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Immigration and Naturalization Service

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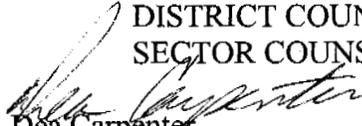
Office of the General Counsel

425 I Street NW
Washington, DC 20536

MEMORANDUM FOR REGIONAL COUNSEL
DISTRICT COUNSEL
SECTOR COUNSEL

FEB 7 2002

FROM:


Dea Carpenter
Deputy General Counsel

SUBJECT: Administrative Closure When Alien is *Prima Facie* Eligible for TPS or DED

I. Introduction

This memorandum sets out a uniform policy for handling cases in which an alien in proceedings is *prima facie* eligible for TPS and/or DED. In short, INS should agree to administratively close proceedings involving individuals who are *prima facie* eligible for temporary protection against removal.¹ This policy conserves and prioritizes resources, both those of INS and EOIR, for other cases in which there is no present impediment to removal from the United States. Furthermore, this policy is consistent with the humanitarian concerns underlying the designation of nationals of a particular country for protection against removal.

*Administrative closure:*² Administrative closure is a procedural convenience that allows the immigration court or Board to remove cases from its calendar in "appropriate situations."³ It is analogous to a remand to the Service for administrative action, though the charging document remains outstanding and proceedings technically remain pending.⁴ The BIA has held that

¹ This memorandum supplements existing guidance. See, e.g., Lori Scialabba memorandum, "Deportation of aliens who are *prima facie* eligible for TPS but fail to register" (March 31, 1997) ("... INS should not oppose a continuance . . . to allow the alien an opportunity to file an application for TPS, . . . If the alien qualifies for TPS benefits . . . , the INS should move to administratively close the proceedings.").

² This paragraph was adapted from Mary Reiko Osaka and Michael P. Conricode, "Removal, Deportation and Exclusion Proceedings," INS Trial Attorney Manual (1999).

³ Matter of Amico, 19 I&N Dec. 652, 654 at n.1 (BIA 1988); see also Matter of Munoz-Santos, 20 I&N Dec. 205, 207 (BIA 1990).

⁴ See General Counsel Legal Opinion 90-84, "Effect of administrative closure on section 204(h) of the INA (section 5 of IMFA)" (October 17, 1990).

administrative closure is not appropriate if either party objects.⁵ It follows that either party may move to re-calendar a case, or reinstate an appeal, at any time.

*Temporary Protected Status (TPS):*⁶ TPS is a temporary immigration status granted to eligible nationals⁷ of designated countries. The Attorney General may provide TPS to aliens in the United States who are temporarily unable to return to their homeland because of ongoing armed conflict, environmental disaster, or other extraordinary and temporary conditions. TPS is the Attorney General's sole authority to allow otherwise removable aliens to remain in the United States "because of their particular nationality. . . ." INA § 244(g). During a period of TPS, beneficiaries may remain and work in the United States. TPS affords only temporary protection against removal and does not provide any independent basis for regularizing one's status in the United States. When the Attorney General terminates a TPS designation, beneficiaries return to the same immigration status they maintained before TPS (unless that status had since expired or been terminated) or to any other status they may have acquired while registered for TPS. Accordingly, if an alien enjoyed no lawful status prior to receiving TPS and did not obtain any alternative status during the TPS period, he or she would revert to that unlawful status upon termination of the TPS designation.

Deferred Enforced Departure (DED): Like TPS, DED is a discretionary, temporary protection against removal granted to aliens from a designated country. While TPS and DED serve similar purposes, there are three important distinctions. First, TPS is a creature of statute, while DED emanates from the President's constitutional powers to conduct foreign relations. Second and related, whereas the Attorney General exercises the statutory authority to designate a country for TPS, only the President may exercise the constitutional authority to designate DED for nationals of a particular country. Third, TPS is a "status," while DED beneficiaries possess no status but only protection against removal.⁸ DED was first used in 1990 and has been used a

⁵ *Matter of Gutierrez-Lopez*, 21 I&N Dec. 479, 480 (BIA 1996); *Munoz-Santos*, at 207; *Matter of Lopez-Barrios*, 20 I&N 203, 204 (BIA 1990). In *Gutierrez-Lopez*, the Board contemplated that its instructions - not to close a case if either party objects - would apply to immigration judges and the Board alike. "Administrative closure of a case is used to temporarily remove a case from an Immigration Judge's calendar or from the Board's docket. A case may not be administratively closed if opposed by either of the parties." 21 I&N Dec. at 480 (emphasis added).

