁴ If the applicant continues to have TPS, and the Asylum Office finds they do are not eligible for asylum, it issue a denial of the asylum application rather than a referral the applicant to the IJ.⁵⁵ While the asylum seeker will continue to have TPS, they will not be able to pursue asylum further unless they are placed in removal proceedings in the future or can meet certain criteria to seek reopening directly with the asylum office.⁵⁶

If the applicant loses TPS between the issuance of the NOID and the date of issuance of the final decision, USCIS will refer the asylum applicant to the IJ, as such individuals are not in lawful status. 8 C.F.R. § 208.14(c). Similarly, the Asylum Office will refer asylum applicants with DED to the IJ because DED is not considered to be "in status" and therefore is not valid status under 8 CFR § 208.14(c)(2).⁵⁷

⁵¹ 8 CFR § 208.14 (defining valid status as "an applicant who is maintaining valid immigrant, nonimmigrant, or Temporary Protected Status at the time the application is decided.").

⁵² USCIS Affirmative Asylum Procedures Manual at 37 (2016), uscis.gov/sites/default/files/document/guides/AAPM-2016.pdf.

⁵³ *Id.* at 26

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ 8 CFR § 208.14(c)(1); *see also* USCIS Affirmative Asylum Procedures Manual at 37.

If the Asylum Office grants asylum, it does not matter whether the applicant was in status or not at the time of the application; the applicant becomes an asylee, which is a lawful status granted for indefinite duration.⁵⁸

A Venezuelan client is now potentially eligible for an Employment Authorization Document (EAD) under three categories. Which is the best choice for the client?⁵⁹

The chart below discusses the differences in when to apply, the cost of applying, and the length of the EAD card if granted.

Issues	DED (Category (a)(11))	TPS (Categories (a)(12) initial and (c)(19) renewal)	Asylum pending (Category (c)(8))
When can applicant file?	Any time after the DED announcement but before 7/20/2022	Immediately and concurrently with the I-821 through 9/5/21 (180-day initial registration period)	After waiting 365 days, or after 150 days if the client is a ASAP/CASA member, from the date of the I-589 filing
Cost of EAD?	\$410	Varies; must pay for I-821 and the EAD fee is based on age; \$545 total for adults	\$495 (unless ASAP/CASA member)
Fee waiver?	Available	Available	Available
Length of EAD?	Valid through 7/20/22 regardless of when issued	Valid through 9/9/22 regardless of when issued	Two years from date of issuance

⁵⁸ According to the DHS Office of Immigration Statistics Office of Strategy, Policy, and Plans, the leading countries of nationality for persons granted affirmative asylum were Venezuela (23 percent), China (15 percent), Egypt (7.8 percent), and Turkey (6.3 percent) (Table 8), dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2019/refugee_and_asylee_2019.pdf.

⁵⁹ For practitioners with Liberian clients trying to assess their EAD options, note that while Liberians have DED until June 30, 2022, Liberians are eligible to apply for permanent resident status under Section 7611 of the National Defense Authorization Act for Fiscal Year 2020, 52 Liberian Refugee Immigration Fairness (LRIF) through December 20, 2021. As such Liberians, have different EAD considerations than Venezuelans despite both benefiting from DED. See U.S. Citizenship and Immigration Services, "Liberian Refugee Immigration Fairness," (last updated Jan. 4, 2021), uscis.gov/green-card/green-card-eligibility/liberian-refugee-immigration-fairness.

November [REDACTED], 2017

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
California Service Center
Laguna Niguel, CA 92607-0590



U.S. Citizenship
and Immigration
Services

[REDACTED]
CATHOLIC CHARITIES ILS

[REDACTED]



[REDACTED]



A [REDACTED]

RE: [REDACTED]
I-821, Application for Temporary Protected Status

REQUEST FOR EVIDENCE

IMPORTANT: THIS NOTICE CONTAINS YOUR UNIQUE NUMBER. THE ORIGINAL NOTICE MUST BE SUBMITTED WITH THE REQUESTED EVIDENCE.

You are receiving this notice because U.S. Citizenship and Immigration Services (USCIS) requires additional evidence to process your form. Please provide the evidence listed on the attached page(s). Include duplicate copies if you are requesting consular notification.

