



July 1, 2022

PM-602-0188

## Policy Memorandum

**SUBJECT:** Rescission of *Matter of Z-R-Z-C-* as an Adopted Decision; agency interpretation of authorized travel by TPS beneficiaries

### Purpose

U.S. Citizenship and Immigration Services (USCIS) rescinds its designation<sup>1</sup> of the decision of the Administrative Appeals Office (AAO) in *Matter of Z-R-Z-C-*<sup>2</sup> as an Adopted Decision and updates its interpretation of the effects of authorized travel by Temporary Protected Status (TPS) beneficiaries, in accordance with the reasoning contained in this memorandum. This memorandum supersedes the prior USCIS Policy Manual content incorporating *Matter of Z-R-Z-C-*<sup>3</sup> regarding the treatment of a TPS beneficiary's return after authorized travel abroad under the provisions of the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 (MTINA), § 304(c), Pub. L. 102-232, 105 Stat. 1733, 1749 (Dec. 12, 1991) (8 U.S.C. § 1254a note).

### Scope

Based on developments in legal precedent, recent guidance from the DHS Office of the General Counsel (DHS OGC),<sup>4</sup> and further evaluation of current and past policy, USCIS hereby updates its interpretation of MTINA and related guidance as follows:

- USCIS will no longer use the advance parole mechanism to authorize travel for TPS beneficiaries, but will instead provide a new TPS travel authorization document. This document will serve as evidence of the prior consent for travel contemplated in INA 244(f)(3) and serve as evidence that the bearer may be inspected and admitted into TPS pursuant to MTINA if all other requirements are met.<sup>5</sup>

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<sup>1</sup> See *Matter of Z-R-Z-C-*, Adopted Decision 2020-02 (AAO Aug. 20, 2020). PM-602-0179, issued August 20, 2020.

<sup>2</sup> See *Matter of Z-R-Z-C-*, Adopted Decision 2020-02 (AAO Aug. 20, 2020).

<sup>3</sup> See Policy Alert - Temporary Protected Status and Eligibility for Adjustment of Status under Section 245(a) of the Immigration and Nationality Act, <https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20201006-TPSAndAOS.pdf>.

<sup>4</sup> DHS Office of the General Counsel, *Immigration Consequences of Authorized Travel and Return to the United States of Individuals Holding Temporary Protected Status*, issued April 6, 2022 (DHS OGC memorandum) (attached).

<sup>5</sup> The new TPS travel document will be available to noncitizens who are in valid TPS, as provided in INA 244(f)(3). Those who seek travel authorization based on pending initial applications for TPS may continue to apply under the advance parole procedures.

- TPS beneficiaries whom DHS has inspected and admitted into TPS under MTINA, subsequent to that inspection and admission, will have been “inspected and admitted” and are “present in the United States pursuant to a lawful admission,” including for purposes of adjustment of status under INA 245. This is true even if the TPS beneficiary was present without admission or parole when initially granted TPS.

In adjudicating an application for adjustment of status, or any other benefit request where relevant, USCIS will consider whether to apply this guidance to travel undertaken by the applicant before the issuance of this memorandum. This consideration will include a case-by-case review of any reliance on the prior policy, applicable law, as well as any other factors relevant to the application of this guidance to prior travel. Additionally, to be eligible for consideration under this guidance, past travel must meet each of the following requirements:

- The noncitizen obtained prior authorization to travel abroad temporarily on the basis of being a TPS beneficiary;<sup>6</sup>
- The noncitizen’s TPS was not withdrawn or the designation for their foreign state (or part of a foreign state) was not terminated or did not expire during their travel;<sup>7</sup>
- The noncitizen returned to the United States in accordance with the authorization to travel; and
- Upon return, the noncitizen was inspected by the former Immigration and Naturalization Service (INS) or DHS at a designated port of entry and paroled or otherwise permitted to pass into the territorial boundaries of the United States in accordance with the TPS-based travel authorization.

This guidance does not apply to travel undertaken by noncitizens whose TPS was not valid for the duration of travel, who traveled without obtaining advance authorization under INA 244(f)(3), who did not return in accordance with prior authorization under INA 244(f)(3), who were not inspected at a designated port of entry, who were found to be inadmissible on the grounds specified in INA 244(c)(2)(A)(iii) when returning from authorized travel, or who were paroled or permitted to enter the United States on a basis other than the TPS-based travel authorization.<sup>8</sup>

USCIS recognizes that the regulation implementing travel authorization for TPS beneficiaries continues to refer to the advance parole provisions.<sup>9</sup> Until the regulation is amended in accordance with MTINA as described in this memorandum, and corresponding changes are made to related

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<sup>6</sup> TPS beneficiaries are noncitizens granted TPS in accordance with INA 244(a)(1)(A).

<sup>7</sup> See INA 244(c)(3) and INA 244(b)(3)

<sup>8</sup> These TPS beneficiaries do not meet the requirements specified in section 304(c) of MTINA.

<sup>9</sup> See 8 CFR 244.15 (“Permission to travel may be granted by the director pursuant to the Service’s advance parole provisions.”).

forms and other documentation,<sup>10</sup> USCIS will consider the reference to advance parole in 8 CFR 244.15 to encompass any advance discretionary authorization to travel under INA 244(f)(3).<sup>11</sup>

## Background

TPS, which was created by Congress in 1990,<sup>12</sup> is available to qualifying noncitizens present in the United States who are nationals of a foreign state or any part of such foreign state (or individuals having no nationality who last habitually resided there) designated for TPS by the Secretary of Homeland Security (formerly the Attorney General).<sup>13</sup> TPS designations are discretionary, but the Secretary must first find that country conditions meet the statutory criteria, including that the designation is based on an ongoing armed conflict, an environmental disaster, or “extraordinary and temporary conditions.”<sup>14</sup>

Noncitizens who meet the statutory criteria may be granted TPS regardless of their immigration status—even while in removal proceedings or after having been ordered removed—and regardless of their manner of entry.<sup>15</sup> Among other criteria, a noncitizen must be “admissible as an immigrant” in order to be eligible for TPS, though certain inadmissibility grounds do not apply to TPS applicants and waivers are available for some other grounds.<sup>16</sup>

For the duration of their TPS, beneficiaries are protected from being removed by DHS and are authorized to work in the United States.<sup>17</sup> They are also eligible to travel abroad with DHS’s prior consent.<sup>18</sup>

Shortly after the enactment of IMMACT90, the former INS issued regulations implementing TPS.<sup>19</sup> The rules, in part, specified that permission to travel would be issued under INS’s advance parole processes.<sup>20</sup> A subsequent opinion from the INS Office of the General Counsel explained the consequences of travel under a grant of advance parole, including that any TPS beneficiary who

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<sup>10</sup> Related forms and documentation include the Form I-821, Application for Temporary Protected Status and its instructions and Form I-131, Application for Travel Document and its instructions. As previously stated, USCIS will create and issue a new TPS travel document as evidence of TPS-authorized travel and cease to issue the Form I-512/I-512L, Authorization for Parole of an Alien into the United States, to TPS beneficiaries.

<sup>11</sup> See OGC memorandum p. 28, explaining that 8 CFR 244.15 was abrogated by the MTINA travel provision.

<sup>12</sup> See Section 302 of the Immigration Act of 1990 (IMMACT90), Pub. L. No. 101-649 (Nov. 29, 1990).

<sup>13</sup> See INA 244(a).

<sup>14</sup> See INA 244(b).

<sup>15</sup> See INA 244(c)(1)-(2).

<sup>16</sup> By statute, INA 212(a)(5) (labor certification requirements) and INA 212(a)(7)(A) (documentation requirements for immigrants) do not apply to TPS applications. Also by statute, waivers are available for all other grounds of inadmissibility except INA 212(a)(2)(A) and (B) (convictions of certain crimes or multiple criminal convictions), INA 212(a)(2)(C) (controlled substance traffickers, unless related to a single offense of simple possession of 30 grams or less of marijuana), and INA 212(a)(3)(A), (B), (C), and (E) (relating to national security, terrorist activities, foreign policy, or participation in Nazi persecutions, genocide, torture, or extrajudicial killings). See INA 244(c)(1)(A)(iii), (c)(2)(A).

<sup>17</sup> See INA 244(a)(1).

<sup>18</sup> See INA 244(f)(3).

<sup>19</sup> See 56 Fed. Reg. 618-01 (Jan. 7, 1991) (interim rule); 56 Fed. Reg. 23491-02 (May 22, 1991) (final rule).

<sup>20</sup> See 56 Fed. Reg. at 622 (TPS interim rule); 56 Fed. Reg. at 23,498 (TPS final rule).

returns from such authorized travel would be subject to exclusion proceedings, and not deportation proceedings, upon termination of the individual's TPS.<sup>21</sup> Recognizing that multiple avenues of relief, such as suspension of deportation, would be unavailable to TPS beneficiaries in exclusion proceedings, the Acting INS General Counsel advised that the advance parole document issued to TPS recipients include a warning about this consequence of travel.<sup>22</sup>

In order to allow TPS beneficiaries to travel abroad without altering their immigration status and eligibility for relief from deportation, Congress enacted section 304(c) of MTINA, which provides that a TPS beneficiary "whom the Attorney General authorizes to travel abroad temporarily and who returns to the United States in accordance with such authorization" shall "be inspected and admitted in the *same immigration status* the alien had at the time of departure," unless the noncitizen is inadmissible under specified grounds.<sup>23</sup>

However, the TPS travel regulation (now located at 8 CFR 244.15)<sup>24</sup> has not been substantively updated since it was initially issued prior to MTINA's enactment. Despite MTINA's requirement of inspection and admission and INS General Counsel's 1992 opinion advising against the practice of continuing to facilitate authorized travel for TPS beneficiaries through advance parole, the regulation and USCIS practice remained unchanged in this regard until now.<sup>25</sup> From 1991 to the present, TPS beneficiaries seeking authorization to travel abroad have done so by filing the Form I-131, Application for Travel Document, and requesting advance parole. If approved, they were issued Form I-512 or I-512L, Authorization for Parole of an Alien into the United States, as evidence of their travel authorization. Upon returning from abroad, they were inspected and, if eligible, paroled into the United States.

This use of advance parole had consequences for TPS beneficiaries seeking to adjust status under INA 245(a), which requires a noncitizen to have been inspected and admitted or paroled into the United States. Many INS and USCIS offices considered TPS beneficiaries who were paroled after authorized travel abroad to have met this requirement; consequently, some TPS beneficiaries who had initially entered the United States without inspection and admission or parole were able to overcome ineligibility under INA 245(a) by traveling abroad and returning with an advance parole document.<sup>26</sup>

The USCIS Policy Manual affirmed this interpretation with the publication of Volume 7, Part B on February 25, 2016, stating that a TPS beneficiary who was inspected and permitted to enter—

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<sup>21</sup> See Immigration and Naturalization Service (INS) General Counsel Opinion No. 91-44; see also *Matter of G-A-C*, 22 I&N Dec. 83, 89 (BIA 1998) (holding that, under pre-IIRIRA law, a noncitizen granted advance parole and paroled into the United States upon return from travel abroad was properly placed in exclusion proceedings when parole was revoked); *Matter of Torres*, 19 I&N Dec. 371, 373-76 (BIA 1986) (same).

<sup>22</sup> See INS General Counsel Opinion No. 91-44.

<sup>23</sup> See Section 304(c) of MTINA (limiting inspection and admission in the same immigration status held at the time of departure to those TPS beneficiaries who are not subject to certain criminal, national security, and related grounds of inadmissibility as described in INA 244(c)(2)(A)(iii) (emphasis added)).

<sup>24</sup> The provision originally was located at 8 CFR 240.15 (1990).

<sup>25</sup> See INS General Counsel Opinion No. 92-10.

<sup>26</sup> USCIS acknowledges that prior to and even after the publication of Volume 7, Part B, of the USCIS Policy Manual on February 25, 2016, there were some discrepancies of practice between USCIS offices.

whether admitted or paroled—after traveling abroad with TPS-related advance parole documentation met the inspected and admitted or inspected and paroled requirement for purposes of adjustment eligibility.<sup>27</sup>

This interpretation remained in place until August 20, 2020, when USCIS departed from this position and designated the AAO’s *Matter of Z-R-Z-C-* as an adopted decision.<sup>28</sup>

*Matter of Z-R-Z-C-* held that DHS’s and INS’s past treatment of TPS beneficiaries who were paroled upon returning from travel authorized under INA 244(f)(3) as parolees for purposes of eligibility for adjustment of status under INA 245(a) was contrary to the language of MTINA, as such individuals should not be considered to have been paroled.<sup>29</sup> The decision also held that being “inspected and admitted” after TPS-authorized travel does not constitute being inspected and admitted for purposes of adjustment of status under INA 245(a).<sup>30</sup>

*Matter of Z-R-Z-C-* relied heavily on MTINA’s instruction that TPS beneficiaries be admitted in the “same immigration status the alien had at the time of departure,” particularly focusing on the phrase “same immigration status.” The decision interpreted that phrase to encompass the entirety of a noncitizen’s circumstances under the immigration laws, explaining that “MTINA travel authorization is a unique form of travel authorization and operates as a legal fiction that restores the alien to the *status quo ante* as if the alien had never left the United States.”<sup>31</sup> Consequently, the decision reasoned, TPS recipients who return from authorized travel abroad cannot be treated as “paroled” for purposes of adjustment, as they had not been in parole status prior to departing.

For similar reasons, *Matter of Z-R-Z-C-* determined that MTINA’s instruction that TPS beneficiaries who travel with advance permission be “inspected and admitted” upon their return (if they are not subject to specified grounds of inadmissibility) does not result in an inspection and admission for purposes of adjustment eligibility.<sup>32</sup> Since the grant of TPS is not itself an “admission,” to admit returning TPS beneficiaries who had been present without admission or parole before traveling would be to place them in a different—and improved—immigration posture than they held before they departed.<sup>33</sup> This result, the decision asserted, contradicts MTINA’s intention and therefore the phrase must be assigned a different meaning.

Acknowledging the significant change in *Matter of Z-R-Z-C-*’s reading of MTINA, USCIS limited its application in order to “minimize adverse impacts” on TPS recipients who may have reasonably relied on the previous treatment of travel with advance parole.<sup>34</sup> Accordingly, USCIS applied the new guidance only to those who traveled and returned to the United States after *Matter of*

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<sup>27</sup> See [General Adjustment of Status Policies and Section 245\(a\) of the Immigration and Nationality Act](#), PA-2016-001, issued February 25, 2016.

