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United States Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

In the Matter of: Virgo Moise Emmanuel BELIZAIRE, Respondent, In Removal Proceedings.	File No. A077-841-706

MOTION OF AMICI CURIAE FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENT'S OPPOSITION TO U.S. DEPARTMENT OF HOMELAND SECURITY'S APPEAL

Amici the American Immigration Council (the Council), the Northwest Immigrant Rights Project (NWIRP), and the American Immigration Lawyers Association (AILA) request leave to submit the attached amicus brief in support of Respondent's opposition to the U.S. Department of Homeland Security's (DHS) appeal of the Immigration Judge's decision in his case, which granted his application to adjust to Lawful Permanent Resident (LPR) status pursuant to INA § 245(a). Amici submit this brief to explain that, pursuant to the plain language of, and

congressional intent behind, INA § 244(f)(4), a TPS holder must be deemed to have been inspected and admitted for purposes of adjustment of status under INA § 245(a) even if his or her last entry into the United States was without inspection. In their brief, Amici respectfully urge this Board to follow the precedent of the majority of courts to have considered the issue, including both the Sixth and Ninth Circuit Courts of Appeals. *See Flores v. U.S. Citizenship & Immigration Servs.*, 718 F.3d 548 (6th Cir. 2013) and *Ramirez v. Brown*, 852 F.3d 954 (9th Cir. 2017).

Amici the Council, NWIRP and AILA are all interested in advancing the just administration of the immigration laws and have a particular interest in ensuring that TPS holders receive the full benefit of the law as intended by Congress. A more detailed description of each organization and its interest in he case can be found in the attached brief.

Respectfully submitted,

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Dated: August 14, 2019

CERTIFICATE OF SERVICE

On August 14, 2019, I, Hilda Bonilla, served a copy of the foregoing Brief of the American Immigration Council and Northwest Immigrant Rights Project as Amici Curiae in support of Respondent's Opposition to the U.S. Department of Homeland Security's Appeal by U.S mail delivery, postage pre-paid, on the following:

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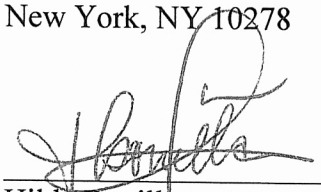

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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS

In the Matter of: Virgo Moise Emmanuel BELIZAIRE, Respondent, In Removal Proceedings.	File No. A077-841-706

BRIEF OF THE AMERICAN IMMIGRATION COUNCIL AND NORTHWEST IMMIGRANT RIGHTS PROJECT AS AMICI CURIAE IN SUPPORT OF RESPONDENT'S OPPOSITION TO U.S. DEPARTMENT OF HOMELAND SECURITY'S APPEAL

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I. INTRODUCTION AND STATEMENT OF AMICI CURIAE

Amici the American Immigration Council (the Council), the Northwest Immigrant Rights Project (NWIRP), and the American Immigration Lawyers Association (AILA) proffer this brief in support of Respondent's opposition to the administrative appeal filed in his case. The U.S. Department of Homeland Security (DHS) appealed the April 26, 2018 order of the Immigration Judge (IJ), granting the application to adjust to Lawful Permanent Resident (LPR) status pursuant to INA § 245(a) of Respondent Virgo Moise Emmanuel Belizaire (Mr. Belizaire). The IJ correctly determined that Mr. Belizaire, must be deemed "inspected and admitted" for purposes of adjustment under § 245(a) because he previously was granted and has maintained Temporary Protected Status (TPS) pursuant to INA § 244. Amici submit this brief to explain that the plain language of, and congressional intent behind, the immigration statutes require this interpretation.

At issue is the language of INA § 244(f)(4), which provides that "for purposes of adjustment of status under [INA § 244] and change of status under [INA § 248], 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 INA § 245. *See Ramirez v. Brown*, 852 F.3d 954 (9th Cir. 2017); *Flores v. U.S. Citizenship & Immigration Servs.*, 718 F.3d 548 (6th Cir. 2013). Any other interpretation contravenes § 244. For that reason, amici urge the Board of Immigration Appeals (BIA) to affirm the IJ's decision in this case.

The Council is a non-profit organization established to increase public understanding of immigration law and policy, advocate for the fair and just administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring

contributions of immigrants in the United States. The Council has a substantial interest in ensuring that TPS holders like Mr. Belizaire receive the full benefit of INA § 244(f)(4) when applying for adjustment of status and has appeared as amicus in support of plaintiffs before federal courts considering the same issue, including in *Ramirez, supra*; *Ramirez v. Dougherty*, 23 F. Supp. 3d 1322 (W.D. Wash. 2014); and *Medina v. Beers*, 65 F. Supp. 3d 419 (E.D. Pa. 2014).

NWIRP is a non-profit legal organization dedicated to the defense and advancement of the legal rights of noncitizens in the United States with respect to their immigrant status. NWIRP represents TPS holders seeking to adjust status and represented the plaintiff in the appeal to the Ninth Circuit in *Ramirez, supra*.

AILA is a national association with more than 15,000 members throughout the United States, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality, and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor, and courtesy of those appearing in a representative capacity in immigration and naturalization matters. AILA's members practice regularly before DHS, immigration courts, and the BIA, as well as before the U.S. District Courts, U.S. Courts of Appeals, and before the Attorney General.

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 INA § 244, the DHS Secretary may designate a foreign country for TPS due 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* INA § 244(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 7, 2019), https://www.uscis.gov/humanitarian/temporary-protected-status. Among the countries currently designated for TPS is Haiti, Mr. Belizaire's country of origin. *Id*.[1]

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. *See* INA § 244(c)(1)(A)(iii). Thus, DHS inspects all TPS applicants, who must demonstrate either that they are admissible or that they qualify for a waiver of any applicable ground of admissibility. Certain grounds of inadmissibility are waived by statute and others may be waived at the discretion of DHS. INA § 244(c)(2)(A). 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. INA § 244(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. §

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[1] The DHS Secretary announced the termination of the TPS designation for Haiti in November 2017 but deferred the effect of this termination until July 22, 2019 to provide TPS holders time "to arrange for their departure or to seek an alternative lawful immigration status in the United States, if eligible." *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. Two district courts subsequently temporarily enjoined the termination of TPS for Haiti. *See Saget v. Trump*, 375 F. Supp. 3d 280 (E.D.N.Y 2019); *Ramos v. Nielsen*, 336 F. Supp. 3d 1075 (N.D. Cal. 2018).

244.9; *see also* USCIS, Form I-821, Application for Temporary Protected Status (July 3, 2019), 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 7, 2019), https://www.uscis.gov/humanitarian/temporary-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. INA § 244(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 7, 2019), https://www.uscis.gov/humanitarian/temporary-protected-status.

A benefit of TPS is that, "for purposes of adjustment of status under [INA § 245] and change of status under [INA § 248], the [TPS holder] shall be considered as being in, and maintaining, lawful status as a nonimmigrant." INA § 244(f)(4).

