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Temporary Protected Status: Current Immigration Policy and Issues

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Summary

When civil unrest, violence, or natural disasters erupt in spots around the world, concerns arise over the safety of nationals from these troubled places who are in the United States. Provisions exist in the Immigration and Nationality Act (INA) to offer temporary relief from removal under certain circumstances. The United States currently provides some type of blanket relief from deportation or forced departure to nationals from eight countries: Burundi, El Salvador, Honduras, Liberia, Montserrat, Nicaragua, Somalia, and Sudan. All currently have Temporary Protected Status (TPS). Under INA, the Executive Branch grants TPS. Congress, however, has also granted TPS legislatively, and legislation that would grant TPS to nationals of specified countries has been introduced in the last several Congresses.

Background

The Immigration and Nationality Act (INA) provides that all aliens (i.e., persons who are not citizens or nationals of the United States) must enter pursuant to the INA and be authorized by the Bureau of Citizenship and Immigration Services (BCIS). The major categories of aliens are immigrants, refugees and asylees (all admitted for or adjusted to legal permanent residence), and nonimmigrants (admitted for temporary reasons, e.g., students, tourists or business travelers). Aliens who lack proper authorization are generally of two kinds: those who entered the United States without inspection according to immigration procedures, or those who entered the United States on a temporary visa and have stayed beyond the expiration date of the visa. Unauthorized aliens of both kinds are subject to removal.

As a signatory to the United Nations Protocol Relating to the Status of Refugees (hereafter, U.N. Protocol), the United States agrees to the principle of *nonrefoulement*,

which means that it will not return an alien to a country where his life or freedom would be threatened. *Nonrefoulement* is embodied in several provisions of U.S. immigration law. Most notably, it is reflected in the provisions requiring the Attorney General to withhold the deportation or removal of aliens to a country in which the alien's life or freedom would be threatened on the basis of race, religion, nationality, membership in a particular social group, or political opinion.¹ Provisions in the INA for withholding removal can be traced back to the 1950s.

The legal definition of asylum in the INA is consistent with the U.N. Protocol, which specifies that a refugee is a person who is unwilling or unable to return to his country of nationality or habitual residence because of a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The definitions of refugee and asylee are essentially the same in the INA, with the notable difference being the physical location of the persons seeking the status. Those who are in the United States or at a U.S. port of entry apply for asylum, while those who are displaced abroad apply for refugee status. The standards of proof and minimum thresholds are similar, but the procedures and priorities for refugee admissions are quite different. The current procedures and guidelines for admitting refugees and for protecting aliens already within the country (i.e., asylum or withholding deportation) were enacted as part of the Refugee Act of 1980.

If the motivation of the migrant is determined to be economic improvement rather than the political reasons that underpin the legal definition, the person is not considered eligible for asylum. This distinction is sometimes difficult to discern, because persecution as well as war may lead to economic hardships, and economic deprivation may trigger persecution or insurrection. Since factors such as extreme poverty, deprivation, violence, and the dislocation brought on by famines or natural disasters may evoke a humanitarian response, the term "humanitarian migrants" encompasses all those who emigrate to the United States for such reasons, including those who receive asylum.²

The concept of "safe haven" embraces humanitarian migrants. It covers those who may not meet the legal definition of refugee but are nonetheless fleeing potentially dangerous situations. Safe haven also assumes that the host country, in this instance the United States, is the first country in which the fleeing alien arrives safely, or is the country where the alien is temporarily residing when the unsafe conditions occur. Safe haven is implicitly temporary in nature because it is given prior to any decision on the long-term resolution of the alien's status. It is also a form of blanket relief because it is premised on more generalized conditions of turmoil or deprivation in the country of origin, in contrast to the individual circumstances weighed in the case-by-case asylum process.

In terms of permanent residence over the long term, the United States endorses the internationally held position that voluntary repatriation is the best outcome for refugees.

¹ §208 of INA (8 U.S.C. §1158); §241(b)(3) of INA (8 U.S.C. §1231); and §101(a) of INA (8 U.S.C. §1101(a)(42)).

² The term "humanitarian migrant" is not defined in the INA, nor, in this context, is it meant to imply that a sympathetic policy response is warranted. Rather, it refers to factors underlying the alien's justification for immigration.

The international community ranks resettlement in the country of first asylum as the second desirable option, and resettlement in a third country as the last positive alternative.