⁶ Section 302 of the Immigration Act of 1990 (IMMACT 1990), codified at 8 U.S.C. section 1254a and section 244 of the Immigration and Nationality Act (INA, or the Act); see also 8 C.F.R. 244. For a list of past and current TPS designations, see http://www.ins.gov/graphics/services/tps_inter.htm.

⁷ In the case of an alien having no nationality, a person who last habitually resided in the designated state is also eligible to apply for TPS benefits.

⁸ This distinction becomes relevant for applicants who apply for asylum "affirmatively" at an Asylum Office. Were the Asylum Office not to grant asylum, the TPS beneficiary's application would be "denied," while the DED

total of five times. Currently, nationals of Liberia are designated under DED through September 29, 2002.

II. Why administrative closure is preferred

There are two related reasons for favoring administrative closure of cases involving individuals who are eligible for TPS or DED benefits. First, administrative closure conserves INS and EOIR resources that are better directed towards completing proceedings involving aliens for whom there is no present impediment to removal from the United States. Although legal proceedings may take many years to run their course, TPS and DED classes may also be extended for many years. While TPS and DED do not necessarily lead to permanent status and beneficiaries may remain subject to removal upon termination of those protections, beneficiaries may also find alternative means by which to regularize their status. Although DED is not a status like TPS, the policy in favor of administrative closure is as applicable to DED beneficiaries as to TPS beneficiaries, since DED classes are often designated in anticipation of a more durable, legislative solution.⁹

Second, during the time that proceedings are administratively closed, country conditions may improve to such an extent that an individual who has filed or contemplates filing an application for asylum may now believe that it is safe to return home.¹⁰ Favoring administrative closure is thus consistent with the rationale for several exceptions to the one-year filing deadline for asylum applicants. See 8 CFR 208.4(a)(5)(iv) (maintenance of TPS, immigrant and non-immigrant status, or parole may constitute an extraordinary circumstance that qualifies as an exception to the one-year filing deadline).¹¹ The Service should not encourage individuals to

beneficiary's application would be "referred" to an Immigration Judge. A Presidential Memorandum designating a group for DED protection could instruct otherwise, but this has been the practice to date.

⁹ See, e.g., former President Clinton's "Statement on Deferring Deportation of Liberian Refugees" (Sept. 28, 2000) ("I understand that Congress is actively considering a legislative fix for this problem, and I would welcome any solution that would provide relief for Liberians with longstanding ties to the United States.").

¹⁰ An asylum applicant may properly decline the opportunity to administratively close proceedings if he or she believes that a meritorious asylum claim could become "stale" with the passage of time. In this regard, whether to seek administrative closure of proceedings is a matter of litigation strategy that initially resides with the alien.

¹¹ See 65 Fed. Reg. 76121, 76123 (Dec. 6, 2000) ("[t]here are sound policy reasons to permit persons who were in a valid immigrant or nonimmigrant status, or who were given parole, to apply for asylum within a reasonable time after termination of parole or immigration status. The Department does not wish to force a premature application for asylum in cases in which an individual believes circumstances in his country may improve, thus permitting him to return to his country."). TPS is a status, the maintenance of which is expressly mentioned in the list of possible exceptions to the one-year asylum deadline. DED is not a status, but the rationale against forcing premature asylum applications is equally, if not more, compelling. DED protection is granted only sparingly in those cases where the President anticipates and often encourages a more durable, legislative solution. Here, the shared purpose of TPS and

pursue asylum claims prematurely if there is no current ability to remove the individual from the United States.