B. Adjustment of Status

Section 245 of the Immigration and Nationality Act (INA) governs the process by which individuals with temporary nonimmigrant status[2] may apply to adjust to LPR status based on

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[2] INA § 245 initially provided adjustment of status only for individuals with non-immigrant visas (which are, by definition, temporary) who sought to adjust to immigrant visas (for LPR status). Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163, 217 (1952). Over time Congress provided additional categories of individuals the opportunity to apply for adjustment. *See, e.g.*, INA § 245(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); § 245(g), (h) (allowing adjustment for noncitizens who qualify as enumerated "special immigrants" under INA § 101(a)(27)); § 245(j) (allowing adjustment for certain informants assisting in the investigation of criminal organizations); § 245(l) (allowing adjustment for

their relationship with, inter alia, a U.S. citizen or LPR family member or a qualifying U.S. employer.[3] Adjustment of status allows the applicant to obtain permanent 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* INA § 212(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." INA § 245(a). An applicant for lawful permanent residence also generally must be "eligible to receive an immigrant visa" (for example, based on an approved visa petition filed by a qualifying family member) that is immediately available at the time the time of application. INA § 245(a)(2). 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 INA § 212 or eligible for a waiver of any such ground. *Id*. Finally, they must show that they are not barred from adjustment under INA §

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survivors of trafficking who have been granted a T visa); § 245(m) (allowing adjustment for survivors of enumerated violent crimes who have been granted a U visa).

[3] 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 (June 6, 2019), https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume7-PartA-Chapter1.html.

245(c)(2) for, inter alia, unlawful presence or unauthorized employment or must satisfy an exception to those bars. Immediate relatives of U.S. citizens, like Mr. Belizaire, are exempted from these bars. INA § 245(c)(2); *see also* INA § 201(b)(2)(A)(i) (defining "immediate relatives" as spouses, parents of adult children, or children of U.S. citizens).

C. Nonimmigrant Status

There are twenty-two nonimmigrant classifications, with numerous subclassifications. INA § 101(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. Nonetheless, the TPS statute expressly requires that "for purposes of adjustment of status under [INA § 245] and change of status under [INA § 248], the [TPS holder] shall be considered as being in, and maintaining, lawful status as a nonimmigrant." INA § 244(f)(4).

"Being in" nonimmigrant status necessarily requires an admission. All nonimmigrants are admitted in nonimmigrant status. INA § 214(a) ("The admission to the United States 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. INA § 248.

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. INA §§ 221(a)(1)(B), 222(c)–(d). Obtaining a nonimmigrant visa, however, does not guarantee admission. INA § 221(h). Instead, the nonimmigrant also must be inspected by DHS officers at a port of entry. INA § 221(f); 8 C.F.R. § 214.1(a)(3)(i) ("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 [INA § 101(a)(15)]." INA § 214(b).[4]

D. Relevant Federal Court Decisions

While, the Second Circuit Court of Appeals has not yet ruled on the issue, two Courts of Appeals have held that INA § 244(f)(4) unambiguously requires DHS to find that TPS holders are deemed "inspected and admitted" for purposes of adjustment of status under INA § 245. *Ramirez*, 852 F.3d at 959-61; *Flores*, 718 F.3d at 551-553 (6th Cir. 2013). The plaintiffs in both cases had sought to adjust on the same basis as Mr. Belizaire: 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. Both Courts of Appeals found that, because § 244(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. *Ramirez*, 852 F.3d at 956; *Flores*, 718 F.3d at 554. At least six district courts have issued similar

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[4] There are limited exceptions to this general rule for S, T, U and V nonimmigrants who may be granted this status stateside. Notably, the BIA has found that a grant of either U or V nonimmigrant status is an "admission," even though neither satisfied the statutory definition of the term. *See Matter of Garnica Silva*, 2017 Immig. Rptr. LEXIS 21813 (BIA June 29, 2017) (concerning U visas and noting similarities to S and T visas); Exh. B, *Matter of A-M-U-* (BIA Nov. 18, 2018) (concerning V visas). Additionally, these exceptions are not relevant to an interpretation of Congress' intent in using the term "nonimmigrant" in § 244(f)(4), as Congress created all of these nonimmigrant statuses subsequent to enactment of the TPS statute. *See* Immigration Act of 1990, P.L 101-649 (Nov. 29, 1990) (TPS statute); Violent Crime Control and Law Enforcement Act of 1994, (P.L. 103-322 (Sept. 13, 1994) (creating S visa); Victims of Trafficking and Violence Protection Act of 2000, P.L. 106-386 (Oct. 28, 2000) (creating U and T visas); Legal Immigration Family Equity Act of 2000, P.L. 106-553 (Dec. 21, 2000) (creating V visa).

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); *Leymis V. v. Whitaker*, 355 F. Supp. 3d 779 (D. Minn. 2018); *Sanchez v. Johnson*, No. 16-651 (RBK), 2018 U.S. Dist. LEXIS 206624 (D.N.J. Dec. 7, 2018); *Melgar v. Barr*, No. 18-1956 (DWF/BRT), 2019 U.S. Dist. LEXIS 56474 (D. Minn. Apr. 2, 2019); Exh. A, *Rodriguez Solorzano*, No. MO-17-CV-00249-DC (W.D. Tex. Jan. 15, 2019).[5]

Prior to any of these decisions, the Eleventh Circuit held the opposite without fully analyzing the interplay of the TPS and adjustment statutes. *Serrano v. U.S. Att'y Gen.*, 655 F.3d 1260 (11th Cir. 2011). Both the Sixth and the Ninth Circuits rejected the sparse analysis provided in the Eleventh Circuit's per curium decision. *Ramirez*, 852 F.3d at 959-60; *Flores*, 718 F.3d at 555.

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).[6] In a footnote, the

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[5] *Rodriguez Solorzano* notes that the Fifth Circuit has indicated in dicta that it, too, agrees. Exh. A, at 10-11. In *Guerrero v. Nielsen*, 742 Fed. Appx. 793, 799 (5th Cir. 2018), the Fifth Circuit favorably cited and "summarized the *Ramirez* decision as holding that 'receipt of TPS is legally equivalent to being inspected admitted or paroled' since Section 244(f)(4) confers 'lawful status as a nonimmigrant,' and no one can be in lawful status as a nonimmigrant without having been inspected and paroled." Exh. A, *Rodriguez Solorzano*, at 10-11.

[6] 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.

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.

On July 31, 2019, USCIS issued a policy memorandum designating *Matter of H-G-G-*, a matter decided by USCIS' Administrative Appeals Office, as Adopted Decision 2019-01.[7] *Matter of H-G-G-* further memorializes Defendants' "long-standing" position—including that found in its Policy Manual—that TPS holders are "considered as being in, and maintaining, lawful status as a nonimmigrant" pursuant to INA § 244(f)(4) only during the period in which they hold TPS and are not considered to have been inspected and admitted for purposes of adjustment of status under INA § 245(a). USCIS Policy Memorandum 602-0172. USCIS, like all federal courts to have interpreted INA § 244(f)(4), found that its meaning was plain. *Matter of H-G-G*, Adopted Decision 2019-01 at 10. Despite this, *Matter of H-G-G-* fails to give meaning to all terms within the provision and specifically fails to give meaning to Congress' use of the terms "considered," being in," "maintaining," and "lawful nonimmigrant status." INA § 244(f)(4). Moreover, *Matter of H-G-G-* recognizes that USCIS' interpretation conflicts with the Ninth and Sixth Circuit interpretations of the plain language of the statutes. *See Matter of H-G-G*, Adopted

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> 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 (August 14, 2019). This policy references both *Serrano* and much older opinions from the General Counsel of the legacy Immigration and Naturalization Service. *Id*. at n. 58.