Temporary Protected Status

Temporary Protected Status is the statutory embodiment of safe haven for those aliens who may not meet the legal definition of refugee but are nonetheless fleeing — or reluctant to return to — potentially dangerous situations. TPS is blanket relief that may be granted under the following conditions: there is ongoing armed conflict posing serious threat to personal safety; a foreign state requests TPS because it temporarily cannot handle the return of nationals due to environmental disaster; or there are extraordinary and temporary conditions in a foreign state that prevent aliens from returning, provided that granting TPS is consistent with U.S. national interests.³

The Attorney General in consultation with the Secretary of State, can issue TPS for periods of 6 to 18 months and can extend these periods if conditions do not change in the designated country.⁴ To obtain TPS, eligible aliens report to BCIS, pay a processing fee, and receive registration documents and a work authorization. The major requirements for aliens seeking TPS are proof of eligibility, e.g., a passport issued by the designated country, continuous physical presence in the United States since the date TPS went into effect, timely registration, and being otherwise admissible as an immigrant. The regulation specifies grounds of inadmissibility that cannot be waived, including those relating to criminal convictions and the persecution of others.⁵

Aliens who receive TPS are not on an immigration track that leads to permanent residence or citizenship. The “temporary” nature of TPS is apparent in the regulation. INS has made clear that information it collects when an alien registers for TPS may be used to institute exclusion or deportation proceedings upon the denial, withdrawal or expiration of TPS.⁶ Moreover, the TPS provision in the INA states that a bill or amendment that provides for the adjustment to lawful temporary or legal permanent resident (LPR) status for any alien receiving TPS requires a supermajority vote in the Senate (i.e., three-fifths of all Senators) voting affirmatively.⁷

³ §244 of INA (8 U.S.C. §1254a).

⁴ Under the Homeland Security Act of 2002 (P.L. 107-296), the former Immigration and Naturalization Service was transferred to the Department of Homeland Security. As a part of this transfer, the responsibility for administering the TPS program was transferred from the Attorney General in the Department of Justice to the Secretary of the Department of Homeland Security. This program is now administered by the Bureau of Citizenship and Immigrations Services (BCIS).

⁵ 8 U.S.C. §240.

⁶ *Ibid.*

⁷ §244(h) of INA (8 U.S.C. §1254a).

Other Blanket Forms of Relief

In addition to TPS, the Attorney General has provided, under certain conditions, discretionary relief from deportation so that aliens who have not been legally admitted to the United States may remain in this country either temporarily or permanently. The statutory authority cited by the agency for these discretionary procedures is generally that portion of immigration law that confers on the Attorney General the authority for general enforcement and the section of the law covering the authority for voluntary departure.⁸ Such blanket relief is an exercise of the discretion of the Secretary of DHS, and thus, the Secretary of State need not be consulted.

Prior to the enactment of TPS, the BCIS provided relief by means of the suspension of enforcement of the immigration laws against a particular group of individuals. The two most common discretionary procedures to provide relief from deportation have been deferred departure or deferred enforced departure (DED) and extended voluntary departure (EVD). The discretionary procedures of DED and EVD continue to be used to provide relief the Administration feels is appropriate, and the executive branch's position is that all blanket relief decisions require a balance of judgment regarding foreign policy, humanitarian, and immigration concerns. Unlike TPS, aliens who benefit from EVD or DED do not necessarily register for the status with BCIS, but they trigger the protection when they are identified for deportation. If, however, they wish to be employed in the United States, they must apply for a work authorization from the BCIS.

Nationalities Receiving Temporary Protections

Aliens from eight countries currently have temporary protection from deportation. The estimated number of aliens currently protected range from 292 Montserratians to 290,000 Salvadorans. The number of Somalians covered by TPS expanded from 323 to an estimated 7,000 when it was extended in September 2001. Of those who currently have TPS, aliens from Liberia have had TPS for the longest period — since March 1991.

In 1990, when Congress enacted the TPS statute, it also granted TPS for one year to nationals from El Salvador who were residing in the United States. Subsequently, the Attorney General, in consultation with the State Department, granted TPS to aliens in the United States from the following countries: Kuwait from March 1991 to March 1992; Rwanda from June 1995 to December 1997; Lebanon from March 1991 to March 1993; the Kosovo Province of Serbia from June 1998 to December 2000; Bosnia-Herzegovina from August 1992 to February 2001; and Angola from March 29, 2000 to March 29, 2003; and Sierra Leone from November 4, 1997 to May 3, 2004.

Rather than extending Salvadoran TPS when it expired in 1992, the former Bush Administration granted DED to what was then estimated as 190,000 Salvadorans through December 1994. The first Bush Administration also granted DED to about 80,000 Chinese following the Tiananmen Square massacre in June 1989, and the Chinese retained DED through January 1994. On December 23, 1997, President Clinton instructed the Attorney General to grant DED to the Haitians for one year.

⁸ §240 of INA (8 U.S.C. §1229a); §240B (8 U.S.C. §1229c); P.L. 107-296 transfers administration to BCIS.