<sup>28</sup> See *Matter of Z-R-Z-C-*, Adopted Decision 2020-02 (AAO Aug. 20, 2020). PM-602-0179, issued August 20, 2020.

<sup>29</sup> *Id.* at 8-9.

<sup>30</sup> *Id.* at 6.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*; see also *Sanchez v. Mayorkas*, 141 S. Ct. 1809 (2021).

<sup>34</sup> See *Matter of Z-R-Z-C-*, Adopted Decision 2020-02 (AAO Aug. 20, 2020). PM-602-0179, issued August 20, 2020.

*Z-R-Z-C-*'s adoption.<sup>35</sup> USCIS subsequently updated the USCIS Policy Manual to incorporate *Matter of Z-R-Z-C-*'s reasoning into determinations of eligibility for adjustment of status.<sup>36</sup>

When *Matter of Z-R-Z-C-* was adopted, the issue of whether a grant of TPS was an admission for purposes of adjustment under INA 245 was the subject of nationwide litigation that had resulted in a split within the U.S. Circuit Courts of Appeals. The split was resolved on June 7, 2021, when the Supreme Court held in *Sanchez v. Mayorkas* that a grant of TPS is not an admission.<sup>37</sup> The Court noted that “[l]awful status and admission . . . are distinct concepts in immigration law: Establishing one does not necessarily establish the other.”<sup>38</sup>

The Court, however, acknowledged but expressly did not reach the separate issue of whether a TPS beneficiary “paroled” into the country following authorized travel abroad should be treated as having been “paroled” for purposes of adjustment under INA 245(a).<sup>39</sup> Nonetheless, the Court’s focus on the text of the applicable statutory provisions and its characterization of TPS as a “kind of lawful status” emphasizes shortcomings in the reasoning contained in *Matter of Z-R-Z-C-* and earlier policies for implementing MTINA.

USCIS has since reevaluated the reasoning articulated in *Matter of Z-R-Z-C-*, both on its own merits and in light of the Supreme Court’s decision in *Sanchez* and a recent decision by the U.S. Court of Appeals for the Fifth Circuit in *Duarte v. Mayorkas*, which held that MTINA does not permit the use of parole for TPS beneficiaries who travel with prior authorization under INA 244(f)(3).<sup>40</sup> Rather, the court in *Duarte* concluded that MTINA mandates that authorized TPS travelers be inspected and admitted upon their return and treated as having been inspected and admitted in future adjudications.<sup>41</sup> Additionally, at USCIS’ request, DHS OGC recently completed a review of MTINA and *Matter of Z-R-Z-C-*, as well as *Sanchez* and *Duarte*, and concluded that the plain meaning of section 304 of MTINA, and, in any event, the best interpretation of that provision, is that the term “inspected and admitted” be assigned its ordinary meaning in immigration law.

As a result, USCIS is persuaded that an interpretation different from that expressed in *Matter of Z-R-Z-C-*, detailed below, more accurately implements MTINA’s provisions and best supports USCIS’ policy objectives. In short, USCIS has concluded that:

- TPS beneficiaries who are inspected and allowed to lawfully pass through a port of entry under the TPS-specific standards established by MTINA and INA 244 should be inspected and admitted into Temporary Protected Status.

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<sup>35</sup> *Id.*

<sup>36</sup> See Policy Alert - Temporary Protected Status and Eligibility for Adjustment of Status under Section 245(a) of the Immigration and Nationality Act, <https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20201006-TPSAndAOS.pdf>.

<sup>37</sup> *Sanchez*, 141 S. Ct. at 1812.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 1813 n.4 (“The Government notes that *Sanchez* was treated as ‘paroled’ when he returned from an authorized trip abroad after obtaining TPS. . . . We express no view on whether a parole of the kind *Sanchez* received enables a TPS recipient to become an LPR absent any other bar in [INA 245].”).

<sup>40</sup> *Duarte v. Mayorkas*, 27 F.4th 1044 (5th Cir. 2022).

<sup>41</sup> *Id.* at 1058.

- Inspection and admission under MTINA satisfies the “inspected and admitted” requirement for eligibility for adjustment of status under INA 245(a) and the “lawful admission” requirement for the exceptions of INA 245(k).
- For cases in the Fifth Circuit, USCIS must treat qualifying prior travel as inspection and admission pursuant to *Duarte v. Mayorkas*. Elsewhere, USCIS should, where needed and on a case-by-case basis, determine whether a noncitizen who was paroled or otherwise permitted to enter after TPS-authorized travel under prior guidance should be treated as inspected and admitted for purposes of a given adjudication.

## Discussion

In the course of reevaluating *Matter of Z-R-Z-C-*, USCIS requested advice from DHS OGC on the following questions:

- What is the best reading of MTINA’s requirement that TPS beneficiaries who have traveled overseas with prior authorization be “inspected and admitted” into the United States upon their return “in the same immigration status [they] had at the time of departure?”
- What effect does such authorized travel and return have on eligibility for adjustment of status under INA 245?<sup>42</sup>

DHS OGC responded to USCIS’ request with its memorandum, *Immigration Consequences of Authorized Travel and Return to the United States of Individuals Holding Temporary Protected Status* (DHS OGC memorandum) (attached), which it also shared with U.S. Immigration and Customs Enforcement (ICE) and U.S. Customs and Border Protection (CBP).

In the memorandum, DHS OGC reviewed the statutory and regulatory framework for TPS and MTINA; prior actions taken by INS and by USCIS to interpret and implement these provisions, including the designation of *Matter of Z-R-Z-C-* as an adopted decision; and recent developments in case law addressing whether, or when, a TPS beneficiary is “admitted.”

After analyzing the statutory text and history of TPS and MTINA, relevant case law, and the historical meaning attributed to the phrase “inspected and admitted,” DHS OGC concluded that the terms used in section 304 of MTINA should be interpreted in accordance with their ordinary meaning in immigration law and that such interpretation was consistent with legislative intent. DHS OGC summarized its response to USCIS’ question as follows:

- The MTINA travel-and-return provision is best understood as providing that TPS beneficiaries with advance authorization to travel who present at a port of entry must be inspected and, so long as they are otherwise admissible under the TPS-specific standards established by MTINA and INA 244, admitted into Temporary Protected Status. USCIS is

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<sup>42</sup> DHS OGC memorandum p. 2.

therefore well within its authority to rescind *Matter of Z-R-Z-C-* and give the phrase “inspected and admitted” the same meaning it holds—and has long held—elsewhere in the INA. Indeed, USCIS would be assuming a stronger legal posture by doing so. The Department should not authorize such travel via advance parole procedures, nor should such TPS travelers be paroled upon their return.

- The phrase “inspected and admitted” in MTINA is best understood as satisfying the “inspected and admitted” eligibility requirement for adjustment of status under INA 245(a) and (k).<sup>43</sup>

The DHS OGC memorandum fully states DHS’s legal position and complete analysis of these issues. Below, USCIS has summarized its understanding of DHS OGC’s analysis in order to provide context for the policy decisions within this memorandum.

#### 1. MTINA is Best Understood as Requiring Inspection and Admission into TPS<sup>44</sup>

DHS OGC concluded that by using “inspected and admitted” in MTINA, Congress strongly indicated its intent that the authorized reentry of TPS beneficiaries effectuates an “admission,” as that term had long been understood and defined in case law: an immigration officer’s authorization of a noncitizen to lawfully pass through a U.S. port of entry following inspection and a determination of admissibility.<sup>45</sup>

Consequently, USCIS’ use of advance parole for TPS travel authorization was inconsistent with MTINA, as the INA specifies that noncitizens who are paroled into the United States “shall not be considered to have been admitted.”<sup>46</sup> Further, DHS OGC concluded that “the same immigration status [a TPS beneficiary] had at the time of departure” on authorized travel is best understood to refer to “Temporary Protected Status,” and upon returning, the beneficiary, if eligible, must be admitted into that “same immigration status.”<sup>47</sup>

In further support of this reading, DHS OGC referenced the *Sanchez* Court’s recognition of TPS as a lawful status and noted that, although the Court was not addressing whether TPS was a status into which one could be admitted following authorized travel, two types of status that it examined in its decision—U nonimmigrant status and asylum status—were forms of lawful status whose conferral does not necessarily result in an admission but also statuses into which noncitizens nevertheless may be admitted after inspection at a port of entry.<sup>48</sup>

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<sup>43</sup> DHS OGC memorandum p. 2.

<sup>44</sup> See DHS OGC memorandum p. 15.

<sup>45</sup> See DHS OGC memorandum p. 15.

<sup>46</sup> See INA 101(a)(13)(B); see also INA 212(d)(5)(A) (“parole of [an] alien shall not be regarded as an admission of the alien”). See generally DHS OGC memorandum p. 16.

<sup>47</sup> See DHS OGC memorandum p. 18.

<sup>48</sup> See DHS OGC memorandum p. 19. Noncitizens may be admitted into U nonimmigrant status if their petition is approved while they are overseas. See 8 CFR 214.14(c)(5)(i)(B) and (f). Asylees who are authorized to travel abroad under INA 208(c)(1)(C) are inspected and admitted upon their return, even if they had initially entered the United States without inspection or parole. See Memorandum from Bo Cooper, General Counsel, INS, *Readmission of Asylees and*



These arguments, as laid out in the DHS OGC memorandum, persuade us that TPS beneficiaries should be inspected and admitted into TPS after an authorized trip abroad pursuant to MTINA and INA 244(f)(3).

## 2. TPS Beneficiaries Who Are Inspected and Admitted after Authorized Travel Satisfy the “Inspected and Admitted” Requirement for Adjustment of Status under INA 245

Upon examining the statutory histories of the TPS program and MTINA and considering Congress's choice to borrow the well-understood term of art “inspected and admitted” from the adjustment of status provisions, DHS OGC found it reasonable to assume that Congress was aware that travel under MTINA would result in previously ineligible noncitizens being able to meet the INA 245(a) requirement of inspection and admission and parole.<sup>49</sup>

In consideration of DHS OGC’s conclusion that Congress intended to use the phrase “inspected and admitted” in MTINA as it was ordinarily used elsewhere in immigration law, USCIS has concluded that it will consider inspection and admission under MTINA to satisfy the requirement of inspection and admission for INA 245 and in other relevant contexts, including the “lawful admission” requirement of INA 245(k). USCIS agrees that this policy best reflects MTINA’s language and intent and promotes consistency in the language of inspection and admission across the immigration laws.

## 3. Applying this Straightforward Interpretation of MTINA Best Serves USCIS’ Policy Goals

In considering the issues raised subsequent to USCIS’ adoption of *Matter of Z-R-Z-C-*, as well as the recent Fifth Circuit decision in *Duarte* and DHS OGC’s legal opinion referenced above, USCIS has examined several policy options to determine what would most effectively advance the agency’s policy objectives while recognizing any legitimate reliance interests implicated in any changes to the agency’s application of MTINA. Those objectives include administering immigration laws clearly, lawfully, and consistent with Congress’s intent; ensuring equitable treatment of noncitizens under the immigration laws; applying a uniform policy throughout the United States; promoting family unity; and reducing barriers and promoting access to the legal immigration system.

As a preliminary matter, USCIS’ options are constrained, at least in part, by the Fifth Circuit’s ruling in *Duarte*. USCIS may either adopt that court’s holding nationwide to ensure a consistent position for all TPS travelers, or adopt one of several options that would result in inconsistent application of the law across jurisdictions.

First, USCIS considered adopting *Duarte* in the Fifth Circuit, but leaving the designation of *Matter of Z-R-Z-C-* in place and maintaining its holdings as USCIS policy in all other jurisdictions. This

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*Refugees Without Travel Documents*, General Counsel Opinion 99-6 (citing 8 CFR 223.3(d)(2)(i)) (“An arriving alien who presents a valid refugee travel document may be admitted to the United States and resume his or her status as a refugee or asylee.”).

<sup>49</sup> DHS OGC memorandum pp. 21-23.

option would have provided some measure of continuity with the policy changes made in 2020 and would be consistent with the agency's position in litigation. However, in finding that "MTINA mandated that [the plaintiffs in *Duarte*] be 'admitted'—not paroled—upon their return from their travel abroad," and that the plaintiffs therefore "were admitted and not paroled into the country," the Fifth Circuit indicated that any past returning TPS beneficiary be treated as having been admitted, regardless of whether USCIS had determined otherwise or whether they were in fact paroled by CBP.<sup>50</sup>

Consequently, TPS beneficiaries whose cases arise under the Fifth Circuit's jurisdiction would be subject to a different analysis than similarly situated TPS beneficiaries whose cases arise elsewhere if USCIS were to continue applying *Matter of Z-R-Z-C-*, preventing equitable treatment of noncitizens and application of a uniform policy throughout the country. Further, the interpretation in *Matter of Z-R-Z-C-* strains the ordinary meaning of the statutory text concerning inspection and admission, which places a continuing legal burden on USCIS. The presence of pending lawsuits in multiple states poses the risk of different rulings in different jurisdictions and, consequently, interpretations and policy that vary across the country.

USCIS also considered withdrawing *Matter of Z-R-Z-C-* and returning to the earlier policy in which TPS beneficiaries traveled with an advance parole document, were paroled upon return, and were therefore considered to meet the INA 245(a) "inspected and admitted or paroled" requirement on the basis of parole. However, this approach is contrary to the holding in *Duarte*, and in addition to the problems caused by a jurisdictional split as discussed above, INS General Counsel advised against a policy that such individuals be considered paroled when MTINA was enacted, and DHS OGC has similarly advised against such a policy today. It would also be contrary to MTINA's language of admission and would result in TPS beneficiaries being placed in a different immigration status—that of a parolee—in further contravention of MTINA.

When assessing the option adopted in this memorandum, the possibility that TPS beneficiaries who had been present without admission or parole could become "inspected and admitted" by traveling abroad with prior authorization drew concern that such an outcome would be in tension with the general understanding that TPS is not intended to confer advantages other than the protection from removal specified in the statute. However, as OGC noted in their memorandum, prior to MTINA Congress specified that Salvadoran TPS holders could travel using advance parole, thereby creating just such mechanism through which TPS beneficiaries who had not previously been admitted or paroled could, in fact, meet the requirement at INA 245(a).<sup>51</sup> To the extent that such a tension does in fact exist, we reiterate that it is reasonable to assume that Congress was aware of the outcome of this language, and therefore any apparent tension does not outweigh our conclusion that the best reading of MTINA's text should be adopted.