[7] *See* Policy Memorandum 602-0172, https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2019/Matter_of_H-G-G-_Adopted_Decision_2019-01_AAO_July_31_2019.pdf.

Decision 2019-01 at 6-7 (citing *Ramirez v. Brown*, 852 F.3d 954, 962 (9th Cir. 2017), and *Flores v. USCIS*, 718 F.3d 548, 553 (6th Cir. 2013)); *see also id*. at 21 (noting that USCIS will continue to follow *Ramirez* and *Flores* within the jurisdictions of the Ninth and Sixth Circuit).

As an adopted decision, *Matter of H-G-G-* is not binding on the BIA. To the contrary, as the Policy Memorandum itself expressly states, it "is intended solely for the guidance of USCIS personnel in the performance of their official duties. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner." Policy Memorandum 602-0172.

III. ARGUMENT

A. The Plain Language of INA § 244(f)(4) Requires that TPS Holders Be Considered as Having Been Inspected and Admitted as Nonimmigrants for Purposes of Adjustment of Status under INA § 245

"[T]he starting point for interpreting a statute is the language of the statute itself." *See Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Relevant to this case, subsection 244(f)(4) specifies that TPS recipients "shall be considered as being in, and maintaining, lawful status as a nonimmigrant" for purposes of adjustment under § 245. All but one of the courts to have interpreted § 244(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; *Leymis V.*, 355 F. Supp. at 783; *Sanchez*, 2018 U.S. Dist. LEXIS 206624 at *12; *Melgar*, 2019 U.S. Dist. LEXIS 56474 at *8; Exh. A, *Rodriguez Solorzano*, No. MO-17-CV-00249-DC, at 11-12. *But see Serrano*, 655 F.3d at 1265-1266.

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

Significantly, § 244(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 . . . .").

An interpretation that does not consider TPS holders to have been inspected and admitted for purposes of adjustment of status would fail to give independent meaning to the phrase "being in," as opposed to simply "maintaining" nonimmigrant status. An individual necessarily must be inspected and admitted in order to "be[] in" nonimmigrant status. INA § 244(f)(4). Both the statute and the implementing regulations require that only an individual who has been "admitted" can hold nonimmigrant status. *See supra* Section II.C.

In a section entitled "Admission of nonimmigrants," the statute directs that "[t]he admission to the United States of any [noncitizen] as a nonimmigrant shall be for such time and under such conditions as the Attorney General may by regulation prescribe …." INA § 214(a)(1). The implementing regulations addressing the timing of and conditions placed on the admission of a nonimmigrant specifically 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); *Leymis V.*, 355 F. Supp. 3d at 782-783 (same); *Melgar*, 2019 U.S. Dist. LEXIS 56474 at *10-11 (same).

As discussed above, an adjustment applicant who is in "unlawful immigration status" generally is barred from adjusting to LPR status. *See* INA § 245(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 § 244(f)(4) that applies 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—also included in § 244(f)(4)—would be sufficient. *See State St. Bank & Trust Co.*, 326 F.3d at 139 (cautioning against statutory interpretations that would render provisions superfluous). Similarly, this interpretation would not account for Congress' reference to the "change of status" provision, INA § 248, in § 244(f)(4). Section 248, 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." INA § 248(a). If "being in" nonimmigrant status did not encompass an

admission, § 244(f)(4) would not meaningfully provide TPS holders with the ability to change status under § 248. 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, numerous courts have found the TPS application process to be comparable to the inspection process a noncitizen undergoes at the time of admission. As the Ninth Circuit recognized, "in practice . . ., 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; *see also Leymis V.*, 355 F. Supp. 3d at 783 (same); *Melgar*, 2019 U.S. Dist. LEXIS 56474 at *11 (same). Both statuses involve an in-depth application and review process—entailing extensive identity, criminal background, and admissibility screening. *See supra* Section II.A; *Ramirez*, 852 F.3d at 963 ("The statute thus contemplates and confers the power to vet each applicant thoroughly and make delicate judgments on a particularized basis about whether the alien should be 'admitted' into the United States."); *Leymis V.*, 355 F. Supp. 3d at 783 (finding the processes for obtaining TPS and for inspection and admission as a nonimmigrant "similarly rigorous"); Exh. A, *Rodriguez Solorzano*, No. MO-17-CV-00249-DC, at 12 ("[T]he receipt of TPS requires the vetting of a TPS applicant in a similar fashion to that of the typical admission determination.") (citing *Ramirez*, 852 F.3d at 960-63). "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 of Appeals 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 § 244(f)(4). *Serrano*, 655 F.3d at 1264-66. The plaintiff in that case erroneously argued that he did "not have to meet [§ 245(a)]'s eligibility requirement" because of his grant of TPS, *id.* at 1263, and "that [§ 244(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 *§ 245(a)*, concluding that § 244(f)(4) "does not change § [245(a)]'s threshold requirement that [an applicant] is eligible for adjustment of status only if he was initially inspected and admitted or paroled." *Id*. The court did not consider the distinct argument that the plain language at § 244(f)(4) instructs that TPS holders should be considered to have satisfied the inspection and admission requirements by virtue of demonstrating their eligibility for TPS. Thus, the court failed to consider the key terms in § 244(f)(4) and did not address whether this provision required that a TPS holder be deemed to have been inspected and admitted "for purposes of adjustment of status under § [245]." In short, "[t]he Eleventh Circuit's reading offers little persuasive analysis." *Sanchez*, 2018 U.S. Dist. LEXIS 206624 at *13.

2. Section 244(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 244(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. INA § 244(f)(4) (emphasis added). Congress did not create a new nonimmigrant classification for TPS recipients. *Cf*. INA § 101(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* INA § 101(a)(15); 8 C.F.R. § 214.1 *et seq*.[8] 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"—which indicates that something should be deemed to be other than what it is—is not unique to this provision of the INA. For example, the statute 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." INA § 202(b)(3) (emphasis added). Clearly, an individual cannot be born in two different countries; by using the phrase "be considered," Congress made clear its intent to create a legal fiction—to treat the person's birthplace legally as something other than what it was. Similarly, INA § 101(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 pursuance 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* INA §§ 201(b)(2)(A)(i) (specifying circumstances in which the spouse of a deceased U.S. citizen "shall be considered" to remain an immediate relative), 212(a)(5)(B)(ii) (setting forth when noncitizen physicians "shall be considered" to have passed certain medical examinations), 212(p)(2) (specifying when wages for noncitizen professional athletes "shall be considered" as not affecting the wages of U.S. workers).

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[8] A noncitizen can hold both TPS and a nonimmigrant status simultaneously. INA § 244(a)(5). TPS holders who independently have a nonimmigrant status would not need to rely on § 244(f)(4) to demonstrate that they are in and maintaining nonimmigrant status.