These basic considerations, as well as the general principles that guide the proper exercise of prosecutorial discretion, are further explored in former Commissioner Meissner's November 17, 2000 memorandum, entitled "Exercising Prosecutorial Discretion."¹²

III. Notice

TPS: Section 244 of the Act contains several provisions requiring that aliens be notified of a TPS designation. In addition to providing general notice of a designation, INA §§ 244(b)(1),(4), the Attorney General must "promptly notify" an individual who is in proceedings that TPS may be available. INA § 244(a)(3)(C). If an immigration judge does not advise an individual during a master calendar or merits hearing that he or she may be eligible for TPS, the Service should inform the individual. Additionally, the Service should inform the individual of any applicable ground of inadmissibility for which a waiver is available and required.

DED: While there is no parallel statutory notice provision for DED, Service attorneys should note an individual's apparent eligibility for DED benefits if the immigration judge does not.

IV. When to agree to adjourn proceedings

TPS: If, upon notification of a TPS designation, an individual indicates that he or she wishes to apply for TPS, the Service should agree to a reasonable¹³ adjournment to permit the individual an opportunity to file the application and obtain proof of filing. The Service should

DED - protection - outweighs their difference in "status." Parole is not a status, yet it is listed as a possible "extraordinary circumstance" under 8 CFR section 208.4(a)(5)(iv).

¹² <http://www.ins.gov/graphics/lawsregs/handbook/discretion.pdf>.

¹³ What constitutes a reasonable adjournment to obtain proof of filing may depend on both the Service's ability to receive and conduct initial data entry on the application, and also whether the application is filed at the district office or Service Center. District filing rules and timeframes may vary. Only after the Service Center completes initial data entry does it generate and mail the alien a receipt notice, Form I-797. Recently, several INS Service Centers have experienced processing "frontlogs" that have delayed the mailing of Form I-797 receipt notices to TPS applicants. While a U.S. Postal Service return receipt notice might suffice as proof of filing, INS Service Centers report that very few TPS applicants mail their applications with the green return receipt card. During normal operating times when there is no "frontlog," an adjournment of 45 days should be sufficient time for an individual to file a TPS application and obtain a receipt notice as proof of filing.

not agree to an adjournment if an individual is clearly ineligible for TPS.¹⁴ Prior to adjournment, the Service should inform the individual of any applicable ground of inadmissibility for which a waiver is available and required. The Service should ask the individual to produce proof at the next hearing that the waiver application was filed along with the general TPS application package.

DED: Unlike TPS, DED beneficiaries historically have not needed to apply for the benefit of non-removal. Unless subject to one of several enumerated bars, all nationals of a country designated for DED automatically have been protected against removal, though they must apply for work authorization if they so desire. Because there is no DED application requirement, potential beneficiaries do not need an adjournment to apply and obtain proof of application. At the alien's request or immigration judge's suggestion, the Service should agree to administratively close proceedings against an individual who is a national of a country designated for DED, unless the individual is otherwise barred from receiving those benefits.

V. When to agree to administratively close proceedings

A. Temporary Protected Status

The Service should not oppose administrative closure of proceedings if an alien produces evidence that he or she actually *filed* a TPS application. The Service will not agree to administratively close a case merely because an alien appears to be eligible, though the Service should agree to a reasonable adjournment (see above) so that the alien may file a TPS application package. At the same time, the Service will not require proof of final adjudication before acquiescing to administrative closure. The Service should oppose administrative closure if an individual does not appear to be eligible for TPS.

The Service generally should agree to administratively close proceedings only after pleadings have been taken and the issue of removability has been established. No purpose would be served by closing proceedings if the alien is not removable from the United States. Moreover, if TPS or DED protection is extended for a number of years, it may prove difficult later to obtain the necessary evidence - conviction records, witnesses, etc - to support the charge(s) contained in the NTA.

¹⁴ An individual is not eligible for TPS if he or she: (1) has been convicted of any felony or two or more misdemeanors, as defined in 8 CFR 244.1, committed in the United States; (2) is an alien described in section 208(b)(2)(A) of the Act (asylum bars); (3) is subject to one of several grounds of inadmissibility that may not be waived; or (4) does not satisfy the continuous residence and continuous physical presence requirements of the designation. See INA § 244(c)(2); 8 CFR 244.1-4.

Proof of filing: Proof of filing may include, but is not limited to: (1) a Form I-797 receipt notice that INS mails back to the applicant; or (2) a U.S. Postal Service return receipt postcard.¹⁵ Evidence of filing may vary for applications filed at the district office.