Further, we no longer believe that this perceived tension is necessarily, or best, resolved by continuing to apply a policy premised on disregarding the well-established meaning of the term "inspected and admitted" and the ordinary understanding of the phrase "into the same immigration

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<sup>50</sup> See *Duarte*, 27 F.4th at 1060-61.

<sup>51</sup> DHS OGC memorandum pp. 21-22.

status” and instead assigning these phrases a different meaning for MTINA purposes than elsewhere in the INA. By contrast, reading the “same immigration status” to refer to TPS gives effect to the text of MTINA and is consistent with the ordinary understanding of inspection and admission into a particular lawful status under the immigration laws (e.g., nonimmigrant status).

Moreover, the analysis outlined in this memorandum and detailed by the DHS OGC persuades us that this position is better positioned to withstand legal challenges—and already has support in the Fifth Circuit’s decision in *Duarte*—thereby promoting uniform policy nationwide and conserving USCIS resources by avoiding further litigation.

We acknowledge that allowing certain TPS beneficiaries to meet the “inspected and admitted or paroled” requirement of INA 245(a) (as was generally the case prior to the adoption of *Matter of Z-R-Z-C-*) and the “lawful admission” requirement of INA 245(k) after returning from authorized travel will result in some previously ineligible noncitizens becoming eligible for adjustment of status. Critically, though, this change does not, in itself, create a direct pathway to lawful permanent resident status. Those who benefit from this new policy must still satisfy all other requirements for adjustment of status, including having an immigrant visa immediately available and being admissible to the United States for permanent residence, and they must also merit a favorable exercise of discretion.<sup>52</sup> The adjustment of status bars of INA 245(c) also apply. The change effected by this memorandum, however, advances USCIS’ goals of promoting access to legal immigration and promoting family unity in addition to aligning our policy with the clearest reading of the statutory text.

In deciding to rescind its designation of *Matter of Z-R-Z-C-* as an Adopted Decision, USCIS has also considered whether there are legitimate reliance interests implicated by the rescission.<sup>53</sup> Those potential reliance interests, detailed below, relate to whether a noncitizen is subject to inadmissibility or deportability grounds of removal, where jurisdiction over an application for adjustment of status lies, whether TPS-authorized travel may result in a noncitizen’s inadmissibility on other grounds, whether a TPS beneficiary may lose access to certain public benefits, and how the agency’s workload may be impacted.<sup>54</sup> As discussed further below, after considering these reliance interests and the effects of this policy change on both the agency and noncitizens who travelled with authorization based on TPS, USCIS has decided to rescind its adoption of *Matter of Z-R-Z-C-* and will no longer use advance parole to implement INA 244(f)(3).

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<sup>52</sup> Under MTINA, TPS beneficiaries returning from authorized travel are assessed for inadmissibility only under the grounds specified in INA 244(c)(2)(A)(iii). Thus, they may be admitted into the United States in TPS even if they are inadmissible on other grounds. The fact of a TPS beneficiary’s admission under MTINA has no bearing on the beneficiary’s inadmissibility on other grounds.

<sup>53</sup> See *Dep’t of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1913 (2020).

<sup>54</sup> In addition to the interests described below, USCIS considered but deemed negligible any reliance interests of third parties, such as states, that may be affected by this change. The manner in which TPS beneficiaries are authorized to travel and the effects of such travel have no reasonable connection to any interests third parties may assert, such as any costs to states due to the presence of additional noncitizens in their territory. TPS beneficiaries already cannot be removed by DHS, they may work, and there is no definite terminus to their status so USCIS does not expect that this policy will change the population of noncitizens in the United States. And as noted above, inspection and admission does not, by itself, create any pathways to lawful permanent residence.

For example, unadmitted TPS beneficiaries who were amenable to removal proceedings based on certain inadmissibility grounds under INA 212 prior to their authorized travel outside the United States will no longer be subject to removal based on those inadmissibility grounds after being inspected and admitted into TPS upon their return. As admitted noncitizens, they will instead be subject to deportability grounds under INA 237. In some cases, TPS beneficiaries who were amenable to inadmissibility charges under INA 212 may not fall within a ground of deportability under INA 237 and would not be amenable to removal proceedings unless they later become deportable under one of the INA 237 grounds. Conversely, some TPS beneficiaries who did not fall within a ground of inadmissibility may be subject to deportability under INA 237. USCIS defers to other DHS components on the effect of DHS OGC's legal determination on removal proceedings, and USCIS officers should follow agency guidance if issuing Notices to Appear under these legal determinations.

In some cases, applying this guidance retroactively to TPS beneficiaries who were paroled upon returning from authorized travel may shift jurisdiction over certain adjustment of status adjudications from USCIS to the Executive Office for Immigration Review (EOIR). Before the adoption of *Matter of Z-R-Z-C-*, TPS beneficiaries who were paroled upon return were treated as "arriving aliens" on the basis of that parole, regardless of whether they had met the definition of an arriving alien before their travel.<sup>55</sup> Consequently, USCIS had jurisdiction over their applications for adjustment of status in most cases if they were later placed in removal proceedings.<sup>56</sup>

After *Matter of Z-R-Z-C-* was adopted, reentry after TPS-authorized travel was not treated as a parole for purposes of adjustment of status, even though USCIS continued to use advance parole as the mechanism for authorizing travel. Consequently, if a noncitizen was placed into proceedings after TPS-authorized travel, USCIS would only have jurisdiction over the adjustment application if the noncitizen had been an "arriving alien" when departing on authorized travel.<sup>57</sup>

Under this new guidance, TPS beneficiaries whom USCIS considers to have been admitted into the United States under MTINA will no longer be "arriving aliens," and USCIS would not have jurisdiction over applications for adjustment of status for those placed into proceedings after TPS-authorized travel, regardless of whether they were "arriving aliens" when they departed. Those applicants will need to apply for adjustment of status with EOIR or seek to have their removal proceedings terminated in order to apply with USCIS.<sup>58</sup>

Nonetheless, for the reasons described in this policy memorandum, USCIS has determined that the interpretation of MTINA explained in this guidance has the strongest legal foundation and will best promote access to legal immigration and family unity. USCIS is adopting this guidance in recognition that the benefits outweigh the costs related to any shifts in jurisdiction.

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<sup>55</sup> See 8 CFR 1.2 (defining "arriving alien").

<sup>56</sup> See 8 CFR 245.2(a)(1); see also 8 CFR 1245.2(a)(1)(ii) (specifying the circumstances in which EOIR, and not USCIS, would have jurisdiction over an arriving alien's application for adjustment of status).

<sup>57</sup> See *Matter of Z-R-Z-C-*, Adopted Decision 2020-02 (AAO Aug. 20, 2020), PM-602-0179, p. 9, issued August 20, 2020.

<sup>58</sup> See 8 CFR 1245.1(i).

The rescission could result in an increase in certain types of adjudications and form submissions, such as Form I-485, Application to Register Permanent Residence or Adjust Status, or the Form I-131, Application for Travel Document. This could impact backlogs and wait times for adjudication of the impacted forms. However, upon submission of these forms, applicants must pay the applicable filing fees (unless provided a fee waiver), which provide operational resources to supplement workforces to process the increased volume of forms. Therefore, considering the limited reliance interests implicated by this policy change and the positive impact the change will have on important agency policy objectives, the benefits of rescinding the adoption of *Matter of Z-R-Z-C-* justify the related costs to the agency.

Rescinding the policy in *Matter of Z-R-Z-C-* may adversely affect TPS beneficiaries who relied on *Matter of Z-R-Z-C-* to avoid inadmissibility under INA 212(a)(6)(B) or (a)(9)(A)(ii) that would have otherwise resulted from their departure from and again seeking admission to the United States. Under INA 212(a)(6)(B), a noncitizen is inadmissible if they again seek admission to the United States within 5 years of departure after failing or refusing to attend or remain in attendance at removal proceedings without reasonable cause. Under INA 212(a)(9)(A)(ii), a noncitizen is inadmissible if they seek admission within a specified period after departing the United States while under an outstanding order of removal. If TPS beneficiaries who meet the other criteria for inadmissibility under these grounds travel with authorization and subsequently present themselves for inspection and admission into TPS under MTINA, they will thereby trigger inadmissibility.<sup>59</sup> Although such inadmissibility would not prevent them from admission into TPS under MTINA, it could lead to ineligibility for adjustment of status or other immigration benefits.<sup>60</sup> Because *Matter of Z-R-Z-C-* held that TPS beneficiaries returning from authorized travel must be treated as if they had never left, TPS-authorized travel would not have resulted in inadmissibility under these grounds. While this is a worse outcome for those individuals affected by this change, USCIS has assessed this impact against both mitigating and countervailing considerations, beginning with the limited size of the affected population: *Matter of Z-R-Z-C-* was USCIS' policy for less than 2 years and applied only prospectively, and those who traveled under the policy in effect before its adoption would also have become inadmissible when they presented themselves for inspection and were paroled into the United States if they met the other criteria for inadmissibility under these

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<sup>59</sup> Inadmissibility under both of these grounds requires either departure or removal, and therefore may be triggered in circumstances where a noncitizen departs the United States under an order of removal, even if the departure did not execute the order. See INA 212(a)(6)(B) and (9)(A)(ii). USCIS will continue to apply the holding of *Matter of Arrabally and Yerabally*, 25 I&N Dec. 771 (BIA 2012)—that a noncitizen who leaves the United States temporarily pursuant to a grant of advance parole does not make a departure from the United States within the meaning of INA 212(a)(9)(B)(ii)—to authorized travel under MTINA followed by admission to the United States into TPS, as the Board's reasoning remains equally applicable. Therefore, this change will not adversely affect individuals with respect to reliance upon *Matter of Arrabally*.

<sup>60</sup> See INA 245(a)(2) (requiring that an applicant for adjustment of status be admissible to the United States).

grounds.<sup>61</sup> Additionally, noncitizens may seek relief from INA 212(a)(9)(A)(ii) inadmissibility by obtaining consent to reapply for admission.<sup>62</sup>

With respect to eligibility for public benefits, noncitizens paroled into the United States for more than one year are “qualified aliens” for the purpose of eligibility for Federal public benefits.<sup>63</sup> Noncitizens paroled for less than one year may be eligible for certain State and local public benefits.<sup>64</sup> In addition, Cuban and Haitian entrants, as defined in section 501(e) of the Refugee Education Assistance Act of 1980 (REAA), are qualified aliens.<sup>65</sup> Cuban and Haitian entrants are not subject to some limitations on eligibility for certain Federal public benefits applicable to other qualified aliens.<sup>66</sup> The definition of Cuban and Haitian entrant under the REAA includes, among other things, Cuban and Haitian nationals who have been paroled into the United States regardless of current status, and Cuban and Haitian nationals currently paroled.<sup>67</sup> A grant of TPS does not render a noncitizen a qualified alien, or a Cuban and Haitian entrant. Admitting noncitizens in the future into TPS rather than paroling them may therefore have some effect on their eligibility for certain public benefits. With respect to USCIS deeming an applicant for adjustment of status or other immigration benefit to have been previously admitted rather than paroled, we emphasize that this determination is limited to adjudication of the immigration benefit request before USCIS and is not intended to affect the decisions of other agencies, including regarding whether a noncitizen is a qualified alien or a Cuban and Haitian entrant. Again, in general, this deeming would take place with respect to an applicant voluntarily seeking an immigration status, such as lawful permanent residence, to which it is relevant.

USCIS has also considered whether and to what extent this interpretation of MTINA should be applied to past travel by TPS beneficiaries that was authorized under the auspices of parole. For cases arising in the Fifth Circuit, *Duarte* indicates that past paroles are to be treated as inspection and admission, regardless of the procedure used when TPS beneficiaries were permitted to reenter the United States and regardless of the status listed on their travel documentation.<sup>68</sup> In other jurisdictions, to the extent that USCIS must determine whether to consider a prior entry an admission or parole, it will consider, on a case-by-case basis for individual adjudications, whether retroactive application of this policy is appropriate. In most cases, whether the prior entry is treated as an admission or a parole will not affect the outcome of the adjudication, particularly in the

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<sup>61</sup> Under INA 212(d)(5)(A), DHS has the authority to parole a noncitizen who is “applying for admission,” and when the parole ends, the noncitizen is treated “in the same manner as that of any other applicant for admission to the United States.”

<sup>62</sup> Inadmissibility under INA 212(a)(9)(A)(ii) does not apply to a noncitizen who obtains DHS’s consent to reapply for admission before the noncitizen’s reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous territory. INA 212(a)(9)(A)(iii). Consent to reapply may be requested in accordance with 8 CFR 212.2.

<sup>63</sup> 8 U.S.C. §§ 1611(a), 1641(b)(4).

<sup>64</sup> 8 U.S.C. § 1621(a)(3).

<sup>65</sup> 8 U.S.C. § 1641(b)(7).

<sup>66</sup> *See, e.g.*, 8 U.S.C. § 1612(b)(2).

<sup>67</sup> 8 U.S.C. § 1522 note.

<sup>68</sup> *See Duarte*, 27 F.4th at 1061 (concluding that “USCIS was ... not authorized to grant the Appellants the advance parole that the 512L form it issued them purported to allow” and that as a result they “were admitted and not paroled into the country”).

context of adjustment of status under INA 245(a).<sup>69</sup> If the distinction between admission and parole is not dispositive, then no retroactivity determination need be made.

In circumstances where the distinction between admission and parole is dispositive, USCIS will determine whether to consider a prior return from TPS-authorized travel as an admission. USCIS recognizes that this type of retroactivity in adjudications is generally disfavored where affected parties have relied on a past interpretation in such a way that they would be harmed by the change. Consequently, when determining whether to apply this guidance retroactively to a case, USCIS will apply *Retail Wholesale and Department Store Union AFL-CIO v. NLRB*, 466 F.2d 380 (D.C. Cir. 1972)—known as the *Montgomery Ward* test in the Ninth Circuit<sup>70</sup>—as adopted by the Board of Immigration Appeals in *Matter of Cordero-Garcia*, 27 I&N Dec. 652, 657 (BIA 2019).<sup>71</sup> The five-factor test formulated by the D.C. Circuit entails the following considerations:

- (1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.<sup>72</sup>

If a particular noncitizen who relied on either *Matter of Z-R-Z-C-* or DHS's prior use of advance parole to implement TPS travel would be negatively affected or otherwise burdened by retroactive application of this new policy, USCIS will weigh any such harm against the other factors in the *Retail Union* test on a case-by-case basis. If there was no such detrimental reliance or burden, or if the harm in a particular case is outweighed by other factors in favor of retroactive application, then officers may deem a prior parole an admission for purposes of the adjudication before them. In general, when USCIS determines that an applicant is eligible for adjustment of status but for having been paroled rather than admitted under MTINA, and the applicant merits adjustment in the exercise of discretion, it would be appropriate on a case-by-case basis to deem the prior parole to be an admission.