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." INA § 244(f)(4). For that reason, it is immaterial that 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." INA § 101(a)(13)(A). First, just as 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 INA § 101(a)(15)—they also do not need to demonstrate that they were actually inspected and admitted. Rather, because an inspection and admission is a prerequisite for being in nonimmigrant status, a TPS holder must be "considered" as having been inspected and admitted to be "considered" to be in nonimmigrant status.

Furthermore, as this Board held after analyzing the history and use of the terms "admitted" and "admission" in the INA, Congress was not "providing the exclusive definition for th[e]se terms" in § 101(a)(13)(A). *Matter of Agour*, 26 I&N Dec. 566, 572 (BIA 2015). 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 of TPS, does not require a "lawful entry," since applicants can apply for those statuses either abroad or from within the United States. *See* INA §§ 101(a)(15)(S), (T), (U); 245(j), (l), (m). In this context, this Board has affirmed, in an unpublished decision, that a stateside grant of nonimmigrant U status was an "admission" even though it did not satisfy the statutory definition of the term. *See Matter of Garnica Silva*, 2017

Immig. Rptr. LEXIS 21813 (BIA June 29, 2017); see also, Exh. B, *Matter of A-M-U-* (BIA Nov. 18, 2018) (same with respect to V visas).[9]

B. Congressional Intent Supports the Plain Meaning of INA § 244(f)(4)

Any other interpretation of the statute would also violate the congressional intent behind INA § 244, 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.") (quoting *Crandon v. United States*, 494 U.S. 152, 158 (1990)); *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 INA § 244(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 INA § 245, entitled "Adjustment of status of nonimmigrant to that of person admitted for permanent residence." Given the express language in § 244(f)(4) that "for purposes of adjustment" under § 245, TPS recipients "shall be

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[9] Although specifically considering whether the grant of a U visa was an admission for purposes of a removal provision, INA § 237(a)(2)(A)(i), the BIA also found that it was an admission for purposes of adjustment of status. *Id*. at *7-*8. The BIA also noted the similarities between the U visa provisions and those for S and T nonimmigrants. *Id*. at *6, *7.

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 permanent resident," as § 245 is titled. As the Ninth Circuit explained:

> [Section 245's] heading is not without significance, as it uses language that directly links the adjustment statute to the TPS statute and § [244(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 § [245].

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") (quoting *Bailey v. United States*, 516 U.S. 137, 145 (1995), *superseded by statute, Welch v. United States*, 136 S. Ct. 1257, 1267 (2016)).

Moreover, this interpretation is consistent with the intent and purpose of the TPS statute. Were this Board *not* to consider TPS holders as having been inspected and admitted for the purposes of adjustment, it would fail 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* INA § 244(b). Under a contrary interpretation of § 244(f)(4), TPS holders like Mr. Belizaire 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 . . . ."); *Melgar*, 2019 U.S. Dist. LEXIS 56474 at *14 ("[I]t simply defies logic that Congress would allow TPS beneficiaries to live and work in this country as a form of refuge, but deny them the ability to become lawful permanent resident without physically leaving this country."). 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.

Similarly, the contrary 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-appellant] 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 § 244(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.

C. A Contrary Interpretation Would Create 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 Hill v. Del. N. Cos. Sportservice, Inc.*, 838 F.3d 281, 294-95 (2d Cir. 2016) (interpreting the Fair Labor Standards Act to avoid an otherwise absurd result). Here, the IJ's interpretation accords with the plain language of the statute and produces neither an absurd nor unreasonable result. In contrast, a contrary interpretation would necessarily ignore certain words in the statute and produce an absurd result at odds with the purpose of § 244(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. INA § 244(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, Instructions for Application for Travel Document (Apr. 24, 2019) at 4, 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. This entry into the United States satisfies the requirement in § 245(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 can cure this ineligibility by traveling abroad for any reason. It is absurd to conclude that Congress would have intended, on the one hand, to withhold the benefit of INA § 244(f)(4) to TPS holders who entered without inspection, but on the other hand, allow those same TPS holders to benefit from § 244(f)(4) simply by traveling abroad after they have been granted TPS. Reversing the IJ's decision would produce this absurd result.

IV. CONCLUSION

For the foregoing reasons, amici urge the Board to find that the language of INA § 244(f)(4) required the IJ to deem that Mr. Belizaire had been "inspected and admitted" for purposes of adjustment of status under INA § 245 and to affirm the IJ's decision in this case.

Respectfully submitted,

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Dated: August 14, 2019

CERTIFICATE OF SERVICE

On August 14, 2019, I, Hilda Bonilla, served a copy of the foregoing Brief of the American Immigration Council and Northwest Immigrant Rights Project as Amici Curiae in support of Respondent's Opposition to the U.S. Department of Homeland Security's Appeal by U.S mail delivery, postage pre-paid, on the following:

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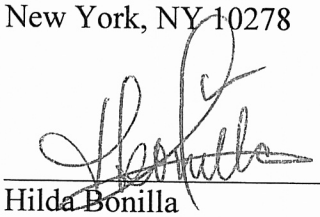

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A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
MIDLAND/ODESSA DIVISION

LUIS ORLANDO RODRIGUEZ SOLORZANO, *Plaintiff*,	§	
v.	§	**No. MO-17-CV-00249-DC**
KIRSTJEN M. NIELSON, in her official capacity as Secretary of Homeland Security of the United States; LEE FRANCIS CISSNA, in his official capacity as Director of U. S. Citizenship and Immigration Services; ROBERT COWAN, in his official capacity as Director of the National Benefits Center; DAVID ROARK, in his official capacity as Director of the Texas Service Center; MARGARET A. HARTNETT, in her official capacity as Director of the El Paso Field Office; and UNITED STATES OF AMERICA, *Defendants*.	§	

ORDER DENYING DEFENDANTS' MOTION TO DISMISS

BEFORE THE COURT is Defendants Kirstjen M. Nielson, Lee Francis Cissna, Robert Cowan, David Roark, Margaret A. Hartnett, and United States of America's Motion to Dismiss. (Doc. 18). After due consideration, the Court **DENIES** Defendants' Motion to Dismiss and **REMANDS** this case to the United States Citizenship and Immigration Service (USCIS) for further review consistent with this Order. (Doc. 18).

I. FACTUAL BACKGROUND

Plaintiff Luis Orlando Rodriguez Solorzano was born on October 11, 1951, in Honduras. (Doc. 16 at 8). On November 8, 1997, Plaintiff entered the United States. *Id*. On January 5, 1999, following the devastation of Hurricane Mitch, the Attorney General designated Honduras under the Temporary Protected Status (TPS) program. (Doc. 18 at 3); 8 U.S.C. § 1254a(b)(1)(B). On or about

Exhibit XX

June 3, 1999, Plaintiff applied for and received TPS pursuant to 8 U.S.C. § 1254a(a)(1). *Id*. As a TPS beneficiary, Plaintiff is protected from removal from the United States. *Id*.