In prior years, various Administrations have given EVD status to Poles (July 1984 to March 1989), Nicaraguans (July 1979 to September 1980), Iranians (April to December 1979), and Ugandans (June 1978 to September 1986). Lebanese had been handled sympathetically as a group, getting EVD on a case-by-case basis since 1976, prior to receiving TPS from 1991 to 1993. Other countries whose nationals have benefitted in the past from a status similar to EVD include Cambodia, Cuba, Chile, Czechoslovakia, Dominican Republic, Hungary, Laos, Rumania, and Vietnam.⁹

Table 1. Countries Whose Nationals in the United States Benefit from Temporary Relief from Deportation

Country	Status	Dates	Estimated number ^a
Burundi	TPS	November 4, 1997 - November 2, 2005	19
El Salvador	TPS	March 2, 2001 - March 9, 2005	290,000
Honduras	TPS	December 30, 1998 - July 5, 2006	81,875
Liberia	TPS	October 1, 2002 - October 1, 2005	3,792
Montserrat	TPS	August 22, 1998 - February 27, 2005	292
Nicaragua	TPS	December 30, 1998 - July 5, 2006	4,309
Somalia	TPS	September 16, 1991 - September 17, 2005	324
Sudan	TPS	November 4, 1997 - November 2, 2005	1,949

- a. Estimates based upon BCIS data for designated status or work authorizations. These approximate numbers do not necessarily include all aliens from the countries who are in the United States and might be eligible for the status. BCIS updates these numbers when it renews TPS for nationals from a given country.

Issues

Central Americans. In the aftermath of Hurricane Mitch, then-Attorney General Janet Reno announced on November 5, 1998, that she would temporarily suspend the deportation of aliens from El Salvador, Guatemala, Honduras, and Nicaragua. On December 30, 1998, the Attorney General designated TPS for undocumented Hondurans and Nicaraguans in the United States as of that date. The Administration maintained that Honduras and Nicaragua had such extraordinary displacement and damage from Hurricane Mitch as to warrant TPS. TPS was recently extended for both and is scheduled to expire on January 5, 2005. After Hurricane Mitch, Guatemalans and Salvadorans had their stays of removal extended for 60 days — until March 8, 1999. The Bush Administration decided to grant TPS to Salvadorans following two earthquakes that rocked El Salvador in winter 2001. Prior to leaving office in January, the Clinton Administration said it would temporarily halt deportations to El Salvador. Whether to

⁹ To the best of our knowledge, this list includes all countries that have benefitted from some form of blanket relief since the 1950s.

grant blanket relief to nationals from neighboring Central American countries has perplexed policy-makers long before these recent earthquakes. Proponents of granting TPS to the Central Americans maintain it is an appropriate humanitarian response because people should not be forced to return to countries devastated by the natural disaster. Opponents fear TPS for those Central Americans in the United States would serve as a magnet to the millions of people displaced by natural disaster, prompting many of them to seek entry to the United States.

Liberians. Liberians have had protections for the longest period, of those who currently have TPS or other forms of blanket relief from deportation, having first received TPS in March 1991. In 1999 approximately 10,000 Liberians in the United States were given DED after their TPS expired September 28, 1999. Their DED status was subsequently extended to September 29, 2002. On October 1, 2002, Liberia was redesignated for TPS for a period of 12 months, on August 6, 2003, it was extended until October 1, 2004. On August 25, 2004, TPS for Liberia was once again extended until October 1, 2005. The State and Justice departments determined that the ongoing armed conflict in the country would jeopardize the personal safety of returning nationals.

Peruvians and Colombians. Violence growing out of the drug war and insurgencies have prompted some to request TPS for nationals in the United States from Peru and Colombia. The proponents are not asserting that the governments of these countries are repressing people or violating human rights; rather, they maintain that illegal forces within the country are creating dangerous conditions that the governments have not been successful in remedying. Others maintain that many countries around the world are dangerous and that conditions in Peru and Colombia do not warrant TPS.

Adjustment of Status. Since aliens granted TPS, EVD, or DED are not eligible to become legal permanent residents (LPRs) in the United States, a special act of Congress is required for such aliens to adjust their immigration status. For example, a law enacted in 1987 contained a special extension of the legalization program established by the Immigration Reform and Control Act (IRCA) to include otherwise eligible aliens who had been granted EVD status during the five-year period following the IRCA legalization cut-off date (i.e., through November 1, 1987). As a result, Afghans, Ethiopians, Poles, and Ugandans were among those who became eligible to legalize as temporary and subsequently permanent resident aliens. Congress also enacted legislation in 1992 that allowed Chinese who had deferred enforced departure following the Tiananmen Square massacre to adjust to LPR status (P.L. 102-404). Legislation enabling Haitians to adjust their status passed at the close of the 105th Congress (P.L. 105-277).¹⁰ Legislation to allow Guatemalans, Hondurans, Liberians, and Salvadorans (among others) to adjust to LPR status received considerable attention in past Congresses, but were not enacted.¹¹ Legislation that would adjust aliens from Montserrat (H.R. 603) and Liberia (H.R. 1930) has been introduced, as well as legislation to make Columbians eligible for TPS (H.R. 2853, S. 986).

¹⁰ See CRS Report 98-270, *Immigration: Haitian Relief Issues and Legislation*, by Ruth Wasem.

¹¹ See CRS Report RL30780, *Immigration Legalization and Status Adjustment Legislation*, by Ruth Wasem.