Your response must be received in this office by [REDACTED]

Please note that you have been allotted the maximum period allowed for responding to an RFE. The time period for responding cannot be extended. 8 CFR 103.2(b)(8)(iv). Because many immigration benefits are time sensitive, you are encouraged to respond to this request as early as possible, but no later than the deadline provided above. If you do not respond to this notice within the allotted time, your case may be denied. The regulations do not provide for an extension of time to submit the requested evidence.

You must submit all requested evidence at the same time. If you submit only some of the requested evidence, USCIS will consider your response a request for a decision on the record. 8 CFR 103.2(b)(11).

If you submit a document in any language other than English, the document must be accompanied by a full and **complete** English translation. The translator must certify that the translation is accurate and he or she is competent to translate from that language to English. **If you submit a foreign language translation in response to this request for evidence, you must also include a copy of the foreign language document.**

Processing of your I-821 will resume upon receipt of your response. If you have not heard from USCIS within **60 days of responding**, you may contact the USCIS National Customer Service Center (NCSC) at **1-800-375-5283**. If you are hearing impaired, please call the NCSC TDD at **1-800-767-1833**.



[REDACTED]

You recently submitted an application for TPS Haiti.

A review of your immigration record or the documentation submitted indicates that prior to entering the United States, you were living or resettled in a country other than the TPS designated country. In order for USCIS to determine whether you have been firmly resettled in another country prior to your arrival, you must provide the following additional information:

- ✓ First, submit a list of all addresses where you resided for the three (3) years prior to entering the United States. You must include the city, state, and country for each address as well as the length of time that you resided at each address.

- ✓ Second, you indicated that you lived in [REDACTED] from [REDACTED] through [REDACTED], and that you are a citizen of that country. If you have lived in any other country besides the TPS designated country before coming to live in the United States, please provide an explanation of your immigration status in that country, as well as your stay in [REDACTED], whether you had lawful permission to be in that country; whether your permission was temporary or permanent; your reasons for being in that country; your reasons for leaving; whether you were a refugee from another country; whether you had the same privileges provided to other persons who lived permanently in the country (see above); and any reasons why you do not consider yourself to have been firmly resettled in the country or countries where you lived (other than the TPS designated country) before you came to the United States.

- ✓ Third, submit as much of the following documentation as possible:
 - Copies of any records showing that you are a citizen of one or more countries other than the TPS designated country;
 - Copies of voter registration documentation from countries other than the TPS designated country;
 - Copies of any visas, residence cards or other immigration documents for countries other than the United States where you have lived;
 - Copies of your passport(s) showing entries and departures. This includes expired passports;
 - Evidence of your purpose for living in the other country or countries before arriving in the United States (e.g., school records; temporary employment);
 - Any evidence that you were not allowed to enjoy the same privileges provided to other persons who lived permanently in the same country where you lived, such as freedom to worship, work, travel, live where you wished, attend school, obtain medical care, and vote if you were a citizen of the country.
 - Any other evidence that you believe demonstrates that you were not firmly resettled in the other countries where you lived before coming to the United States.

The Application for Temporary Protected Status (TPS) you have submitted is incomplete because you failed to answer all of the questions on Part 4 of the application. As stated in the instructions on Part 4 of the I-821, if any of the questions apply to you, describe the circumstances and include a full explanation on a separate sheet of paper.

Enclosed is a copy of page 9 of the Form I-821. Please complete part 4 question 29a and attach the

page to this request. Submit this request and the completed Form I-821 page 9 to the address as described on this notice. All questions, fields of information, etc. must be answered as indicated on the form and the form must contain your original signature.

PLEASE RETURN THE REQUESTED INFORMATION AND ALL SUPPORTING DOCUMENTS WITH THIS ORIGINAL REQUEST ON TOP TO:

**U.S. Citizenship and Immigration Services
California Service Center
P.O. Box 10590
Laguna Niguel, CA 92607-0590**



Kathy A. Baran
Director
Officer: AD8455
Enclosures:

Form I-821 Application for Temporary Protected Status