On July 29, 2014, Plaintiff's U.S. citizen spouse filed a Form I-130—Petition for Alien Relative—on Plaintiff's behalf. *Id*. In connection with his spouse's petition, Plaintiff filed a Form I-485—Application to Register Permanent Resident or Adjust Status—seeking to become a Lawful Permanent Resident (LPR) pursuant to 8 U.S.C. § 1255. (Doc. 16 at 8). On or about August 14, 2014, USCIS issued a Request for Initial Evidence (RFE) asking Plaintiff to provide, among other things, evidence of lawful admission or parole into the United States. (Doc. 16-5 at 2). On September 12, 2014, Plaintiff responded to the RFE with a Brief in Response. (Doc. 16-6). The Brief did not provide admission-related evidence, but, instead, Plaintiff cited a 6th Circuit Court of Appeals and a Board of Immigration Appeals decision in an effort to establish his eligibility to adjust status due to his receipt of TPS. *Id*.

On January 24, 2018, USCIS denied Plaintiff's I-485 Application to adjust status because Plaintiff had not satisfied the requirement that he be "inspected and admitted or paroled into the United States." (Doc. 16-7). Plaintiff filed his original Complaint on December 15, 2017, and his Amended Complaint on March 6, 2018. (Docs. 1, 16). In his Amended Complaint, Plaintiff asks the Court to review USCIS's denial of his I-485 Application pursuant to the Administrative Procedure Act (APA), find that Plaintiff does qualify for adjustment of status under § 1255(a), and order Defendants to adjudicate his application in a fair and impartial manner. (Doc. 16).

On April 5, 2018, Defendants filed the instant Motion to Dismiss asserting that USCIS's denial of Plaintiff's Application was based on unambiguous statutory language or, alternatively, a reasonable interpretation of the relevant statutes. (Doc. 18). Thus, Defendants argue, the Court should dismiss the Amended Complaint because Plaintiff cannot satisfy his burden under the APA to set aside USCIS's decision. *Id*. In his Response, Plaintiff argues dismissal is not appropriate in this case as his Amended Complaint clearly outlines the single, legal issue before the Court: whether

Plaintiff's TPS application should be deemed an "admission" for purposes of adjustment of status. (Doc. 19). Defendants filed their Reply on April 25, 2018. (Doc. 21). Accordingly, the Court finds this matter ready for disposition.[1]

II. LEGAL STANDARDS

1. Motion to Dismiss

Defendants move to dismiss Plaintiff's Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), which authorizes dismissal of a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). To survive a Rule 12(b)(6) motion to dismiss, the plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The Court is not bound to accept as true a legal conclusion couched as a factual allegation in the complaint. *See id*. In analyzing a motion to dismiss for failure to state a claim, the Court accepts all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff. *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007). On a Rule 12(b)(6) review, the Court may examine the complaint, documents attached to the complaint, and documents attached to the motion to dismiss to which the complaint refers and which are central to the plaintiff's claims, as well as matters of public record. *Lone Star Fund V (U.S.), L.P. v. Barclays Bank PLC*, 594 F.3d 383, 387 (5th Cir. 2010).

Here, the factual allegations are not at issue. (Doc. 19 at 2). Instead, Plaintiff maintains that a "single legal issue" of first impression in this Circuit is before the Court. *Id.* Defendants agree that

[1] On May 9, 2018, Plaintiff filed a Memorandum in Support of Plaintiff's Response in Opposition to Defendants' Motion to Dismiss (Memorandum). (Doc. 22). As Defendants point out in their Motion to Strike Plaintiff's Memorandum, parties may file a response opposing a motion and a reply in support. Local Rule CV-7(e)–(f). Then, "[a]bsent leave of court, no further submissions on the motion are allowed." *Id.* at (f). Finding that Plaintiff failed to seek leave of Court to file its Memorandum and that the parties' arguments are otherwise adequately briefed, the Court **GRANTS** Defendants' Motion to Strike and **STRIKES** Plaintiff's Memorandum. (Docs. 22, 29).

the "sole issue before the Court is whether an alien who enters the United States without inspection and subsequently receives TPS has been 'admitted' for purposes of adjustment." (Doc. 18 at 8). "[B]ecause a court can fully resolve any purely legal question on a motion to dismiss, there is no inherent barrier to reaching the merits at the 12(b)(6) stage." *Marshall Cty. Health Care Auth. v. Shalala*, 988 F.2d 1221, 1226 (D.C. Cir. 1993) (citing *Neitzke v. Williams*, 490 U.S. 319, 327 (1989)). It does not appear—and the parties do not assert—any material outside of the pleadings is pertinent to resolve the legal issue before the Court. Thus, a conversion of this motion to a Rule 56 motion for summary judgment is not necessitated. 10 *Cyc. of Federal Proc*. § 35:27 (3d ed. 2018). Indeed, "there is no real distinction in this context between the question presented in on a 12(b)(6) motion and a motion for summary judgment." *Marshall Cty. Health Care Auth.*, 988 F.2d at 1226. In agency review cases such as this—where the court must resolve a purely legal question about an agency action—it is proper for the Court to decide whether Plaintiff has an actionable legal theory and to settle it at the motion to dismiss stage. *See Skalka v. Kelly*, 246 F. Supp. 3d 147, 151–52 (D.D.C. 2017), appeal dismissed, No. 17-5102, 2017 WL 4220432 (D.C. Cir. July 27, 2017).

2. Review of Agency Action

Plaintiff's cause of action in this case involves the review of an administrative agency action: USCIS's denial of Plaintiff's I-485 Application for adjustment of status. (Doc. 16). Under the APA, a reviewing court may set aside agency action, findings, and conclusions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). An agency acts in an arbitrary and capricious manner if it "has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Permian Basin Petroleum Ass'n v. Dep't of the Interior*, 127 F. Supp. 3d 700, 706–07 (W.D. Tex. 2015) (quoting *Motor Vehicle Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983)). "Although this

inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

Here, the agency action in question centers on USCIS's interpretation of the interplay between the relevant Immigration and Nationality Act (INA) statutes. 8 U.S.C. §§ 1254a, 1255. "When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 842-43. Despite their opposing interpretations, both parties assert the statutes at issue are unambiguous. Similarly, the respective Circuit Courts with which the parties align themselves reached their conflicting conclusions based on the "plain language" of the statutes. *See Serrano v. U.S. Atty. Gen.*, 655 F.3d 1260, 1262 (11th Cir. 2011); *Flores v. U.S. Citizenship & Immigration Servs.*, 718 F.3d 548, 554 (6th Cir. 2013); *Ramirez v. Brown*, 852 F.3d 954, 961 (9th Cir. 2017).

III. DISCUSSION

This case, and the lengthy analysis it necessitates, demonstrates the "archaic and convoluted state of our current immigration system." *Flores*, 718 F.3d at 549. Nonetheless, the Court—having thoroughly reviewed the statutes, considered the various interpretations of the Circuit and District Courts, and guided by Fifth Circuit dicta—finds that the plain language of the statutes indicates Congress' clear intent that an alien granted TPS is "admitted" for purposes of adjustment of status.