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<sup>69</sup> USCIS recognizes that a smaller subset of adjustment cases will turn on the distinction between admission and parole, namely employment-based adjustment of status applications by noncitizens seeking an exception to the bars to adjustment in INA 245(c)(2), (7), and (8). The exception at INA 245(k) requires, in part, that the applicant be present in the United States "pursuant to a lawful admission." In such cases, USCIS will conduct the individualized assessment, described above, in determining whether to apply this guidance to past travel.

<sup>70</sup> *Montgomery Ward & Co. v. FTC*, 691 F.2d 1322 (9th Cir. 1982).

<sup>71</sup> USCIS expects that under this test, retroactive application of the policy will be appropriate in many cases where the question of parole or admission is relevant. Further guidance on how the *Retail Union* test may be applied to individual applications for adjustment of status can be found in the USCIS Policy Manual, Volume 7, Adjustment of Status, Part B, 245(a) Adjustment, Chapter 2, Eligibility Requirements, Section A, "Inspected and Admitted" or "Inspected and Paroled," Subsection 2, Admission [[7 USCIS-PM B.2\(A\)\(2\)](#)].

<sup>72</sup> See *Retail Wholesale*, 466 F.2d at 390.

## **Conclusion**

USCIS rescinds its August 2020 designation of the AAO's decision in *Matter of Z-R-Z-C-* as an Adopted Decision. USCIS will no longer use advance parole when authorizing TPS travel under MTINA. TPS beneficiaries who are inspected and admitted by CBP will be treated as such in USCIS adjudications. Where appropriate, USCIS will also consider TPS beneficiaries who were paroled under prior guidance to have been inspected and admitted into Temporary Protected Status, including for purposes of the "inspected and admitted" requirement for adjustment of status under INA 245(a) and the "lawful admission" requirement for INA 245(k), even if the beneficiary was present without admission or parole when initially granted TPS. USCIS recognizes this interpretation of MTINA and related guidance relating to adjustment of status effectively reverses the position it took with the adoption of *Matter of Z-R-Z-C-*.

In considering this rescission, USCIS determined that assigning the terms in section 304 of MTINA their ordinary meanings, as described in the DHS OGC memorandum, would most effectively advance the agency's policy objectives. This rescission will result in the clear and lawful administration of the immigration laws consistent with Congress's intent as expressed in the text of MTINA, thereby ensuring equitable treatment of noncitizens under the immigration laws and the application of a uniform policy throughout the United States. This policy position does not, in itself, create a direct pathway to lawful permanent resident status. However, it promotes family unity and removes barriers, thereby promoting access, to the legal immigration system by allowing certain TPS beneficiaries to satisfy the "inspected and admitted or paroled" requirement of INA 245(a) and the "lawful admission" requirement of INA 245(k) after a return from authorized travel. As the analysis in this memorandum demonstrates, USCIS believes the reading of MTINA adopted in this memorandum is both permissible and the best interpretation of the statutory text.

## **Policy**

Effective immediately, USCIS rescinds its adoption of *Matter of Z-R-Z-C-*. The guidance in this memorandum supersedes prior guidance.

## **Changes to Policy Manual**

The following section of the USCIS Policy Manual will be updated in accordance with the agency's clarified interpretation of the MTINA travel provisions, as explained in this memorandum.

Affected Section: Volume 7 > Part B > Chapter 2 > Section A, Eligibility Requirements

Affected Section: Volume 12 > Part D > Chapter 2 > Section C, Effect of Change in Law

## **Citation**

Volume 7: Adjustment of Status, Part B, 245(a) Adjustment, Chapter 2, Eligibility Requirements [[7 USCIS-PM B.2](#)].



PM-602-0188: Rescission of *Matter of Z-R-Z-C-* as an Adopted Decision; agency interpretation of authorized travel by TPS beneficiaries

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Volume 12: Citizenship and Naturalization, Part D, General Naturalization Requirements, Chapter 2, Lawful Permanent Resident Admission for Naturalization, Section C, Effect of Change in Law [[12 USCIS-PM D.2\(C\)](#)].

## **Use**

This PM 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.

## **Contact Information**

Questions or suggestions regarding this PM should be addressed through appropriate directorate channels.

## **Attachment**

DHS Office of the General Counsel, *Immigration Consequences of Authorized Travel and Return to the United States of Individuals Holding Temporary Protected Status*, issued April 6, 2022.

Office of the General Counsel  
U.S. Department of Homeland Security  
Washington, DC 20528



Homeland  
Security

April 6, 2022

**MEMORANDUM**

TO: Ur Mendoza Jaddou  
Director  
U.S. Citizenship and Immigration Services

FROM: Jonathan E. Meyer  
General Counsel  
Department of Homeland Security

JONATHAN E MEYER Digitally signed by JONATHAN E MEYER  
Date: 2022.04.06 19:57:31 -04'00'

CC: Chris Magnus  
Commissioner  
U.S. Customs and Border Protection

Tae D. Johnson  
Acting Director  
U.S. Immigration and Customs Enforcement

SUBJECT: *Immigration Consequences of Authorized Travel and Return to the United States by Individuals Holding Temporary Protected Status*

**I. PURPOSE**

U.S. Citizenship and Immigration Services (USCIS) has requested guidance<sup>1</sup> on the best interpretation of a provision of the Miscellaneous and Technical Immigration and Nationality Amendments of 1991 (MTINA). This provision calls for noncitizens with Temporary Protected Status (TPS)<sup>2</sup> who have traveled overseas with advance authorization to be “inspected and admitted” into the United States upon their return “in the same immigration status [they] had at the time of departure.”<sup>3</sup>

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<sup>1</sup> A copy of this memorandum is being shared with U.S. Immigration and Customs Enforcement (ICE) and U.S. Customs and Border Protection (CBP) because of the cross-component interests in the subject matter and the implications of any policy change on such components. In developing this memorandum, the Office of the General Counsel consulted with component counsel from USCIS, ICE, and CBP.

<sup>2</sup> See Immigration and Nationality Act (INA) § 244; 8 C.F.R. pts. 244, 1244.

<sup>3</sup> Pub. L. No. 102-232, § 304(c), 105 Stat. 1733, 1749.

For nearly thirty years, the Department of Homeland Security (DHS) and its predecessors used its advance parole authority to implement this provision. This position contravened the advice of the General Counsel of the Immigration and Naturalization Service (INS), as stated in a 1992 opinion.<sup>4</sup>

In 2020, USCIS adopted, as binding policy guidance, a decision issued by its Administrative Appeals Office (AAO), known as *Matter of Z-R-Z-C-*.<sup>5</sup> This decision held that, under MTINA, such individuals should be treated not as “paroled” within the meaning of INA 245(a) for purposes of adjustment of status, but rather as if they had never left the country. Following the Supreme Court’s decision in *Sanchez v. Mayorkas* and in connection with multiple pending lawsuits, USCIS is reconsidering the approach taken in *Matter of Z-R-Z-C-* and has sought advice from the Office of the General Counsel (OGC) on the best interpretation of the relevant statutory provision.

## II. QUESTIONS PRESENTED

- a. What is the best reading of MTINA’s requirement that TPS holders who have traveled overseas with the Government’s permission be “inspected and admitted” into the United States upon their return “in the same immigration status [they] had at the time of departure?”
- b. What effect does such authorized travel and return have on eligibility for adjustment of status under section 245 of the Immigration and Nationality Act (INA)?

## III. SUMMARY CONCLUSIONS

- a. The MTINA travel-and-return provision is best understood as providing that TPS holders with advance authorization to travel who present at a port of entry must be inspected and, so long as they are otherwise admissible under the TPS-specific standards established by MTINA and INA § 244, admitted into Temporary Protected Status. USCIS is therefore well within its authority to rescind *Matter of Z-R-Z-C-* and give the phrase “inspected and admitted” the same meaning it holds—and has long held—elsewhere in the INA. Indeed, USCIS would be assuming a stronger legal posture by doing so, and would be coming into compliance with legal advice issued by the INS General Counsel 30 years ago. The Department should not authorize such travel via advance parole procedures, nor should such TPS travelers be paroled upon their return.
- b. The phrase “inspected and admitted” in MTINA is best understood as satisfying the “inspected and admitted” eligibility requirement for adjustment of status under INA § 245(a) and (k).

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<sup>4</sup> Memorandum from Grover J. Rees III, General Counsel, INS, *Legal Opinion: Travel Authorization for Aliens Granted TPS*, Genco Op. No. 92-10, 1992 WL 1369349 (Feb. 27, 1992) (1992 Genco Op.).

<sup>5</sup> *Matter of Z-R-Z-C-*, Adopted Decision 2020-02 (AAO 2020).

## IV. BACKGROUND

### A. Statutory & Regulatory Framework

We begin with a brief discussion of the history and context of the statutes at issue, in particular the MTINA travel provision, and the related regulatory history.

#### 1. Creation of TPS in the Immigration Act of 1990

Congress created the TPS program in Title III of the Immigration Act of 1990 (IMMACT90),<sup>6</sup> placing the TPS provisions in what is now section 244 of the INA.<sup>7</sup> TPS provides temporary protection from removal as well as employment authorization to certain noncitizens present in the United States who are nationals of a country (or stateless individuals who last habitually resided there) designated for TPS by the Secretary of Homeland Security (formerly the Attorney General).<sup>8</sup> TPS designations are discretionary, but the Secretary must first find that country conditions meet detailed statutory criteria based on ongoing armed conflict, certain natural disasters, or other extraordinary and temporary conditions.<sup>9</sup>

Eligible noncitizens may be granted TPS, irrespective of their current immigration status or manner of entry, so long as they meet the statutory TPS criteria.<sup>10</sup> IMMACT90 also provided that TPS recipients “may travel abroad with the prior consent of the [Secretary],” and that “for purposes of adjustment of status under section 245 and change of status under section 248, [a TPS holder] shall be considered as being in, and maintaining, lawful status as a nonimmigrant.”<sup>11</sup>

In addition to creating a process for the Secretary to designate countries for TPS as he deems appropriate, Congress in IMMACT90 explicitly designated TPS for El Salvador for a period of roughly nineteen months.<sup>12</sup> Congress also specified that Salvadorans granted TPS under this statutory designation could be provided “advance parole” to travel abroad in cases of “emergency and extenuating circumstances beyond the control” of the noncitizen.<sup>13</sup>

Finally, section 301 of IMMACT90 created a time-limited program known as the Family Unity Program (FUP), which—similar to TPS—provided protection from removal for covered individuals. The FUP provided a temporary stay of deportation and employment authorization to qualifying noncitizens with close family ties to certain categories of legalized noncitizens.<sup>14</sup>

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<sup>6</sup> Pub. L. No. 101-649, § 302, 104 Stat. 4978.

<sup>7</sup> INA § 244. The TPS provisions originally were located in section 244A of the INA.

<sup>8</sup> INA § 244(a). TPS designations last from six to eighteen months, at which point the Secretary determines whether the conditions underlying the designation continue to be met, and either extends or terminates the designation, as appropriate. Where warranted, TPS extensions must be at least 6 months, but they can be 12 or 18 months in the Secretary’s discretion. INA § 244(b)(3). Eligible noncitizens must register for TPS in order to benefit from a designation. INA § 244(c)(1)(A)(iv).

<sup>9</sup> INA § 244(b).

<sup>10</sup> INA § 244(c)(1), (2).

<sup>11</sup> INA § 244(f)(3), (4).

<sup>12</sup> IMMACT90 § 303(a).

<sup>13</sup> *Id.* § 303(c)(4).

<sup>14</sup> See 8 C.F.R. §§ 236.10-236.18 (implementing regulations for FUP).

Shortly after the enactment of IMMACT90, INS issued regulations for implementing TPS and FUP.<sup>15</sup> Among other things, the rules specified that permission to travel would be issued under INS's advance parole processes, using Form I-131, Application for Travel Document.<sup>16</sup>

The immigration consequences of travel and return of TPS recipients received a great deal of attention in the ensuing months. During a nine-month period from May 1991 to February 1992, the INS General Counsel's Office issued no fewer than four opinions on this subject. On May 13, 1991, the Acting INS General Counsel issued an opinion advising that, consistent with the state of immigration law at the time,<sup>17</sup> a Salvadoran TPS recipient (as well as any other TPS recipient) who traveled abroad pursuant to a grant of advance parole would be subject to exclusion proceedings, not deportation proceedings, upon return to the United States and termination of the individual's TPS.<sup>18</sup> That was so regardless of whether they had previously been admitted to the United States (e.g., as a nonimmigrant) or otherwise effected an entry (e.g., entered without inspection).<sup>19</sup> The Acting General Counsel noted that, "in contrast to deportation proceedings, exclusion proceedings do not provide avenues of relief such as voluntary departure, suspension of deportation, or designation of country of choice for deportation" and that, consequently "[f]ederal courts ha[d] not approved INS' placing an alien in exclusion proceedings after advance parole, without providing the alien with sufficient notice of the loss of entitlement to deportation proceedings at the time the alien was granted advance parole by the Service."<sup>20</sup> Accordingly, the Acting General Counsel advised that "INS employees should be instructed to indicate on the [Form] I-512 [advance parole document] that the alien will be placed in exclusion proceedings and will not benefit from any relief available in deportation proceedings."<sup>21</sup> On May 22, 1991, the INS issued a cable on travel abroad by TPS

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<sup>15</sup> Temporary Protected Status, 56 Fed. Reg. 618 (Jan. 7, 1991) (interim rule); Temporary Protected Status, 56 Fed. Reg. 23,491-02 (May 22, 1991) (final rule); Applicant Processing for Family Unity Benefits, 56 Fed. Reg. 42,948 (Aug. 30, 1991) (proposed rule).

