

# Congress of the United States

Washington, DC 20515

July 24, 2019

Kevin McAleenan  
Acting Secretary  
U.S. Department of Homeland Security  
Nebraska Avenue Complex  
3801 Nebraska Ave. NW  
Washington, D.C. 20016

The Honorable Kenneth T. Cuccinelli, II  
Acting Director  
U.S. Citizenship and Immigration Services  
U.S. Department of Homeland Security  
111 Massachusetts Ave. NW  
Washington, D.C. 20529

Dear Acting Secretary McAleenan and Acting Director Cuccinelli:

We write to obtain more information regarding the administration's use of Temporary Protected Status (TPS) and issues related to the program's management. TPS has provided protection to over 400,000 foreign nationals<sup>1</sup>, in addition to their over more than one quarter million U.S. citizen children, who cannot be safely returned to their countries because of environmental conditions, armed conflict, or other extraordinary and temporary conditions.<sup>2</sup> The administration has terminated status for 98 percent of TPS holders and has overseen an unprecedented number of administrative and regulatory issues affecting re-registration applications.<sup>3</sup>

In light of the critical importance of TPS for the safety of foreign nationals and their U.S. citizen children, we request that the U.S. Department of Homeland Security (DHS) and U.S. Citizenship and Immigration Services (USCIS) jointly respond the following questions:

1. The administration extended, but did not re-designate, TPS for South Sudan, Syria, Yemen, and Somalia.<sup>4</sup> An extension, by its nature, suggests that conditions in a designated country continue to exist and the immediate return of foreign nationals to such country is not possible due to such circumstances. Given this practice:
  - a. Please provide a detailed description of the methodologies and sources (including the names of specific departments or agencies) that provided resources that were used to conclude that a re-designation would not be provided.
  - b. With regards to the failure to re-designate TPS for these countries (despite providing an extension of current status): what was the intent of this decision by the administration? The failure to re-designate appears to imply that it is your agencies' intention to block foreign nationals from further participation in this program despite being potentially eligible based on current country conditions.

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<sup>1</sup> Temporary Protected Status: Overview and Current Issues. Jill H. Wilson, Congressional Research Service. See Appendix Table A-1.

<sup>2</sup> 8 U.S.C § 1254a (West 2019); Leila Schochet and Nicole Prchal Svajlenka, *How Ending TPS Will Hurt U.S.- Citizen Children*, Center for American Progress, Feb. 11, 2019, available at <https://www.americanprogress.org/issues/immigration/reports/2019/02/11/466022/ending-tps-will-hurt-u-s-citizen-children/>.

<sup>3</sup> Catholic Legal Immigration Network, Inc., Temporary Protected Status (TPS) and Deferred Enforcement Departure (DED) (last accessed June 17, 2019), available at <https://cliniclegal.org/tps>.

<sup>4</sup> See: 82 FR 44205 (RIN: 1615-ZB67); 84 FR 13688 (RIN: 1615-ZB79); 83 FR 9329 (RIN: 1615-ZB72); 83 FR 40307 (RIN: 1615-ZB76); 83 FR 43695 (RIN: 1615-ZB77)

2. On several occasions, Members of Congress have asked for the USCIS to exercise its powers under section 244 of the Immigration and Nationality Act to actively address issues impacting the safe return of foreign nationals to certain countries. Last year, Guatemala experienced a volcanic eruption that affected over 1.7 million people and made it unsafe to return nationals. The Guatemalan government requested TPS and over 300 national, state, and local organizations delivered a request to your administration to designate Guatemala for TPS under section 244(b)(1)(B).<sup>5</sup> Forty-six Members of Congress echoed the request in a letter that also called that the administration provide safe haven for Nicaraguans under section 244(b)(1)(C), fleeing from insecurity generated by protests that ultimately morphed into violence, coupled with the foreign state's inability to ensure security and—simultaneously—equal due process.<sup>6</sup> Since last year, Venezuela has experienced rampant civil unrest, leading to pervasive violence and unstable conditions; and made it unsafe for the return of Venezuelan nationals. Bicameral, bipartisan legislation was introduced to provide TPS for Venezuela.<sup>7</sup>

On multiple occasions, Members of Congress requested that your administration issue these designations.<sup>8</sup> **Notwithstanding such concerns, your agency has failed to provide an appropriate response as to why it chooses not to exercise its statutory authority despite these countries being potentially eligible for TPS.**<sup>9</sup> In response to these congressional queries, please provide responses to the following questions:

- a. Has your administration come to a final determination regarding whether to grant TPS to Guatemala, Venezuela, or Nicaragua? If so, what is that determination and on what basis was it made?
- b. What was the State Department's recommendation to DHS regarding whether the conditions in Guatemala, Venezuela, and Nicaragua warranted TPS?
- c. What was USCIS' recommendation to DHS regarding whether the conditions in Guatemala, Venezuela, and Nicaragua warranted TPS?
- d. If your administration decided not to designate Guatemala, Venezuela, or Nicaragua for TPS, will the administration commit to exercise prosecutorial discretion for such nationals arrested, detained, or in removal proceedings while conditions in these countries continue to exist?