1. Relevant Statutes

As previously stated, Plaintiff received TPS pursuant to 8 U.S.C. § 1254a. The Attorney General may designate any foreign state under Section 1254a for a variety of enumerated reasons, such as an ongoing armed conflict or an environmental disaster. 8 U.S.C. § 1254a(b). As a result, a national of a designated foreign state that meets certain statutory requirements is eligible for TPS, which prohibits the alien's removal during the period in which such status is in effect and authorizes the alien to engage in employment in the United States. 8 U.S.C. § 1254a(a). In further explanation of the alien's status during TPS, the statute provides, in relevant part, that:

> (4) for purposes of adjustment of status under section 1255 of this title and change of status under section 1258 of this title, the alien shall be considered as *being in, and maintaining, lawful status as a nonimmigrant*.

8 U.S.C.A. § 1254a(f) (emphasis added). Section 1255—"Adjustment of status of nonimmigrant to that of person admitted for permanent residence"—states that:

> The status of an alien who was *inspected and admitted* or paroled into the United States . . . may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed.

8 U.S.C. § 1255(a) (emphasis added). Section 1255(c) specifies certain aliens to whom "subsection (a) shall not be applicable." 8 U.S.C. § 1255(c). Notably, there is no mention of TPS aliens in the list of those ineligible to adjust their status pursuant to Section 1255(a). *Id.*

2. Opposing Interpretations

As the first Circuit to tackle this interpretation issue, the Eleventh Circuit Court of Appeals upheld the District Court's dismissal of the plaintiff's Complaint challenging USCIS's denial of his application for adjustment of status in *Serrano*. 655 F.3d at 1260. The plaintiff, a native of El Salvador, entered the United States in 1996 without being inspected and admitted or paroled. *Id.* at

1263. He registered for and received TPS in 2001—subsequently re-registering when necessary. *Id*. The plaintiff married his wife, a U.S. citizen, in 2006, and the couple filed the necessary forms seeking to adjust the plaintiff's status to LPR in 2008. *Id*. The Eleventh Circuit found that the "lawful status as a nonimmigrant" held by TPS recipients pursuant to Section 1254a(f)(4) did not change Section 1255(a)'s requirement that an alien must be "inspected and admitted or paroled" to be eligible for adjustment of status. *Id*. at 1265.

Then, in 2013, the issue came before the Sixth Circuit Court of Appeals in *Flores*. 718 F.3d at 548. There, the plaintiff—a Honduran immigrant—entered the United States without inspection in 1998, received TPS in 1999, and continually renewed his TPS designation. *Id*. at 550. After marrying his wife—a United States citizen—in 2010, the couple filed their respective forms with USCIS seeking an adjustment of status for plaintiff to that of LPR. *Id*. USCIS denied the plaintiff's application because he entered the United States without inspection. *Id*. Reviewing the district court's dismissal of plaintiff's claim against USCIS, the Sixth Circuit agreed with the plaintiff that "the language itself, the specific context in which the language is used, and the broader context of the statute as a whole, shows that Congress's clear intent was that a TPS beneficiary is afforded with a pathway to LPR status" and "that TPS beneficiaries are afforded with an exception under the TPS statute which operates as an inadmissibility waiver." *Id*. at 552. Finding support for the plaintiff's interpretation of the plain language of the statutes, the Sixth Circuit pointed out that Section 1254a(f) refers to Section 1255 as a whole, not to any one particular subsection. *Id*. at 553. The Sixth Circuit also found it notable that TPS beneficiaries are not named as one of the "classes of aliens ineligible for visas or admission" under 8 U.S.C. § 1182. *Id*. at 554. Accordingly, the Sixth Circuit held that it "interpret[s] the statute exactly as written—as allowing [a TPS recipient] to be considered as being in lawful status as a nonimmigrant for purposes of adjustment of status under § 1255." *Id*. at 553.

Most recently, the Ninth Circuit Court of Appeals aligned itself with the Sixth Circuit in *Ramirez*. 852 F.3d 954, 964 (9th Cir. 2017). In a now familiar factual situation, the plaintiff—an El

Salvador native—entered the United States without being inspected and admitted in 1999, received TPS in 2001, kept his registration up to date, married his U.S. citizen wife in 2012, and the couple sought LPR status for the plaintiff. *Id*. at 957. In reviewing USCIS's denial of plaintiff's application to adjust his status pursuant to Section 1255, the Ninth Circuit found that Section 1254a(f)(4) "unambiguously treats aliens with TPS as being 'admitted' for purposes of adjusting status." *Id*. at 958. In reaching this holding, the Ninth Circuit highlighted the "lawful status as a nonimmigrant" language in Section 1254a(f)(4), the explicit reference to Section 1255 for purposes of adjustment of status as a TPS recipient, and Section 1255's title: "Adjustment of status of a *nonimmigrant* to that of person admitted for permanent residence." *Id*. at 959–961. The Ninth Circuit also found that the application and approval process to receive TPS shares many of the main attributes of the typical "admission" process for nonimmigrants, including placing discretion into the hands of the Attorney General to make specific determinations about an alien's fitness to receive TPS. *Id*. at 960–963. After pointing to multiple references regarding the "Admission of nonimmigrants" in 8 U.S.C. § 1184, the Ninth Circuit held that "[u]nder the immigration laws, an alien who has obtained lawful status as a nonimmigrant has necessarily been 'admitted.'" *Id*. at 960.

Additionally, District Courts from the Third and Eighth Circuits that have analyzed the interplay of Sections 1254a(f) and 1255 have sided with the Sixth Circuit's analysis in *Flores*. *See Medina v. Beers*, 65 F. Supp. 3d 419, 436 (E.D. Pa. 2014) ("The Court finds that the unambiguous language of § 1254a(f) means that an alien afforded TPS is deemed to be in lawful status as a nonimmigrant—i.e., has satisfied the requirements for being deemed a nonimmigrant, including inspection and admission—for purposes of adjustment of status under § 1255"); *see also Bonilla v. Johnson*, 149 F. Supp. 3d 1135, 1139 (D. Minn. 2016), *appeal dismissed* (July 22, 2016) ("Section 1254a(f)(4) applies to the entirety of § 1255, allows Plaintiff to be considered as being in lawful status as a nonimmigrant for purposes of adjustment of status under § 1255, and therefore satisfies the "inspected and admitted or paroled" prerequisite of § 1255(a)."). Finally, the Fourth Circuit Court

of Appeals, examining the effect of TPS in a different context, seemingly sides with *Serrano* holding that "an alien cannot be admitted to the United States with TPS." *Chavez v. Holder*, 587 F. App'x 43, 45 (4th Cir. 2014) (finding the plaintiff was ineligible for cancelation of removal pursuant to 8 U.S.C. § 1299b(a) because she was not "admitted" when she received TPS and thus did not satisfy that statute's residency requirement). However, the Court notes that the plaintiff in *Chavez*—despite entering the United States without inspection—was granted TPS and allowed to subsequently adjust her status to LPR, before her conviction of petit larceny resulted in the removal proceedings at issue. *Id*. at 43–44.