<sup>16</sup> See 56 Fed. Reg. at 622 (TPS interim rule) ("Permission to travel may be granted by the district director. Such permission to travel shall be requested pursuant to the Service's advance parole provisions contained in [8 C.F.R.] § 212.5(e) . . . There is no appeal from a denial of advance parole."); 56 Fed. Reg. at 23,498 (TPS final rule) (adding "pursuant to the Service's advance parole provisions" after interim rule's provision that "[p]ermission to travel may be granted by the district director" and deleting the provision citing 8 C.F.R. § 212.5(e)); 56 Fed. Reg. at 42951 (FUP NPRM) ("An alien whose application for family unity is granted who desires to travel outside the United States and return must make application for advance parole to the district director having jurisdiction over the applicant's residence. Form I-512 (Authorization for Parole of an Alien into the United States) will be issued to an alien whose application is granted. The authority to grant an application for advance parole for an alien granted family unity benefits rests solely with the district director. An alien who is granted advance parole will be subject to exclusion proceedings upon termination of the parole status.").

<sup>17</sup> Congress amended the INA significantly in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546. See *infra* pp. 7-8 & notes 39, 41.

<sup>18</sup> Memorandum from Paul W. Virtue, Acting General Counsel, INS, *Proceedings Applicable to Salvadoran TPS Aliens After Advance Parole*, Genco Op. No. 91-44, 1991 WL 1185155, at \*1 (May 13, 1991); see also *Matter of G-A-C-*, 22 I&N Dec. 83, 89 (BIA 1998) (holding that, under pre-IIRIRA law, a noncitizen granted advance parole and paroled into the United States upon return from travel abroad was properly placed in exclusion proceedings when parole revoked); *Matter of Torres*, 19 I&N Dec. 371, 373-76 (BIA 1986) (same).

<sup>19</sup> See *id.* The same would be true of FUP beneficiaries.

<sup>20</sup> *Id.* at \*2 (citing *Joshi v. Dist. Dir., INS*, 720 F.2d 799 (4th Cir. 1983) and *Patel v. Landon*, 739 F.2d 1455 (9th Cir. 1984)).

<sup>21</sup> *Id.*

recipients instructing that the remarks block on the Form I-512 should include such a travel warning.<sup>22</sup>

In a subsequent June 17, 1991 memorandum, the Acting INS General Counsel advised that the INS could grant advance parole to a TPS recipient who was subject to pending deportation proceedings.<sup>23</sup> The opinion further explained, however, that the INS should move to dismiss the deportation proceedings “in those cases in which an alien who is in deportation proceedings travels abroad under advance parole after having been granted TPS.”<sup>24</sup> “As noted,” the opinion continued, “these aliens will be subject to exclusion, rather than deportation, proceedings following their return under the advance parole.”<sup>25</sup>

## 2. Enactment of MTINA

On December 12, 1991, one year after the enactment of IMMACT90, Congress passed follow-up legislation known as the Miscellaneous and Technical Immigration and Nationality Amendments of 1991 (MTINA).<sup>26</sup> Section 304 of MTINA provides that TPS recipients who travel overseas temporarily with advance authorization, as well as traveling noncitizens benefiting from the FUP, “shall be inspected and admitted in the same immigration status the alien had at the time of departure”<sup>27</sup> if they were not excludable under certain exclusion grounds—now inadmissibility grounds—that render noncitizens ineligible for TPS or FUP without waiver.<sup>28</sup>

By requiring in MTINA that TPS recipients returning to the United States after authorized travel be “inspected and admitted,” Congress deviated from its approach one year earlier when it specified that Salvadoran TPS recipients be permitted to travel on advance parole.<sup>29</sup> At the time MTINA was enacted, the phrase “shall be inspected and admitted” was well understood in immigration law.<sup>30</sup> The phrase mirrors the terminology of former section 235(a) of the INA, which designated INS immigration officers as responsible for conducting the “inspection” of noncitizens “seeking admission or readmission,” and granted them various

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<sup>22</sup> *INS Instructs on Travel Abroad by TPS Aliens*, 68 No. 22 Interpreter Releases 712 (June 17, 1991) (“The remarks block [on the Form I-512] should also state ‘[U]pon return to the United States, if otherwise eligible, you will be paroled into the United States. You will not be considered to have made an entry and may be subject to exclusion proceedings. Therefore you may not be entitled to the discretionary relief available to aliens in deportation proceedings.’”).

<sup>23</sup> Memorandum from Paul W. Virtue, Acting General Counsel, INS, *Your June 3, 1991, Memorandum: Advance[ ] Parole for TPS Eligible Aliens in Deportation Proceedings*, Genco Op. No. 91-49, 1991 WL 1185160, at \*1 (June 17, 1991).

<sup>24</sup> *Id.* at \*2.

<sup>25</sup> *Id.*

<sup>26</sup> Pub. L. No. 102-232, 105 Stat. 1733.

<sup>27</sup> MTINA § 304(c)(1)(A).

<sup>28</sup> MTINA § 304(c)(1)(A)(i)-(ii). With respect to TPS recipients, the applicable inadmissibility grounds are now described in INA § 244(c)(2)(A)(iii) (formerly INA § 244A(c)(2)(A)(iii) (1990)). Those provisions are as follows: (1) INA § 212(a)(2)(A)(i), (2)(B), and (2)(C) (relating to certain criminal offenses); (2) INA § 212(a)(3)(A), (3)(B), and (3)(C) (relating to certain security, terrorism, and related grounds); and (3) INA § 212(a)(3)(E) (relating to Nazi persecution, genocide, torture, and extrajudicial killings). *See* INA § 244(c)(2)(A)(iii).

<sup>29</sup> *Compare* MTINA § 304(c)(1)(A) *with* IMMACT90 § 303(c)(4).

<sup>30</sup> We were unable to locate any legislative history that specifically concerned the travel provision in MTINA § 304.

authorities for doing so. Likewise, implementing regulations at 8 C.F.R. part 235, titled “Inspection of Persons Applying for Admission” used the same terminology.<sup>31</sup>

Congress’s use of the phrase “inspected and admitted” also aligns with the longstanding threshold eligibility requirement for adjustment of status to that of a lawful permanent resident (LPR) under section 245(a) of the INA that the noncitizen have been “inspected and admitted or paroled into the United States.”<sup>32</sup> Since 1952, the INA has supplied a mechanism for certain noncitizens who were admitted to the United States to adjust their immigration status to that of an LPR without having to travel overseas for consular processing.<sup>33</sup> In particular, the phrase “inspected and admitted or paroled” has been present in INA § 245(a) since 1960.<sup>34</sup>

The MTINA travel provision appears to have been aimed at remedying the adverse consequences of the use of advance parole and parole for TPS and FUP recipients granted authorization to travel. Those adverse consequences were of obvious significance to the INS and stakeholders at the time, as reflected in the questions posed in 1991 to the INS General Counsel and the opinions he issued.<sup>35</sup> As the Board of Immigration Appeals (BIA or Board) later observed in a different context, advance parole “is tied to section 212(d)(5)(A) parole authority because neither the Attorney General, nor the [INS] district director as her delegatee, has authority under law to *admit* an alien into this country unless the law authorizes such admission.”<sup>36</sup> The Board further explained that, in contrast to the circumstances at issue in that case, Congress in the MTINA travel provision expressly provided such authority to admit an

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<sup>31</sup> INA § 235(a) (1990); 8 C.F.R. pt. 235 (1990).

<sup>32</sup> INA § 245(a). Section 245(a) provides, “The status of an alien who was inspected and admitted or paroled into the United States or the status of any other alien having an approved petition for classification as a VAWA self-petitioner 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.” In addition, subject to certain exceptions, a noncitizen is ineligible for adjustment of status if the individual “is in unlawful immigration status on the date of filing the application for adjustment of status or who has failed (other than through no fault of his own or for technical reasons) to maintain continuously a lawful status since entry into the United States” or has engaged in “unauthorized employment” since entry into the United States. INA § 245(c)(2).

<sup>33</sup> Pub. L. No. 82-414, § 245, 66 Stat. 163, 217.

<sup>34</sup> See Pub. L. No. 86-648, § 10, 74 Stat. 504, 505 (1960). Adjustment eligibility originally was limited to noncitizens who had been “lawfully admitted to the United States as a bona fide nonimmigrant.” Pub. L. No. 82-414, § 245(a); see also *Immigrant Status–Adjustment Under Immigration and Nationality Act*, 41 U.S. Op. Atty. Gen. 433, 440 (Nov. 20, 1959) (describing 1958 amendments to INA § 245(a)).

<sup>35</sup> See also *Matter of Singh*, 21 I&N Dec. 427, 440 (BIA 1996) (Rosenberg, Bd. Member, dissenting) (observing that the MTINA travel provision was enacted “[i]n response to expressions of concern that family unity and TPS status recipients who obtained advance parole as then construed by the [INS] could forfeit their right to apply for other forms of relief such as suspension of deportation”); *Applicant Processing for Family Unity Benefits*, 57 Fed. Reg. 6457-01, 6460 (Feb. 25, 1992) (noting “several” comments received on NPRM between August 30, 1991 and September 30, 1991, just prior to MTINA’s enactment, “express[ing] concern over such possible consequences of advance parole as exclusion and loss of the possibility of future suspension of deportation, and urg[ing] the [INS] to change its position on this matter,” and further noting that MTINA addressed the advance parole policy that was of such significant concern to commenters).

<sup>36</sup> *Matter of G-A-C-*, 22 I&N Dec. at 88.

otherwise inadmissible noncitizen, further distinguishing the travel-and-return authority under MTINA from the Department's parole authorities.<sup>37</sup>

When IMMACT90 and MTINA were enacted, an “admission” was understood to “occur . . . when an authorized employee of the Service communicates in a tangible manner to an applicant for admission his determination that the applicant has established that he is not inadmissible under the immigration laws.”<sup>38</sup> However, prior to enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA),<sup>39</sup> the separate concept of “entry”—which could be accomplished with inspection and admission *or* surreptitiously—provided the legal threshold for distinguishing which noncitizens were subject to exclusion versus deportation proceedings.<sup>40</sup> Thus, a noncitizen could effectuate an entry without inspection and admission, and thereby be subject to deportation proceedings, benefitting from the attendant rights and relief options not enjoyed in exclusion proceedings.<sup>41</sup> For example, in deportation proceedings, the noncitizen could have applied for voluntary departure or suspension of deportation, which were forms of discretionary relief that were unavailable in exclusion proceedings. In deportation proceedings, the INS had the burden of demonstrating deportability by clear, unequivocal, and convincing evidence, and the noncitizen could be released on bond or recognizance and could challenge a deportation order directly to a court of appeals; in exclusion proceedings, the noncitizen had the burden of demonstrating that he or she was not excludable,

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<sup>37</sup> *Id.* at 88 n.4.

<sup>38</sup> *Matter of Patel*, 20 I&N Dec. 368, 372 (BIA 1991) (quoting *Matter of V-Q-*, 9 I&N Dec. 78 (BIA 1960)); *see also Matter of Areguillin*, 17 I&N Dec. 308, 310 n.6 (BIA 1980) (internal citation omitted) (“‘Admission’ occurs when the inspecting officer communicates to the applicant that he has determined that the applicant is not inadmissible. That communication has taken place when the inspector permits the applicant to pass through the port of entry.”).

<sup>39</sup> In IIRIRA, Congress eliminated separate exclusion and deportation proceedings, establishing a single removal proceeding under section 240 of the INA. Pub. L. No. 104-208, Div. C., §§ 301-309, 110 Stat. 3009-575-627. The INA now distinguishes applicants for admission, who are subject to the grounds of inadmissibility described in section 212(a), and admitted noncitizens, who are subject to the grounds of deportability in section 237(a). In general, applicants for admission, like former “excludable” noncitizens, face certain disadvantages in relation to admitted noncitizens, such as having to bear the burden of demonstrating they are “clearly and beyond doubt entitled to be admitted,” INA § 240(c)(2)(A), and being subject to more expansive grounds for removability. *See E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 756 (9th Cir. 2018) (“IIRIRA established ‘admission’ as the key concept in immigration law and defines the term as ‘the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.’ (quoting INA § 101(a)(13)(A) and citing *Vartelas v. Holder*, 566 U.S. 257, 262 (2012)).”

<sup>40</sup> *See, e.g., Matter of Pierre*, 14 I&N Dec. 467, 468 (BIA 1973) (internal citations omitted) (“An ‘entry’ involves (1) a crossing into the territorial limits of the United States, i.e. physical presence; plus (2) inspection and admission by an immigration officer; or (3) actual and intentional evasion of inspection at the nearest inspection point; coupled with (4) freedom from restraint.”).

<sup>41</sup> *See, e.g., id.* at 470-71 (noncitizens who did not “enter” the United States were properly placed in exclusion proceedings and therefore ineligible to pursue claims of persecution under former section 243(h) of the INA); *Matter of Ching & Chen*, 19 I&N Dec. 203, 204-06 (BIA 1984) (noncitizens who were refused admission and subsequently escaped from carrier custody while awaiting removal “entered” the United States and were subject only to deportation proceedings); *see also Landon v. Plasencia*, 459 U.S. 21, 25-27 (1982) (distinguishing exclusion proceedings from deportation proceedings); *Navarro-Aispura v. INS*, 53 F.3d 233, 235 (9th Cir. 1995) (“There is . . . no question that deportation proceedings afford greater procedural and substantive rights to an alien than do exclusion proceedings.”); *Matter of Rosas-Ramirez*, 22 I&N Dec. 616, 620 (BIA 1999) (explaining that prior to the enactment of IIRIRA in 1996, persons without an “entry” into the United States were charged as excludable, while those who had made an “entry” were deportable); INA § 212(a) (1988) (former grounds for exclusion); *id.* § 241(a) (1988) (former grounds for deportation).



could only be released through discretionary parole, and could challenge an exclusion order only through *habeas corpus* proceedings in district court.<sup>42</sup>

As section 212(d)(5)(A) of the INA continues to provide today, the parole of a noncitizen into the United States is not, and has never been, considered an admission or, in pre-IIRIRA parlance, an “entry.”<sup>43</sup> Instead, “through a legal fiction,” noncitizens granted parole are considered to “remain[ ] for immigration purposes at the border.”<sup>44</sup> Prior to IIRIRA, this meant they were subject to exclusion proceedings; under IIRIRA, noncitizen applicants for admission granted parole continue to be applicants for admission subject to the grounds of inadmissibility.<sup>45</sup> Accordingly, if a noncitizen who had effected an entry into the United States—and thus could only be deported through deportation proceedings—later traveled with advance parole, the noncitizen would be paroled into the United States upon return. As a consequence, as the INS Office of the General Counsel advised in 1991, were the INS subsequently to pursue deportation of that individual, the individual would be amenable to exclusion proceedings, rather than deportation proceedings, having forfeited significant substantive and procedural rights by virtue of the authorized travel.<sup>46</sup>

## **B. Agency Actions in Response to the MTINA Travel Provision**

Notwithstanding the MTINA travel provision, the TPS travel regulation (now located at 8 C.F.R. § 244.15)<sup>47</sup> continued—and still continues—to require that individuals request travel authorization through advance parole procedures, which results in them being paroled back into the United States at the time of return. That is so despite a legal opinion from the INS General Counsel advising against the use of advance parole for TPS travel authorization after MTINA, discussed *infra*.