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<sup>5</sup> Letter from 307 national, state, and local organizations, in the areas of immigration, civil rights, human rights, labor, religion, and education to Kirstjen Nielsen, Secretary of Homeland Security, U.S. Department of Homeland Security, and Michael Pompeo, Secretary of State, U.S. Department of State (July 25, 2018), *available at* <https://cliniclegal.org/resources/over-300-national-state-and-local-organizations-sign-letter-supporting-tps-guatemala>.

<sup>6</sup> See footnote 8.

<sup>7</sup> Zuzana Cepla, *Bill Summary: Venezuela TPS Act*, National Immigration Forum, Feb. 12, 2019, <https://immigrationforum.org/article/bill-summary-venezuela-tps-act/>; Venezuela TPS Act of 2019, H.R.549, 116th Cong. (2019); Venezuela TPS Act of 2018, S.3759, 115th Cong. (2018).

<sup>8</sup> Letter from Richard J. Durbin, Senator, U.S. Senate to Donald J. Trump, President, United States (March 7, 2019), *available at*

<https://www.durbin.senate.gov/imo/media/doc/March7%20Venezuela%20TPS%20Letter%20FINAL%20SIGNED.pdf>; Letter to L. Francis Cissna, Director, U.S. Citizenship and Immigration Services, U.S. Department of Homeland Security from Nydia M. Velázquez, Representative, U.S. House of Representative (July 27, 2019), *available at* <https://velazquez.house.gov/sites/velazquez.house.gov/files/Velazquez%20MOC%20Letter%20to%20USCIS%20on%20TPS%20for%20Guatemala%20and%20Nicaragua%20July%2027%202018.pdf>.

<sup>9</sup> Note: "USCIS argues that: "because TPS is discretionary, even if the Secretary determines that conditions meet one or more of the prongs for TPS, he or she may still decline to designate the country." See USCIS response to Richard J. Durbin on July 11, 2019.

- e. Does your agency believe that the statutory authority does not apply for these countries? If so, please provide a description of country events that have been highlighted in each of these examples, along with a description of how your agency is limited by the statute (other than previous “discretionary” arguments) for TPS designation.
3. Prior to announcing terminations, USCIS failed to adjudicate timely re-registration applications for nationals from El Salvador, Haiti, Syria, and Honduras following these countries’ final statutory (and not court-ordered) 18-month extensions. These processing delays are unprecedented and resulted in TPS holders not receiving their new Employment Authorization Document (EAD) before the automatic extension of work authorization expired. This in turn is jeopardizing the livelihoods of TPS holders at no fault of their own. USCIS issued Notices of Evidence of Continued Work Authorization for these populations. Estimates are that 20,000 Salvadorans, 4,500 Haitians, 335 Syrians, and an unknown number of Hondurans were affected by these delays.<sup>10</sup> TPS holders covered by Federal Register Notices (FRN) that have been given automatic extensions have also experienced employment issues when presenting FRNs and expired EADs, unable to renew licenses or other identifications as well as harassment from employers.
    - a. Please provide the number of all Notices of Evidence of Continued Work Authorization that USCIS mailed to TPS recipients, broken down by country.
    - b. Please provide information regarding whether USCIS issued a second round of Notices of Evidence of Continued Work Authorization for these countries once the initial notices expired. If so, please provide a number of notices mailed, broken down by country.
    - c. Please provide the legal and policy rationale for employing Notices of Evidence of Continued Work Authorization *instead* of a FRN, especially in light of legal experts expressing serious concerns regarding the compliance of these notices with the Administrative Procedure Act.<sup>11</sup>
    - d. Advocates report employers improperly terminating employees for lack of current EADs and DMVs improperly denying license renewal.
      - i. What steps are you taking to ensure that all jurisdictions are following current policies?
      - ii. Please provide any communication materials (i.e. informational guides or other educational documents) that have been sent to Departments of Motor Vehicles (or other state level entities) on the eligibility of automatically extended EADs.
  4. Please provide a report regarding the number of Tentative Nonconfirmations (TNCs) for TPS and DED holders, broken down by month and country, issued by DHS since January 20, 2017.
  5. Previously, your administration requested information regarding criminal conduct by Haitian nationals and use of public benefits to inform your decision regarding whether to extend TPS for Haiti. Such request is particularly odd, as the statutory authority provided under the TPS program is unambiguous over criminal activities and its impact on eligibility.<sup>12</sup> You should also be aware that the use of public benefits, by law, is extremely limited.