3. Fifth Circuit and the Instant Case

The Fifth Circuit recently recognized the "developing circuit split" on this issue in *Guerrero v. Nielsen*. No. 16-30165, 2018 WL 3387534 (5th Cir. July 10, 2018). However, because USCIS denied the TPS-holder's application for adjustment of status in *Guerrero* based on the alien-crewman bar, the Court confined its determination to that issue, leaving "the effect of TPS on § 1255(a)'s requirements to be decided another day." *Guerrero*, No. 16-30165, 2018 WL 3387534, at *5 (5th Cir. July 10, 2018). At least for this Court, it would appear that day is today.

The Court begins by looking for guidance from other Fifth Circuit decisions. In *U.S. v. Orellana*, the Fifth Circuit described the benefits associated with the approval of a TPS application. *United States v. Orellana*, 405 F.3d 360, 363–64 (5th Cir. 2005). Relevantly, the Court stated that an alien granted TPS "is considered to be in lawful immigration status as a non-immigrant for purposes of adjustment of status under 8 U.S.C. §§ 1255, 1258." *Id.* at 364. The *Orellana* Court also distinguished a grant of TPS from the receipt of temporary benefits:

> Here, however, we are not dealing solely with the temporary extension of benefits pending an administrative ruling upon an application; rather, we are faced with an alien who was actually granted TPS. Unlike an applicant for TPS, whose benefits are limited to protection from removal and temporary work authorization, an alien whose application for TPS is granted also receives the privileges of *applying for adjustment of status* and of traveling abroad with prior

> consent. Importantly, an alien in receipt of TPS is in lawful status, whereas an alien who has merely been extended temporary benefits awaiting the disposition of his application for lawful status may be (and often is) in an unlawful immigration status. We find these differences not without significance . . .

Id. at 370. (emphasis added). A year later, in *U.S. v. Elrawy*, the Fifth Circuit referenced the *Orellana* holding in a case concerning an alien charged with possession of a firearm as an alien admitted under a nonimmigrant visa and an alien illegally present in the United States. 448 F.3d 309 (5th Cir. 2006). Although only citing *Orellana* as authority for the Court's definition of "illegally or unlawfully in the United States," the Court felt compelled to reiterate its holding that "aliens who receive TPS are allowed to remain in the United States and work and are allowed to *apply for adjustment of status* as if they possessed lawful non-immigrant status." *Id*. at 313. (emphasis added).

In a more recent Fifth Circuit opinion, the Court again recalled its *Orellana* holding when comparing Special Immigrant Juvenile (SIJ) status to that of TPS. *United States v. Garcia*, 707 F. App'x 231, 234 (5th Cir. 2017). Agreeing with the plaintiff's argument that SIJ status is similar to the status at issue in *Orellana*, the Fifth Circuit explained in a footnote that:

> The key feature of [TPS] that the *Orellana* opinion held resulted in "lawful status," was that it *cured the bars to adjustment of status* that otherwise prevent those who enter the country unlawfully from obtaining permanent resident status. [citation omitted] SIJ status similarly allows a recipient to adjust their status. 8 U.S.C. § 1255(h)(1); *Ramirez v. Brown*, 852 F.3d 954, 963 (9th Cir. 2017) (noting the government's argument that the SIJ statute provides an even more "precise exception" to the bars on adjusting status than does the TPS statute, but then explaining that the two statutes are functionally equivalent in eliminating those barriers).

Id. at 234, n. 6 (emphasis added).

Notably, the Fifth Circuit favorably cited the Ninth Circuit's *Ramirez* analysis in both *Garcia* and *Guerrero*. *See id*.; *see also Guerrero*, No. 16-30165, 2018 WL 3387534, at *5. In *Guerrero*, the Court used the Ninth Circuit's analysis to highlight the flaws in the plaintiff's position. *Id*. In dicta, the Fifth Circuit summarized the *Ramirez* decision as holding that "receipt of TPS is legally

equivalent to being inspected admitted or paroled" since Section 1254a(f)(4) confers "lawful status as a nonimmigrant," and no one can be in lawful status as a nonimmigrant without having been inspected and paroled. *Id*. In juxtaposition to the *Ramirez* case, the Court found that "that same logic falls apart in Guerrero's case." *Id*. This is because, separate and apart from requiring that an alien be inspected and admitted or paroled into the United States, Section 1255(c) explicitly renders Section 1255(a)—and adjustment of status thereunder—inapplicable to an alien crewman. 8 U.S.C. § 1255. Accordingly, the Fifth Circuit found the concepts of maintaining lawful status as a nonimmigrant and being an alien crewman are "ships passing in the night," whereas the relationship between a conferral of "lawful status as a nonimmigrant" and the requirement that a person be "inspected and admitted or paroled" are intertwined. *See Guerrero*, No. 16-30165, 2018 WL 3387534, at *5.

The plain language of the statutes supports the Fifth Circuit's commentary that the receipt of TPS "cure[s] the bars to adjustment of status" and thus satisfies the prerequisite that an alien be admitted and inspected or paroled. *See Garcia*, 707 F. App'x at 234 n.6 (citing *Orellana*, 405 F.3d at 363–64). First, in order to be eligible for TPS, the statute requires, among other things, that the alien be "admissible as an immigrant." 8 U.S.C. § 1254a(c)(1)(A)(iii). To determine whether an alien applying for TPS is satisfactorily admissible, Section 1254a utilizes Section 1182—the statute generally used to determine admissibility of aliens. *Id*. at 1254a(c)(2)(A). Section 1254a renders specific portions of Section 1182—those requiring labor certifications and certain documentation—inapplicable and allows the Attorney General to waive other prerequisites to admissibility for "humanitarian purposes, to assure family unity, or when it is otherwise in the public interest." *Id*. These alterations are in line with the overall purpose of the TPS statute: to allow aliens from certain, designated foreign states to live and work in the United States without fear of removal. *See id*. However, Section 1254a expressly prohibits the Attorney General from waiving provisions of Section 1182 related to criminals, drug offenses, and national security, Nazi persecutions, or engagement in genocide. *Id*. at 1254a(c)(2)(B). The statute further specifies that aliens convicted of

any felony or 2 or more misdemeanors committed in the United States, or an alien fitting the description of those aliens unable to be granted asylum pursuant to Section 1158(b)(2)(A), are ineligible for TPS. *Id*. Accordingly, the receipt of TPS requires the vetting of a TPS applicant in a similar fashion to that of the typical admission determination. *See Ramirez*, 852 F.3d at 960-63.

After being deemed admissible pursuant to Section 1254a(c) and satisfying the other eligibility requirements, an alien in receipt of TPS receives certain status and benefits during the period of TPS. 8 U.S.C. § 1254a(f). Namely, Section 1254a(f)(4) specifies that an alien in receipt of TPS shall be considered a "nonimmigrant" in lawful status with regard to Section 1255. *Id*. Section 1255, in turn, is aptly titled "Adjustment of status of *nonimmigrant* to that of person admitted for permanent residence." 8 U.S.C. § 1255 (emphasis added). Notably, Section 1254a(f)(4) refers the reader to "section 1255" in its entirety, not to any particular provision of that statute—which Congress certainly could have done, were that its intention. *See Flores*, 718 F.3d at 553. As a result of this plain language reading, the Court disagrees with Defendants' assertion that Section 1254(a)(f)(4) "addresses only section 1255(c)(2)'s bar for adjustment." (Doc. 18 at 10). As the *Ramirez* court points out, other "statutory provisions refer to the *admission* to the United States of any alien as a *nonimmigrant*, though the duration and purpose of the alien's stay may be tightly circumscribed" in various contexts. *Ramirez*, 852 F.3d at 960 (internal quotations omitted)(citing multiple statutes referencing the admission of a nonimmigrant in varying iterations).