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<sup>42</sup> *Plasencia*, 459 U.S. at 25-27; *Ramirez-Durazo v. INS*, 794 F.2d 491, 496-97 & n.2 (9th Cir. 1986).

<sup>43</sup> See INA § 212(d)(5)(A) (providing that “parole of [an] alien shall not be regarded as an admission of the alien”) (1988); *Leng May Ma v. Barber*, 357 U.S. 185, 187-89 (1958); *Geach v. Chertoff*, 444 F.3d 940, 943-45 (8th Cir. 2006); see also *Mojica v. Reno*, 970 F. Supp. 130, 141 (E.D.N.Y. 1997) (“Parole is a mechanism permitting the INS to allow an alien to remain free within the borders of the United States without ‘admitting’ the alien into this country. It is based on a fiction whereby, although free to move about within the United States, the alien remains ‘at the threshold of admission.’ See 8 C.F.R. § 235.3(c).”), *appeal dismissed sub nom.*, *Yesil v. Reno*, 175 F.3d 287 (2d Cir. 1999); see also INA § 101(a)(13)(B) (2020) (“An alien who is paroled under section 212(d)(5) . . . shall not be considered to have been admitted.”).

<sup>44</sup> *Singh v. Gonzales*, 499 F.3d 969, 976 n.9 (9th Cir. 2007) (quoting *Henderson v. INS*, 157 F.3d 106, 111 n.5 (2d Cir. 1998)).

<sup>45</sup> See, e.g., *Leng May Ma*, 357 U.S. at 186; *Geach*, 444 F.3d at 943-45; *Patel v. McElroy*, 143 F.3d 56, 59 (2d Cir. 1998); *Matter of Torres*, 19 I&N Dec. at 373-76; see also 8 C.F.R. §§ 1.2, 1001.1(q) (current regulations defining “arriving alien” as including parolees).

<sup>46</sup> See, e.g., *G-A-C-*, 22 I&N Dec. at 86-92; *Matter of Torres*, 19 I&N Dec. at 373-76; see also 8 C.F.R. § 245.2(a)(3) (1986) (providing that if an applicant for adjustment of status travels and returns via advance parole and parole, and her application “is subsequently denied, the applicant will be subject to the exclusion provisions of . . . of the Act” and that “[n]o alien granted advance parole and inspected upon return shall be entitled to a deportation hearing”).

<sup>47</sup> The provision originally was located at 8 C.F.R. § 240.15 (1990).

### *FUP Rulemaking*

Following the passage of MTINA, however, the INS did engage in further FUP rulemaking on the issue of travel authorization.<sup>48</sup> The FUP travel regulation is located at 8 C.F.R. § 236.16. Like the TPS travel regulation, the INS proposed a rule prior to the enactment of MTINA that would have required FUP beneficiaries seeking to travel to request advance parole and generally be paroled upon return.<sup>49</sup> In the FUP interim rule issued after MTINA's enactment, however, the INS responded to commenters who had expressed concern "over such possible consequences of advance parole as exclusion and loss of the possibility of future suspension of deportation":

Section 304 of [MTINA] modifies this policy. Pursuant to this provision, an alien in the program who leaves the United States with advance authorization, and who is not excludable on a ground referred to in section 301(a)(1) of the Immigration Act of 1990 when he or she returns, shall be inspected and admitted in the same immigration condition the alien had at the time of departure. Thus the alien will continue to be ineligible to adjust status under section 245 of the Immigration and Nationality Act, since voluntary departure is not a "status" under the Act. The alien will obtain authorization using the advance parole mechanism, form I-131, Application for Travel Document. Upon his or her return to the U.S., however, the alien will not be paroled, but instead will be reinstated to voluntary departure under the Family Unity Program.<sup>50</sup>

Accordingly, the interim rule removed the proposed rule's references to advance parole:

An alien granted family unity benefits who intends to travel outside the United States and then return must apply for advance authorization using Form I-131, Application for Travel Document. The authority to grant an application for advance authorization for an alien granted family unity benefits rests solely with the district director. An alien who is granted advance authorization and returns to the United States in accordance with such authorization, and who is found not to be excludable on a ground of exclusion referred to in section 301(a)(1) of the Immigration Act of 1990, shall be inspected and admitted in the same immigration condition the alien had at the time of departure for the remainder of the two-year period granted under the Family Unity Program.<sup>51</sup>

The INS revisited this issue again in issuing the final rule in 1995.<sup>52</sup> Specifically, in the final rule, the INS replaced the interim rule's use of the word "condition" with "status":

To avoid an appearance that the Service is not following the statute, the word "status" will be used in the final rule. If the person was in status at the time of departure, the alien will be placed in status upon return to the United States. Conversely, if the person was out of status upon departure, the alien will be out of

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<sup>48</sup> Applicant Processing for Family Unity Benefits, 57 Fed. Reg. 6457 (Feb. 25, 1992) (interim rule).

<sup>49</sup> 56 Fed. Reg. at 42,951; *see supra* note 15.

<sup>50</sup> 57 Fed. Reg. at 6460.

<sup>51</sup> *Id.* at 6461.

<sup>52</sup> Applicant Processing for Family Unity Benefits, 60 Fed. Reg. 66,062 (Dec. 21, 1995) (final rule).

status upon his or her return. Thus, existing sections of the Act, such as section 245, are unaffected by section 301 of IMMACT 90. If an alien was ineligible to adjust status upon departure, the alien will be ineligible to adjust status upon return.<sup>53</sup>

The remaining substance of the FUP travel regulation was functionally unchanged, and notwithstanding this regulatory change, FUP beneficiaries continued to be paroled back into the United States following their authorized travel rather than inspected and admitted.<sup>54</sup>

#### *1992 INS General Counsel Opinion Advises Against Use of Parole*

In 1992, the INS General Counsel issued a brief opinion on the proper mechanism for implementing MTINA's travel provisions, concluding that because Congress chose not to use the term "parole," and instructed that TPS recipients traveling with the permission of the INS "shall be inspected and admitted in the same immigration status the alien had at the time of departure," it did not intend that the INS should implement this provision through the advance parole mechanism.<sup>55</sup> Instead, the General Counsel advised, the noncitizen "must be given the same status and the same incidents of status as those possessed before departure" and noted that such authorized travel would not interrupt accumulation of continuous physical presence for purposes of the suspension of deportation statute in place at the time, as advance parole would have.<sup>56</sup> The INS General Counsel concluded that individuals with TPS or FUP benefits who have traveled under the auspices of MTINA should not be considered parolees, that unlike individuals who have traveled on advance parole they have not abandoned any rights to deportation proceedings, and that the INS should revise Form I-131, Application for Travel Document, to make clear that travel pursuant to MTINA is separate from the existing advance parole process.<sup>57</sup> However, the 1992 General Counsel opinion did not expressly address what "status" travelers should be inspected and admitted into if they originally entered without inspection and had no lawful status beyond the grant of TPS, or whether TPS itself can be considered a status. In fact, the opinion was ambiguous with respect to its understanding of the phrase "shall be . . . admitted in the same immigration status," though noting that for TPS and FUP travelers who were already in parole status prior to their departure, it meant that they should be *paroled* upon their return.<sup>58</sup>

#### *The INS's Nonadherence to Its General Counsel's Opinion*

The INS, however, did not adhere to its General Counsel's advice that the mechanism for authorizing the travel and return of TPS travelers should no longer be the advance parole process. For 30 years, the text of the relevant regulation (8 C.F.R. § 244.15) has not been changed to remove the requirement that such travel be facilitated through the use of advance parole, and individuals with TPS who wish to travel outside of the United States have done so by

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<sup>53</sup> *Id.* at 66,066.

<sup>54</sup> See Form I-817, Instructions for Application for Family Unity Benefits, at 1 ("If you are granted Family Unity benefits under either IMMACT 90 or the LIFE Act and you intend to travel outside the United States temporarily, you must apply for advance parole authorization by completing Form I-131, Application for Travel Document. Advance parole allows you to request parole into the United States when you return.").

<sup>55</sup> 1992 Genco Op.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*; see also *Matter of Singh*, 21 I&N Dec. at 440-41.

<sup>58</sup> 1992 Genco Op. at 1.

applying for advance parole via Form I-131. They have been provided a parole document indicating that they had been granted advance parole, and then upon arrival at a port of entry were considered for parole and provided a stamp in their passport or travel document indicating that they had been paroled into the United States. For much of this period, in many INS and USCIS offices, such individuals were also considered to have been paroled for purposes of eligibility for adjustment of status under INA § 245(a), and as a result TPS recipients who had initially entered the United States without inspection could meet one eligibility requirement for adjustment of status by applying for permission to travel abroad and being paroled upon their return.

### C. USCIS's 2020 Adoption of *Matter of Z-R-Z-C* (USCIS AAO 2020)

After almost 30 years without changes in the law or its interpretation, on August 20, 2020, the AAO issued *Matter of Z-R-Z-C*, a non-precedential decision that USCIS immediately “adopted” as a nationwide policy in its Policy Manual.<sup>59</sup> These actions significantly changed the agency’s position on the effect of authorized travel and return by TPS recipients.<sup>60</sup> The AAO held that despite DHS’s and INS’s inconsistent history of treating such travelers as parolees for purposes of eligibility for adjustment of status when they return to the United States, that treatment was contrary to the language of MTINA and such individuals should *not* be considered to have been paroled.<sup>61</sup> In seeming contradiction of the language of MTINA, the AAO also opined that being “inspected and admitted” into the United States after such travel does not constitute being inspected and admitted for purposes of adjustment of status under INA § 245(a).<sup>62</sup>

In reaching its conclusion with respect to parole, the AAO relied heavily on MTINA’s instruction that FUP and TPS beneficiaries be admitted in the “same immigration status the alien had at the time of departure.” Reading the phrase “same immigration status” to refer broadly to all attendant circumstances of the noncitizen’s relationship to the immigration laws, the AAO found that the “MTINA travel authorization is a unique form of travel authorization and operates as a legal fiction that restores the alien to the *status quo ante* as if the alien had never left the

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<sup>59</sup> The agency had no written operational guidance on the issue until 2016 when, without analyzing the impact of MTINA, it added a Policy Manual entry relying specifically on other applications of factual parole on applications of adjustment. USCIS Policy Manual Vol. 7: Adjustment of Status, Part B, 245(a) Adjustment, Chapter 2, Eligibility Requirements, Section A.5, Temporary Protected Status [7 USCIS-PM B.3(A.5)] (“For purposes of adjustment eligibility, it does not matter whether the TPS beneficiary was admitted or paroled. In either situation, once the alien is inspected at a port of entry and permitted to enter to the United States, the alien meets the inspected and admitted or inspected and paroled requirement.”). In 2020, the AAO described the 2016 Policy Manual entry as a misapplication of MTINA, and the agency adopted *Matter of Z-R-Z-C*’s reasoning and changed the Policy Manual.

<sup>60</sup> See *supra* note 5. USCIS AAO decisions may only be formally published as precedents if they are approved by the DHS General Counsel and referred by him or her, as the Secretary’s designee, to the Attorney General for review for lawfulness and publication in the Immigration and Nationality Decision (I.&N. Dec.) volumes. See 8 C.F.R. §§ 103.3(c), 1003.1(g)(2), (i). That process was not followed for *Matter of Z-R-Z-C*, whose holding was instead incorporated into USCIS policy guidance via a memorandum from the USCIS Director. Thus, if the choice is made to rescind *Matter of Z-R-Z-C*, USCIS could do so by rescinding the policy guidance and replacing it through the same process, or the Department could follow the process for making a new, precedential decision. Other options may be available as well.

<sup>61</sup> *Matter of Z-R-Z-C* at 8-9.

<sup>62</sup> *Id.* at 6.

United States.”<sup>63</sup> As a result, the AAO concluded that MTINA does not allow a TPS recipient who returns from travel abroad based on an approved advance parole application to be treated as “paroled” for purposes of eligibility for adjustment of status.

Next, the AAO considered MTINA’s instruction that TPS beneficiaries who travel with advance permission be “inspected and admitted” upon their return, so long as they are not subject to specified grounds of exclusion.<sup>64</sup> Noting that a grant of TPS itself is not an “admission” to the United States,<sup>65</sup> and that MTINA-based travel was intended to place TPS recipients in the same position they had prior to their departure, the AAO concluded that MTINA’s use of “the phrase ‘inspected and admitted’ . . . cannot be interpreted to put TPS recipients in a better position than they had been upon their physical departure from the United States . . . .”<sup>66</sup> Therefore, the AAO held that just as the “parole” granted to TPS recipients could not be treated as a parole for purposes of adjustment of status, neither could the “inspection and admission” contemplated by MTINA constitute an “inspection and admission” for purposes of adjustment of status.<sup>67</sup>

*Matter of Z-R-Z-C-* itself—and USCIS’s decision to adopt the AAO’s holding as policy—constituted a new agency position that closed off an avenue that generally had existed for decades for certain TPS recipients to potentially adjust status. Recognizing that TPS recipients who already had traveled and returned on advance parole had reasonably relied on the agency’s longstanding prior practice, USCIS determined that the adopted decision would not be applied retroactively.<sup>68</sup>

#### **D. The Supreme Court’s 2021 Decision in *Sanchez v. Mayorkas***

At the time the AAO decided *Matter of Z-R-Z-C-*, the issue of whether a grant of TPS constitutes an “admission” for purposes of adjustment-of-status eligibility was the subject of litigation nationwide. The question centered on the unique TPS provision at section 244(f)(4) stating that during a period in which a noncitizen is granted TPS, the noncitizen, for purposes of adjustment or change of status under sections 245 and 248 of the INA, respectively, “shall be considered as being in, and maintaining, lawful status as a nonimmigrant.” The AAO took the position that section 244(f)(4) should not be construed as meaning that a grant of TPS constitutes an admission,<sup>69</sup> a position the Board later adopted.<sup>70</sup> Three courts of appeals agreed.<sup>71</sup> However, several federal appeals courts interpreted section 244(f)(4) as meaning that a grant of TPS not only deems TPS recipients to be *in* a lawful nonimmigrant status for purposes of

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<sup>63</sup> *Id.* at 6.