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<sup>10</sup> Letter from 70 law professors and scholars to Kirstjen Nielsen, Secretary of U.S. Department of Homeland Security, and L. Francis Cissna, Director of U.S. Citizenship and Immigration Services (Nov. 28, 2018), *available at* <https://cliniclegal.org/resources/letter-70-law-professors-and-scholars-uscis-and-dhs-regarding-work-permit-extensions-tps>.

<sup>11</sup> *Id.*

<sup>12</sup> See 8 U.S.C. §1254a(c)(2)(B)

For example, TPS holders are ineligible for SNAP, TANF and have limited conditional eligibility for Medicaid or SSI.<sup>13</sup> Such attempts to investigate the use of public benefits or criminal histories illustrates a severe misunderstanding of the law governing TPS and, arguably, indicates a sense of mistrust of USCIS employees' ability in following statutory guidelines.

- a. Has your administration requested information regarding criminal conduct for other countries who hold or held TPS? If so, for which country's nationals? Please provide copies of those requests and subsequent responses.
  - b. Has your administration requested information regarding use of public benefits for other countries who hold or held TPS? If so, for which country's nationals? Please provide copies of those requests and subsequent responses.
6. TPS terminations and unprecedented delays in FRNs following TPS decisions have resulted in a drop off in re-registration. Please provide:
- a. The number of TPS holders who applied for TPS during the most recent re-registration period for each country.
  - b. The number and percentage of approvals for the most recent re-registration period for each country.
  - c. The actual number (not percentage) of denials for the most recent re-registration period for each country.
7. Litigation has produced documentation that suggests a significant role of the White House in advising or urging DHS Secretaries to make decisions terminating TPS in some instances.
- a. What was the role of the Domestic Policy Council or other White House officials in making each decision?
  - b. Has the Domestic Policy Council recommended or advised:
    - i. an extension for any country? Please list which countries;
    - ii. termination for any country? Please list which countries;
    - iii. re-designation for any country? Please list which countries; and
    - iv. against re-designation for any country? Please list which countries.
8. There are hundreds of thousands of US citizen children of TPS holders who face the threat of family separation if TPS for their parents is terminated as announced.
- a. In making its determinations, did DHS consider the impact of terminating TPS on U.S. citizen children of TPS recipients? If yes, please provide information regarding the weight given to that factor and the rationale in terminating or not re-designating TPS for each country. If no, why not?
9. TPS holders and advocates have expressed that your agency's publicly available resources regarding the current state of TPS are unclear. Advocates have expressed concerns about the USCIS' TPS resource webpage.<sup>14</sup>

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<sup>13</sup> Noncitizen Eligibility for Federal Public Assistance: Policy Overview. Audrey L. Singer. Congressional Research Service. December 12, 2016.

<sup>14</sup> Letter from Jill M. Bussey, Director of Advocacy, Catholic Legal Immigration Network, Inc. to L. Francis Cissna, Director, U.S. Citizenship and Immigration Services, U.S. Department of Homeland Security (April 26, 2019), *available at* <https://cliniclegal.org/resources/clinic-recommendations-uscis-regarding-tps-implementation-issues-and-ramos-v-nielsen>.