In light of the Fifth Circuit's commentary and after reviewing the opposing interpretations and analyzing the statutes, the Court feels confident aligning itself with the interpretations of *Flores* and *Ramirez*. Accordingly, the Court finds that Congress intended the lawful status conferred upon TPS recipients by Section 1254(a)(f)(4) to cure the bars to adjustment of status under Section 1255, including the requirement that a person be "inspected and admitted or paroled." Because this holding is based on the plain language of the statute, the Court need not accord deference to the agency

interpretation offered by the Government. *Flores*, 718 F.3d at 554–55 (citing *Pub. Emps. Ret. Sys. v. Betts*, 492 U.S. 158 (1989)).

IV. CONCLUSION

Based on the foregoing, the Court **DENIES** Defendants' Motion to Dismiss. (Doc. 18).

Further, because this Order resolves the sole, purely-legal issue before the Court, the Court **REMANDS** this matter to USCIS for further proceedings consistent with this Order. *See Marshall Cty. Health Care Auth.*, 988 F.2d at 1226.

It is so **ORDERED**.

SIGNED this 15th day of January, 2019.

DAVID COUNTS
UNITED STATES DISTRICT JUDGE

U.S. Department of Justice

Executive Office for Immigration Review

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Name: M[redacted] U[redacted], A[redacted] **A[redacted]-567**

Date of this notice: 11/8/2018

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Guendelsberger, John
Kendall Clark, Molly
Adkins-Blanch, Charles K.

Userteam: Docket

File: [redacted]-567 – Arlington, VA

Date: NOV - 8 2018

In re: A[redacted] M[redacted]-U[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Benjamin R. Winograd, Esquire

ON BEHALF OF DHS: Christopher Gahm
Assistant Chief Counsel

APPLICATION: Cancellation of removal

In a decision dated June 8, 2018, the Immigration Judge found the respondent removable under section 237(a)(2)(B)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(B)(i) (alien convicted of a controlled substance violation); granted a motion by the Department of Homeland Security (DHS) to pretermit any application by the respondent for cancellation of removal under section 240A(a) of the Act, 8 U.S.C. § 1229b(a); and ordered the respondent's removal to Mexico. The respondent now appeals from the Immigration Judge's decision with regard to relief under section 240A(a) of the Act. The DHS opposes this appeal. The appeal will be sustained, and the record remanded to the Immigration Judge.

We review the findings of fact, including the determination of credibility, made by the Immigration Judge under the "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including issues of law, discretion, or judgment, under the de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent admitted that he arrived in the United States at an unknown date without inspection; adjusted his status to that of lawful permanent resident on November 14, 2007; and was convicted on May 29, 2015, and again in May 23, 2016, for violations of Virginia Criminal Code section 18.2-250.1 (unlawful possession of marijuana) (IJ at 3-5; Tr. at 3-4). The Immigration Judge determined that the crime underlying the respondent's May 29, 2015, conviction was committed on July 20, 2014 (IJ at 4; Exhs. 1, 3-E, 6-H). Based on these facts, the Immigration Judge determined that the respondent could not establish the 7 years of continuous residence required to qualify for cancellation of removal. *See* sections 240A(a)(2), (d)(1) of the Act; *see also* sections 212(a)(2)(A)(i)(II), 237(a)(2)(B) of the Act, 8 U.S.C. §§ 1182(a)(2)(A)(i)(II), 1227(a)(2)(B). In finding that the respondent did not accrue the requisite period of continuous residence for cancellation of removal, the Immigration Judge also determined that the respondent's status as a "V" nonimmigrant from July 15, 2002, was not an "admission" under section 101(a)(13)(A) of the Act, 8 U.S.C. § 1101(a)(13)(A) (IJ at 5; *see* Respondent's Br., 05/25/2018, Exh. N).

On appeal, the respondent challenges the imposition of the "stop-time" rule at section 240A(d)(1) of the Act to his case, arguing, inter alia, that "he was admitted in any status"

for purposes of cancellation of removal when he was accorded V nonimmigrant status on July 15, 2002. On de novo review, we find that a grant of V nonimmigrant status constitutes an admission for the purpose of section 240A(a)(2) of the Act.

A "V" visa is intended to promote family unity, and allows certain relatives of lawful permanent residents to continue their wait for immigrant visas while living in the United States with their families. *See* section 101(a)(15)(V) of the Act. Pursuant to the regulations at 8 C.F.R. § 214.15(a), an alien aboard "may apply for a V nonimmigrant visa at a consular office [] and be admitted to the United States." Pursuant to 8 C.F.R. § 214.15(b), "[e]ligible aliens already in the United States may apply to the Service to obtain V nonimmigrant status for the same purpose," and [a]liens in the United States in V nonimmigrant status are entitled to reside in the United States as V nonimmigrants []." The regulation as 8 C.F.R. § 214.15(g) sets forth the "[p]eriod of admission" for those in V nonimmigrants status, regardless of whether they applied for the V nonimmigrant status aboard or in the United States. The use of the phrase "period of admission" at 8 C.F.R. § 214.15(g) can be reflective of Congress's understanding that a grant of V nonimmigrant status is a form of "admission," independent of the kinds of "lawful entr[ies]" contemplated by the language of section 101(a)(13)(A) of the Act. That understanding is consistent with the Immigration and Nationality Act and regulations that reference and consistently treat nonimmigrants as "admitted" aliens.[1] *See Matter of Blancas*, 23 I&N Dec. 458 (BIA 2002) (holding that acquisition of lawful nonimmigrant status is an "admission" for purposes of establishing an alien's eligibility for cancellation of removal).

Inasmuch as the respondent was admitted to the United States on July 15, 2002, the offense committed on July 20, 2014, would not stop the accrual of the 7 years of continuous residence required for cancellation of removal. Therefore, we will sustain the appeal and remand the record to the Immigration Judge to enable the respondent to apply for cancellation of removal under section 240A(a) of the Act. Because we are remanding the record on this basis, we will not, at this time, consider the alternative arguments set forth on appeal. Accordingly, the following orders will be entered.

ORDER: The appeal is sustained.

FURTHER ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with this decision.

FOR THE BOARD

[1] Section 214 of the Act, 8 U.S.C. § 1184, provides for "[t]he admission to the United States of any alien as a nonimmigrant" at section 214(a)(l), and includes a specific provision for the issuance of "V" visas at section 214(q) of the Act, thereby implying that the specific "V" visa procedures constitute a subset of the general "admission" procedures. Further, at section 101(a)(13)(B) of the Act, Congress provided that parolees and crewmen shall not be considered to have been admitted, but set forth no such exclusion for "V" visa recipients.