<sup>64</sup> *Id.* at 6.

<sup>65</sup> See *Matter of H-G-G-*, 27 I&N Dec. 617, 641 (AAO 2019); see also discussion of *Sanchez v. Mayorkas* *infra*.

<sup>66</sup> *Matter of Z-R-Z-C-* at 6.

<sup>67</sup> *Id.* at 6.

<sup>68</sup> *Id.* at 9.

<sup>69</sup> *Matter of H-G-G-*, 27 I&N Dec. at 641.

<sup>70</sup> *Matter of Padilla Rodriguez*, 28 I&N Dec. 164 (BIA 2020)

<sup>71</sup> *Sanchez v. Sec’y, U.S. Dep’t of Homeland Sec.*, 967 F.3d 242 (3d Cir. 2020); *Solorzano v. Mayorkas*, 987 F.3d 392 (5th Cir. 2021); *Serrano v. U.S. Att’y Gen.*, 655 F.3d 1260, 1265 (11th Cir. 2011) (per curiam).

adjustment and change of status eligibility but also to have been *admitted* into a lawful nonimmigrant status for such purposes.<sup>72</sup>

On June 7, 2021, the Supreme Court resolved the circuit split, holding that a grant of TPS is not an admission.<sup>73</sup> The Court noted that “[l]awful status and admission . . . are distinct concepts in immigration law: Establishing one does not necessarily establish the other.”<sup>74</sup> The Court additionally explained that a noncitizen can be admitted but not in lawful status (e.g., a noncitizen who overstays their authorized period of admission in nonimmigrant status (“visa overstay”)) or in lawful status but not admitted (e.g., an asylee).<sup>75</sup> The Court analogized a grant of TPS to the latter situation:

The TPS statute permits [a TPS recipient] to remain in the country; and it deems him in nonimmigrant status for purposes of applying to become an LPR. But the statute does not constructively “admit” a TPS recipient—that is, “consider[.]” him as having entered the country “after inspection and authorization.” § 1254a(f)(4); § 1101(a)(13)(A). And because a grant of TPS does not come with a ticket of admission, it does not eliminate the disqualifying effect of an unlawful entry.<sup>76</sup>

The Court rejected the petitioner’s call to “view the TPS provision’s conferral of nonimmigrant status as also a conferral of admission.”<sup>77</sup> In doing so, the Court pointed to two situations where nonimmigrant status does not presuppose an admission: crewmen, and U visa recipients.<sup>78</sup> Thus, “when Congress does not speak in that manner—when it confers status, but says nothing about admission, for purposes of [INA § 245]—we have no basis for ruling an unlawful entrant eligible to become an LPR.”<sup>79</sup> The Court, however, expressly did not reach the separate issue of whether a TPS recipient “paroled” into the country following authorized travel abroad should be treated as having been “paroled” for purposes of adjustment under INA § 245(a).<sup>80</sup>

### **E. Pending Litigation**

While not directly relevant to the analysis in this memorandum, there are a number of cases pending against USCIS and the Department that relate to one or more aspects of the effect of travel and return on TPS recipients and their applications for adjustment of status. While the Department considers its legal options and policy preferences going forward, USCIS has put a hold on adjudicating adjustment of status applications where the sole basis for denying such an application would be the Policy Manual guidance adopting the holding of *Matter of Z-R-Z-C-*. A

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<sup>72</sup> *Flores v. USCIS*, 718 F.3d 548, 554 (6th Cir. 2013); *Velasquez v. Barr*, 979 F.3d 572, 581 (8th Cir. 2020), *vacated and remanded*, 142 S. Ct. 420 (2021); *Ramirez v. Brown*, 852 F.3d 954, 964 (9th Cir. 2017); *see Matter of Padilla Rodriguez*, 28 I&N Dec. at 167-68 (discussing circuit split); *see also Sanchez*, 141 S. Ct. at 1812 n.3 (same).

<sup>73</sup> *Sanchez*, 141 S. Ct. at 1812.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 1813-14.

<sup>77</sup> *Id.* at 1814.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 1815.

<sup>80</sup> *Id.* at 1813 n.4 (“The Government notes that Sanchez was treated as ‘paroled’ when he returned from an authorized trip abroad after obtaining TPS . . . . We express no view on whether a parole of the kind Sanchez received enables a TPS recipient to become an LPR absent any other bar in [INA § 245].”).

putative class action lawsuit with three plaintiffs, *Gomez v. Jaddou*, directly challenging the agency's Policy Manual adoption of the holding in *Matter of Z-R-Z-C-* was recently filed in the U.S. District Court for the Southern District of New York.<sup>81</sup> In addition, there are a handful of ongoing district court cases by individual litigants in which the Government has sought extensions, one of which remains stayed and two of which were dismissed without prejudice to their renewal while the AAO considers the cases.<sup>82</sup> There is also pending litigation concerning whether TPS holders who entered without inspection and have final orders of removal have executed those final removal orders when traveling with an advance parole document evidencing authorization to travel under INA § 244(f)(3), which affects whether the Department of Justice Executive Office for Immigration Review (EOIR) or USCIS has jurisdiction over their applications for adjustment of status.<sup>83</sup>

## DISCUSSION

In our view, MTINA's statutory text and the relevant provisions in the INA are best understood as requiring that TPS recipients returning from authorized travel, and not subject to certain statutory inadmissibility grounds,<sup>84</sup> should be inspected and admitted into temporary protected status, the "same immigration status [they] had at the time of departure."<sup>85</sup> Though contrary to the practice of the Department and its predecessors since MTINA's enactment, this construction hews far more closely to the statutory text and the apparent intention of Congress than any possible alternative constructions, including that such individuals be paroled or somehow "restored" to the *status quo ante*.<sup>86</sup> It also concurs with the 1992 INS General Counsel opinion on this subject.

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<sup>81</sup> Compl., No. 21-cv-9203 (S.D.N.Y. filed Nov. 8, 2021).

<sup>82</sup> See *Quintanilla v. Wolf*, No. 20 C 4944 (N.D. Ill. Sept. 20, 2021) (dismissing case without prejudice while AAO considers administrative appeal); *Amaya v. Cioppa*, No. 20-CV-4616 (E.D.N.Y. filed Sept. 29, 2020) (dismissing case without prejudice while AAO considers administrative appeal); *Bhujel v. Nielsen*, No. 1:18-cv-12644-LTS (D. Mass. filed Dec. 27, 2018) (currently stayed with joint status reports due every 60 days pending the government's evaluation of the policy position discussed here).

<sup>83</sup> See, e.g., *Cent. Am. Res. Ctr. v. Cuccinelli*, No. 20-cv-02363-RBW (D.D.C. filed Aug. 26, 2020) (challenging Dec. 20, 2019 Policy Alert issued by USCIS instructing adjudicators that TPS travelers do not execute prior removal orders when re-entering the U.S. after travel abroad, and therefore USCIS does not have jurisdiction over their adjustment of status applications). In general, "arriving aliens," as defined in 8 C.F.R. §§ 1.2 and 1001.1(q), must apply for adjustment of status before USCIS, regardless of whether they are in removal proceedings before EOIR. See 8 C.F.R. §§ 245.2(a)(1), 1245.2(a); 71 Fed. Reg. 27,585 (2006). With the exception of "arriving aliens," noncitizens who are in removal proceedings must apply for adjustment before EOIR, whereas noncitizens who are not in removal proceedings file their adjustment applications with USCIS. See *id.*; see also *Brito v. Mukasey*, 521 F.3d 160, 164-66 (2d Cir. 2008) (describing regulatory history).

<sup>84</sup> As noted above, MTINA was enacted prior to IIRIRA and therefore refers to grounds of exclusion rather than grounds of inadmissibility. However, rather than list the specific grounds of exclusion that Congress intended legacy INS to apply to TPS travelers, it instead cited INA § 244A. See Pub. L. No. 102-232, § 304(c)(1)(A)(ii), 105 Stat. 1733, 1749. Section 308(g)(1) of IIRIRA provides that all statutory references to 244A are deemed to refer to 244, which in turn was updated to reference specific grounds of inadmissibility at INA § 212(a). See 8 U.S.C. § 1254a note, INA § 244(c)(2)(A)(iii); see also 8 C.F.R. § 244.3(c) (specifying non-waivable grounds of inadmissibility for purposes of TPS eligibility). Thus, in light of IIRIRA's general change of terminology, the Department would apply the relevant inadmissibility grounds to TPS travelers seeking admission under MTINA.

<sup>85</sup> Pub. L. No. 102-232, § 304(c)(1)(A), 105 Stat. 1733, 1749.

<sup>86</sup> Although the focus of this memorandum is on TPS recipients, our conclusions apply equally to the application of the MTINA travel provision to FUP recipients.

### A. The Language of MTINA Explicitly Requires Inspection and Admission

The “first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.”<sup>87</sup> “The plainness or ambiguity of statutory language is determined [not only] by reference to the language itself, [but also by] the specific context in which that language is used, and the broader context of the statute as a whole.”<sup>88</sup> Accordingly, “we must . . . interpret the relevant words in a statute not in a vacuum, but with reference to the statutory . . . history and purpose.”<sup>89</sup> If the “statute is silent or ambiguous with respect to the specific issue,” the agency is delegated the authority to provide its own interpretation so long as it is “based on a permissible construction of the statute.”<sup>90</sup> To merit deference, however, the agency’s interpretation must be reasonable and consistent “with the design and structure of the statute as a whole.”<sup>91</sup>

As discussed above, in 1991 (and today), the terms “admission” and “admitted” generally encompassed the authorization by an immigration officer for a noncitizen to lawfully pass through a U.S. port of entry following inspection and a determination of admissibility.<sup>92</sup> And the phrase “inspected and admitted” mirrors the language used in section 245(a) as a threshold eligibility requirement for adjustment of status.<sup>93</sup> We must “assume that when a statute uses . . . a term [of art], Congress intended it to have its established meaning,”<sup>94</sup> as informed by well-established administrative interpretation of that term.<sup>95</sup>

As the U.S. Court of Appeals for the Fifth Circuit recently held, the INA’s parole authority in this context is irreconcilable with Congress’s use of the phrase “inspected and

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<sup>87</sup> *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340-41 (1997) (“Our inquiry must cease if the statutory language is unambiguous and the statutory scheme is coherent and consistent.”).

<sup>88</sup> *Id.* at 341; *see also Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 321 (2014) (“Even under *Chevron*’s deferential framework, agencies must operate within the bounds of reasonable interpretation. And reasonable statutory interpretation must account for both the specific context in which language is used and the broader context of the statute as a whole.”) (citations and quotation marks omitted).

<sup>89</sup> *Abramski v. United States*, 573 U.S. 169, 179 (2014) (quotation marks omitted).

<sup>90</sup> *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984); *see also Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) (“If a statute is ambiguous, and if the implementing agency’s construction is reasonable, *Chevron* requires a federal court to accept the agency’s construction of the statute, even if agency’s reading differs from what the court believes is the best statutory interpretation.”) (citing *Chevron*, 467 U.S. at 843-44).

<sup>91</sup> *Utility Air*, 573 U.S. at 321.

<sup>92</sup> *See supra* p. 7, note 38.

<sup>93</sup> *Matter of Z-R-Z-C-* fails to adequately address why these terms and phrases should be assigned a different meaning for MTINA purposes or reasonably explain why they should be read differently in MTINA than elsewhere in the INA.

<sup>94</sup> *McDermott Int’l, Inc. v. Wilander*, 498 U.S. 337, 342 (1991).

<sup>95</sup> *See Air Wis. Airlines Corp. v. Hoeper*, 571 U.S. 237, 248 (2014) (“It is a cardinal rule of statutory construction that, when Congress employs a term of art, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it is taken.” (quotation marks omitted)); *see also Taggart v. Lorenzen*, 139 S. Ct. 1795, 1801 (2019) (“When a statutory term is obviously transplanted from another legal source, it brings the old soil with it.” (quotation marks omitted)); *Medina Tovar v. Zuchowski*, 982 F.3d 631, 636 (9th Cir. 2020) (same – including settled administrative interpretations of a term or phrase, especially a term of art).



admitted” in MTINA.<sup>96</sup> Sections 101(a)(13)(B) and 212(d)(5)(A) of the INA make clear—as did section 212(d)(5) when IMMACT90 and MTINA were enacted—that noncitizens who are paroled into the country “shall not be considered to have been admitted.” Congress’s choice in MTINA to use the well-understood term of art, “inspected and admitted”—particularly after having used “advance parole” just one year earlier to authorize the travel of Salvadoran TPS recipients in IMMACT90—indicates that travel abroad and reentry under MTINA was intended to effectuate an admission and thereby align with the requirement of INA § 245(a). Indeed, absent a compelling reason to depart from the canons of statutory construction, “when Congress uses the same language in two statutes having similar purposes . . . , it is appropriate to presume that Congress intended that text to have the same meaning in both statutes.”<sup>97</sup> As the Supreme Court instructed recently in *Niz-Chavez v. Garland*, “When called on to resolve a dispute over a statute’s meaning, [we] normally seek[] to afford the law’s terms their ordinary meaning at the time Congress adopted them” and to “exhaust all the textual and structural clues bearing on that meaning.”<sup>98</sup>

Moreover, the phrase “the same immigration status” should be construed in context, i.e., in relation to the preceding phrase “shall be inspected and admitted in.” Even if it is possible that Congress intended “immigration status” to mean more generally the individual’s immigration posture, including that of a noncitizen present without inspection and admission, we do not ordinarily understand immigration law as providing for inspection and admission into such an amorphous posture. Instead, noncitizens typically are admitted into specific lawful statuses under the immigration laws (e.g., nonimmigrant status, refugee status).<sup>99</sup>

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<sup>96</sup> *Duarte v. Mayorkas*, 27 F.4th 1044, 1058 (5th Cir. 2022) (“First, because an alien that is paroled into the country is explicitly not considered ‘admitted,’ paroling TPS beneficiaries into the country is contrary to MTINA’s mandate that such travelers ‘shall be inspected and admitted.’”). The *Duarte* Court did not reach the question of what “status” such noncitizens should be admitted into, but we believe the court’s reasoning and holdings support the view expressed here, and that our further conclusion that they are to be admitted into TPS itself is consistent with its analysis.