Proof that a waiver application was filed, if applicable: If the applicant is subject to an applicable ground of inadmissibility for which a waiver is available, the Service should request proof that a waiver application, Form I-601, was filed along with the TPS application package.¹⁶

Duration of administrative closure: Upon proof of proper filing, the Service should agree to administrative closure of proceedings until such time as the alien's application is denied, the TPS designation is terminated, or the alien wishes to re-calendar proceedings to pursue other benefits or relief. See Section VI (Tracking cases).

B. Deferred Enforced Departure

Unlike TPS, DED beneficiaries need not apply for the benefit of non-removal. Traditionally, unless subject to one of several enumerated bars, all nationals of a country designated for DED, who arrived on or before the date specified in the designation order, are automatically protected against removal, though they must apply for an EAD if they so desire. Because there is no DED application requirement, there is no initial need to adjourn proceedings to afford the alien an opportunity to produce proof of application. At the alien's request or immigration judge's suggestion, the Service should agree to administratively close proceedings against an individual who is a national of a country designated for DED, unless the individual is otherwise barred from receiving those benefits.

Duration of administrative closure: The Service should agree to administrative closure of proceedings until such time as the alien's application is denied,¹⁷ the DED designation expires,

¹⁵ The probative value of a U.S. Postal Service return receipt postcard may be limited. Immigration Services Division indicates that the postcard seldom indicates what type of application is contained in the envelope to which the postcard is attached.

¹⁶ See 8 CFR section 244.3 for a list of applicable grounds of inadmissibility for which a waiver may be available. Aside from checking for a Form I-601, if a waivable ground of inadmissibility applies, Assistant District Counsel need not review a copy of the entire TPS application package for sufficiency. The Service Center will mail a I-797 receipt notice only if the application package contained all basic forms and fees. At the time the receipt notice is generated, however, the Service adjudicators have not yet received a fingerprint report from the FBI nor reviewed any other databases that might indicate whether the applicant is subject to a ground of inadmissibility for which a waiver is required. Immigration Services Division reports that few TPS applicants self-identify applicable grounds of inadmissibility and file a Form I-601 along with the TPS application. Even when an applicant affirmatively identifies an applicable ground of inadmissibility yet fails to file a Form I-601, the Service Center contractors who perform initial data entry and generate receipt notices do not review the applications to determine whether a Form 601 was, or should have been, filed. For those applications filed locally, district office practice may vary.

or the alien wishes to resume proceedings to pursue other benefits or relief. See Section VI (Tracking cases).

VI. Tracking cases that are administratively closed

Each district should devise a tracking system so that cases may be returned to the Court's docket if: (1) an application for TPS or for DED-related work authorization is denied; (2) the alien was not in fact eligible at the time TPS or DED-related work authorization was granted or at any time thereafter becomes ineligible for TPS or DED benefits; (3) the TPS designation is terminated; or (4) the DED designation expires.¹⁸

VII. Exceptions and related issues

Exceptions to the general policy: Notwithstanding the general policy outlined above, the Service may oppose administrative closure of proceedings where such closure would not result in a substantial saving of agency resources. For example, the purpose of administrative closure might not be served by agreeing to close proceedings after one or more merits hearings have been conducted. In that scenario, the Service and Court have already expended considerable resources creating a record and assessing the individual's applications for relief. Similarly, the Service may properly oppose administrative closure if requested by the alien only at the beginning of a merits hearing. At this late hour, both the Service and the Court already have invested time reviewing applications for relief and supporting documentation and have allotted a block of time that cannot be rededicated to other cases. Furthermore, an interpreter may have been procured at government expense. Nor may administrative closure be appropriate where the TPS applicant does not appear to be eligible for, and does not seek, any form of relief other than pre-hearing voluntary departure. There may be additional circumstances in which administrative closure is not warranted. The relevant inquiry is whether, in the given scenario, administrative closure will result in a substantial saving of government resources.

The adjudication of "affirmative" asylum applications by the Office of International Affairs does not, alone, constitute the kind of resource investment that would require opposing administrative closure of proceedings. Asylum adjudication in removal proceedings is entirely

¹⁷ Although DED beneficiaries are not required to file an application, individuals who wish to obtain work authorization must file Form I-765 and submit fingerprints. An individual would be formally "denied" DED if s/he applied for work authorization and security checks revealed information that rendered the applicant ineligible for DED benefits.