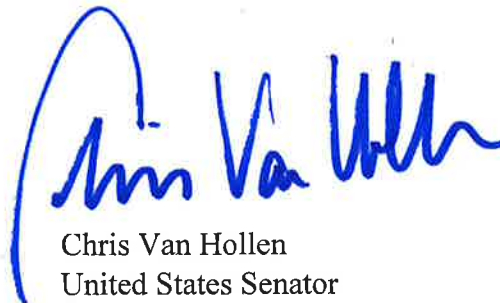
- a. Will you commit to revisit your public facing materials on TPS to make them clearer in response to stakeholder comments?
10. We would also like to take this opportunity to flag concerns relating to similar issues seen with Deferred Enforced Departure (DED) holders. We have learned that multiple DED holders have received erroneous rejection notices from USCIS in response to their timely and properly filed I-765 applications. USCIS indicated that DED holders may submit their applications for work authorization beginning April 3, 2019.<sup>15</sup> Confusion continues to exist among DED recipients, and at this time we request USCIS take the following course of action to correct the individual rejections and to stop potential harm to DED holders:
- a. Identify and re-open, on USCIS Service Motion, all I-765 applications that may have been improperly rejected by USCIS on this basis, and waive the filing fee so that applications may immediately resume processing.
    - i. Immediately alert DED holders, legal representatives, and the public about the error by sending notice of the error and USCIS's response via email and social media;
    - ii. Directly inform EAD applicants and legal representatives of the improper rejection of their application via mail with clear instructions on the next steps USCIS will take to correct the error; and
    - iii. Conduct a stakeholder engagement to provide information and answer questions.
  - b. Alternatively, if USCIS is unable to re-open rejected cases, it should identify and notify all applicants whose I-765s were improperly rejected with clear instruction on refiling. Due to unprecedented USCIS processing delays, the re-filed I-765 applications should be accepted *nunc pro tunc*.
  - c. USCIS should immediately investigate the root causes that led to this error, put into place corrective action, and share its findings with Congress.
  - d. Ensure E-Verify and SAVE have been properly updated to reflect the continued work authorization of DED and EAD holders.

We anticipate a timely response within 30 days. Thank you for your attention to this matter; we look forward to your prompt response.

Sincerely,



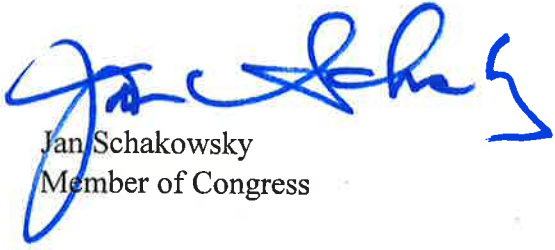
Nydia M. Velázquez  
Member of Congress




Chris Van Hollen  
United States Senator

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<sup>15</sup> 84 Fed. Reg. 13,059 (April 3, 2019), available at <https://www.govinfo.gov/content/pkg/FR-2019-04-03/pdf/2019-06577.pdf>.




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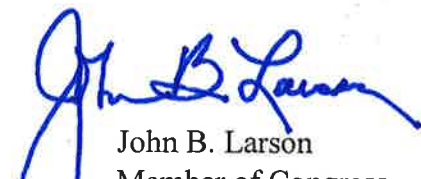
  
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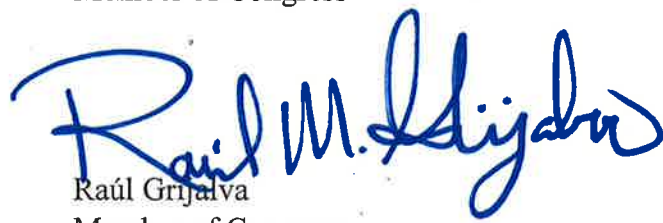
Emanuel Cleaver, II  
Member of Congress



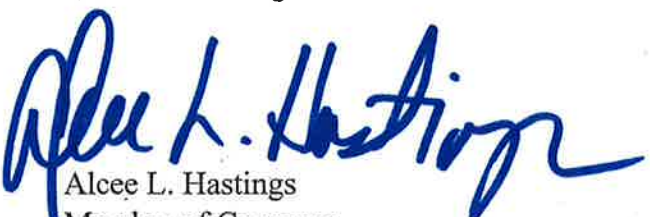
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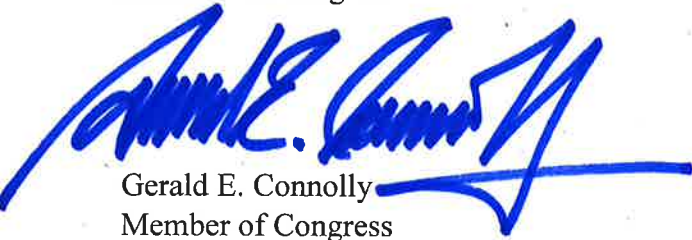
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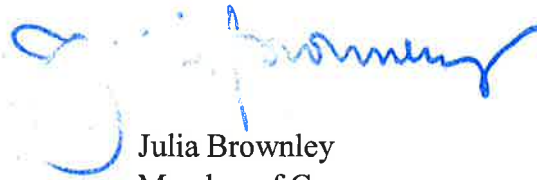
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