¹⁸ The General Counsel's office will continue to work with Immigration Services Division to coordinate communication of decisions to deny TPS or DED protection in particular cases.

de novo, so the efforts of the Asylum Office are not expended costs that should weigh against administrative closure.¹⁹

The Service's refusal to agree to administrative closure does not threaten any of an alien's rights or benefits associated with TPS and/or DED protection. TPS and DED afford the benefits of non-removal and work authorization for the duration of the designation, neither of which are adversely affected by requiring that the alien pursue any relief from removal at the regularly scheduled hearing.

Administrative closure of cases on appeal before the BIA: Often, the Board *sua sponte* administratively closes cases of individuals who may be prima facie eligible for TPS or DED, without first (1) inquiring whether both parties are amenable to such closure or (2) requiring that the alien demonstrate that he or she has applied for such protection. If the Service attorney believes, based on the guidelines in this memorandum and this section in particular, that administrative closure is inappropriate, he or she may file a "motion to reinstate" the appeal. See Gutierrez-Lopez, 21 I&N Dec. at 482. As discussed above, the Board may not administratively close a case if either party opposes such closure.

Handling of pending applications for relief from removal:

The Service should not condition its acquiescence to administrative closure upon an alien's withdrawal of an application or waiver of the right to apply for asylum or any other form of relief. Section 244(a)(5) of the Act provides:

(5) CLARIFICATION. Nothing in this section shall be construed as authorizing the Attorney General to deny temporary protected status to an alien based on the alien's immigration status or to require any alien, as a condition of being granted such status, either to relinquish nonimmigrant or other status the alien may have or to execute any waiver of other rights under this Act.

INA § 244(a)(5) (emphasis added).²⁰ In the event that such conditions were imposed in the past, the Service must identify each case in which: (1) an alien entered into such an agreement,

¹⁹ The Asylum Office does not have a similar mechanism for administratively closing a scheduled asylum interview. The affirmative adjudication of asylum claims is an expediency established by the Service to approve claims that are clearly meritorious. Those who "affirmatively" come forward to seek asylum at an Asylum Office generally wish to pursue their claim without delay. By contrast, aliens are not generally in removal proceedings by choice, may not be ready to seek asylum, and thus may have more incentive to have the case stayed. That said, an alien who was placed in proceedings after referral by the Asylum Office may yet wish to close proceedings for the duration of the TPS or DED protection

whether by waiver, stipulation, or related mechanism; and (2) proceedings were not administratively closed because the alien rejected the condition. In the former category, the Service must make arrangements to release the alien from any such agreement, waiver, or stipulation. In the latter category, the Service should contact the alien and reconsider a request to administratively close proceedings in accordance with this memorandum.

If, upon the termination of a TPS or DED program, an alien still wishes to pursue a pending asylum application, the Service should afford the alien an opportunity to supplement the application.

NTA: This memorandum does not address the propriety of issuing, serving, or filing a Notice to Appear (NTA), each of which actions generates unique legal consequences. District Directors retain prosecutorial discretion to defer issuance of NTAs to nationals of countries designated under a TPS or DED program.

Detention: INS *must* release detained individuals who may be eligible for TPS and who wish to apply for such protection. Release is not contingent upon the filing or adjudication of an application. Individuals need not be held for the 90-day removal period after orders become final. See Tangeman memorandum, "Removal of Criminal Salvadorans and Release of TPS Eligible Salvadorans" (March 23, 2001). While directed specifically to Salvadorans who may be eligible for TPS, the Tangeman memorandum sets out general guidelines that are applicable to potential beneficiaries of other TPS and DED classes.

Questions regarding this memorandum should be directed to Ron Rosenberg, Assistant General Counsel, (202) 514-2895.

²⁰ By its terms, section 244(a)(5) prohibits the imposition of conditions only on the *granting* of TPS itself, and not on the pre-adjudication decision to administratively close proceedings. Nevertheless, the policy reasons for agreeing to administratively close proceedings are not served by requiring an alien to withdraw a pending application or to waive the right to apply for a form of relief if proceedings are later re-calendared.