<sup>97</sup> *Smith v. City of Jackson*, 544 U.S. 228, 233 (2005); see also *Pereira v. Sessions*, 138 S. Ct. 2105, 2115 (2018) (“[I]t is a normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning.” (quoting *Taniguchi v. Kan Pacific Saipan, Ltd.*, 566 U.S. 560, 571 (2012)); *Desert Palace Inc. v. Costa*, 539 U.S. 90, 101 (2003) (“Absent some congressional indication to the contrary, we decline to give the same term in the same Act a different meaning . . .”).

<sup>98</sup> 141 S. Ct. 1474, 1480 (2021).

<sup>99</sup> In a different context, the Courts of Appeals for the Fifth and Ninth Circuits have noted that Black’s Law Dictionary defines “status” more broadly, namely “[a] person’s legal condition, whether personal or proprietary; the sum total of a person’s legal rights, duties, liabilities, and other legal relations, or any particular group of them separately considered,” and as a result found that the phrase “admitted in any status” in section 240B(a) of the INA is not limited to admission into a legal status, but rather it “encompasses all states or conditions, of whatever kind, that an alien may possess under the immigration laws.” *Tula Rubio v. Lynch*, 787 F.3d 288, 293 (5th Cir. 2015); *accord Saldivar v. Sessions*, 877 F. 3d 812, 814-19 (9th Cir. 2017); *Status*, *Black’s Law Dictionary* (11th ed. 2019). The Board disagrees with that interpretation. *Matter of Castillo-Angulo*, 27 I&N Dec. 194, 200 (BIA 2018) (“We also disagree with the view of the Fifth and Ninth Circuits that an alien can be admitted in an unlawful status. See *Saldivar*, 877 F.3d at 816; *Tula-Rubio*, 787 F.3d at 293–94 & n.5. When an alien seeks admission at the border, an immigration official admits the alien only upon a determination that he or she is lawfully entitled to enter the United States. See section 212(a)(7) of the Act, . . . (rendering inadmissible those aliens who are not in possession of valid entry documents at the time they seek admission); . . . Because it is precisely the nature of the alien’s status that determines whether he or she is entitled to admission, we cannot agree with the conclusion of the Fifth and Ninth

It is particularly notable here that MTINA’s direction that TPS recipients be inspected and admitted after such authorized travel, subject only to specific grounds of excludability listed in INA § 244(c)(2)(A)(iii), and not subject to the general inadmissibility grounds listed in INA § 212, indicates that Congress intended to establish for this class of individuals a distinct form of inspection that would ultimately result in a grant of admission into temporary protected status.<sup>100</sup> That Congress in MTINA made the grounds for ineligibility for admission in TPS upon return identical to the unwaivable inadmissibility grounds for TPS itself makes a good deal of sense.<sup>101</sup> A current TPS holder who has been authorized to travel has already been deemed by USCIS (or an immigration judge or the BIA if the applicant is in removal proceedings) to merit TPS following consideration of those inadmissibility grounds that Congress chose to make applicable and, where necessary, pursuant to waivers of any additional and applicable inadmissibility grounds for which Congress made waivers available. As a result, there is little value in having CBP effectively re-adjudicate those judgments where the relevant determination already has been made by Congress and USCIS (or the immigration judge or BIA) in granting TPS in the first instance.<sup>102</sup>

### **B. The “Status” Referred to in MTINA for Returning TPS Travelers is Best Understood as Temporary Protected Status**

Notwithstanding our concerns with *Matter of Z-R-Z-C-*’s construction of MTINA, an unresolved question is which immigration status a returning TPS or FUP recipient should be

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Circuits that an alien can be ‘admitted in’ a status that would not entitle him or her to admission.”). Additionally, in those cases, the courts were considering whether a noncitizen who was “waved through” a port of entry by an immigration officer was “admitted in any status” for purposes of eligibility for cancellation of removal under section 240B(a). Even accepting *arguendo* that this broader conception of “status” should be transplanted to MTINA’s use of “same immigration status,” these Fifth and Ninth Circuit decisions would appear to support the view that returning TPS recipients nevertheless are to be considered “inspected and admitted” for purposes of section 245(a) and other immigration purposes.

<sup>100</sup> Although the legislative history does not illuminate Congress’s intent in passing this provision of MTINA (see *supra* note 30), we do know that it specifically moved away from the parole framework that was causing deleterious effects on certain TPS holders from El Salvador. It is reasonable to infer that Congress used the “inspected and admitted” term of art in an attempt to provide TPS and FUP travelers with access to deportation proceedings under the pre-IIRIRA construct. See *supra* pp. 5-8, note 30. Indeed, if Congress intended the INS to continue using parole, it would not have needed to include this section of MTINA, as that was the agency’s practice at the time of passage.

Additionally, this situation is not unlike that of asylees and refugees who are returning from temporary travel abroad with a refugee travel document, who are subject only to a limited list of inadmissibility grounds. See Memorandum from Bo Cooper, General Counsel, INS, *Readmission of Asylees and Refugees Without Travel Documents*, Genco Op. No. 99-6, 2001 WL 1047688, at \*1 (1999) (“An asylee or refugee returning with a valid refugee travel document must be examined as to his or her admissibility. 8 C.F.R. § 223.3(d)(2)(1). We believe that in the case of asylees, however, this requirement only applies to those grounds of inadmissibility that would also constitute grounds for termination of asylum under 8 C.F.R. § 208.23.”).

<sup>101</sup> See MTINA § 304(c)(1)(A)(ii); see also INA § 244(c)(2)(A)(iii); 8 C.F.R. § 244.3(c).

<sup>102</sup> Of course, were CBP to become aware of new information indicating that an unwaivable TPS inadmissibility ground may exist, denying admission pursuant to MTINA would be appropriate. If CBP becomes aware that an individual has, since being granted TPS, accrued derogatory information that would call into question whether TPS should be maintained, that can be addressed post-admission through revocation efforts, when a person seeks extension of their TPS, and/or should the person seek to adjust their status and have to establish that they are admissible. The mere fact of being inspected and admitted into TPS will not immunize the individual from the consequences of disqualifying post-TPS conduct.

admitted into upon return, especially if they had initially entered the United States without inspection. USCIS has posited that MTINA’s language—“shall be inspected and admitted in the same immigration status the alien had at the time of departure”—requires that returning TPS recipients be “admitted,” as that term was defined by case law<sup>103</sup> and now in section 101(a)(13)(A) of the INA, in the status of Temporary Protected Status, which is the status they held “at the time of departure.” We agree that that is the plain meaning of the provision or, in any event, certainly the best reading.<sup>104</sup>

### 1. The Statutory Language Supports Treating TPS as a Status

By its own choice of words, Congress has indicated that Temporary Protected *Status* is, in fact, a lawful immigration status,<sup>105</sup> and is therefore the “status” referred to in MTINA.<sup>106</sup> Indeed, the MTINA provision requiring inspection and admission “in the same immigration status the alien had at the time of departure” applies to noncitizens “provided temporary protected status under . . . the Immigration and Nationality Act, including aliens provided *such status* under section 303 of the Immigration Act of 1990.”<sup>107</sup> Such a reading is faithful to the text of the statute, and as such should be the starting point in any textual analysis.<sup>108</sup> Even if the concept of “status” may encompass more than one of the enumerated legal immigration statuses available under the INA, a more natural reading of MTINA is that Congress was referring to admission back in TPS or FUP and that it intended that such inspection and admission would meet the requirements of INA § 245(a).<sup>109</sup>

Importantly, other forms of “status” distinct from the immigrant and nonimmigrant categories support treating TPS as a status into which a noncitizen can be admitted following authorized travel abroad *even if* the noncitizen’s original receipt of that status did not constitute an admission. To begin, the Board has acknowledged that FUP—which was created in the same

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<sup>103</sup> See *supra* note 38.

<sup>104</sup> We recognize that the Government recently took the position in litigation that TPS is *not* a status in which noncitizens can be admitted upon return under MTINA. See Brief for Appellants at 6 n.2, *Duarte v. Mayorkas*, No. 27 F.4th 1044 (5th Cir. 2022). However, for the reasons discussed in this paper and bolstered by the Fifth Circuit’s recent decision in that case, OGC has reconsidered that position and believes that TPS recipients can be admitted into temporary protected status when returning from travel pursuant to MTINA. See *Duarte*, 27 F.4th at 1058-61.

<sup>105</sup> See, e.g., *Michel v. Mayorkas*, No. 4:20-cv-10885-IT, 2021 WL 797810, at \*6 (D. Mass. Mar. 2, 2021) (unpublished) (observing that TPS “is an immigration status, albeit a temporary one” and that, given MTINA’s travel provision, “Michel’s ‘immigration status’ when she left for her travel was [TPS], she held the same status upon her return”).

<sup>106</sup> Likewise, Congress may well have considered a grant of FUP to constitute an immigration status, such that the more general reference to “the same immigration status” in MTINA was meant to refer to either TPS or FUP, depending upon which benefit had been conferred.

<sup>107</sup> MTINA § 304(c) (emphasis added).

<sup>108</sup> See *Niz-Chavez*, 141 S. Ct. at 1486 (“Our only job today is to give the law’s terms their ordinary meaning . . . .”); *Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004) (“The starting point in discerning congressional intent is the existing statutory text . . . .”); *Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.*, 530 U.S. 1, 6 (2000) (“[W]hen the statute’s language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.” (quotation marks and citations omitted)).

<sup>109</sup> We have not been asked to address whether a TPS recipient who held a lawful nonimmigrant status prior to departing must or should be admitted in that nonimmigrant status, as opposed to temporary protected status. See INA § 244(a)(5) (clarifying that noncitizens may not be required to relinquish their nonimmigrant status upon being granted TPS).

statute as TPS and addressed in tandem with it in MTINA<sup>110</sup>—is an immigration “status,” while recognizing that a grant of FUP benefits is not an “admission.”<sup>111</sup> Notably, the Board has contrasted the general principle that a grant of FUP benefits is not an admission with the admission-based language in the FUP travel regulations.<sup>112</sup>

In addition, the Supreme Court in *Sanchez* drew a direct parallel between an individual who received TPS after entering the country without inspection and one who received asylum after similarly entering without inspection. The Court explained that “a foreign national can be in a lawful status but not be admitted,” and observed that just as an individual who entered the country without inspection can receive the lawful status of being an asylee without being admitted, an individual can “receive[] a different kind of lawful status”—i.e., temporary protected status—without being admitted.<sup>113</sup> Notably, when asylees travel abroad with the Department’s permission,<sup>114</sup> upon return they are inspected and admitted into their asylee status,<sup>115</sup> notwithstanding the fact that a grant of asylum itself is not an admission.<sup>116</sup> An INS General Counsel opinion on asylee travel abroad underscores that “a refugee or asylee returning from travel abroad with a refugee travel document is readmitted as a refugee or asylee, not as a newly admitted parolee or with some other immigrant status.”<sup>117</sup>

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<sup>110</sup> See *supra* pp. 3-6.

<sup>111</sup> *Fajardo Espinoza*, 26 I&N Dec. at 605; accord *Matter of Reza-Murillo*, 25 I&N Dec. 296, 297 (BIA 2010); see also *Matter of Rotimi*, 24 I&N Dec. 567, 576-77 (BIA 2008) (“Ordinarily, we would expect the privilege of residing in this country to be reflected in a recognized status such as that of nonimmigrant, refugee, or asylee, each of which is set out in the statute. The unique nature of the Family Unity Program may qualify as well, given its statutory foundation in section 301 of the Immigration Act of 1990, and its expectation of long-term presence and ultimate regularization of status.”).

<sup>112</sup> See *Reza-Murillo*, 25 I&N Dec. at 299 (quoting 8 C.F.R. § 236.16); see also *G-A-C-*, 22 I&N Dec. at 88 & note 4 (noting admission-based language in MTINA travel provision).

<sup>113</sup> *Sanchez*, 141 S. Ct. at 1813.

<sup>114</sup> See INA § 208(c)(1)(C).

<sup>115</sup> 8 C.F.R. §§ 223.1(b) (“Except as provided in § 223.3(d)(2)(i), a person who holds refugee status pursuant to section 207 of the Act, or asylum status pursuant to section 208 of the Act, must have a refugee travel document to return to the United States after temporary travel abroad unless he or she is in possession of a valid advance parole document.”); 223.3(d)(2)(i) (“Inspection and immigration status. Upon arrival in the United States, an alien who presents a valid unexpired refugee travel document, or who has been allowed to file an application for a refugee travel document and this application has been approved under the procedure set forth in § 223.2(b)(2)(ii), shall be examined as to his or her admissibility under the Act. An alien shall be accorded the immigration status endorsed in his or her refugee travel document, or (in the case of an alien discussed in § 223.2(b)(2)(ii)) which will be endorsed in such document, unless he or she is no longer eligible for that status, or he or she applies for and is found eligible for some other immigration status.”); see USCIS, *Questions and Answers: Asylum Eligibility and Applications*, <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/asylum-frequently-asked-questions/questions-and-answers-asylum-eligibility-and-applications> (last updated Sept. 16, 2021) (“A refugee travel document may be used for temporary travel abroad and is required for readmission to the United States as an asylee.”); see also Form I-131 Instructions at 1 (“A Department of Homeland Security (DHS) officer at the U.S. port-of-entry will determine your admissibility when you present your travel document.”).

<sup>116</sup> *Matter of V-X-*, 26 I&N Dec. 147, 150-52 (BIA 2013).

<sup>117</sup> Memorandum from Bo Cooper, General Counsel, INS, *Readmission of Asylees and Refugees Without Travel Documents*, Genco Op. INS Genco Op. No. 99-6, 2001 WL 1047688, at \*6; see also *id.* at \*1 (citing 8 C.F.R. § 223.3(d)(2)(i)) (“An arriving alien who presents a valid refugee travel document may be admitted to the United States and resume his or her status as a refugee or asylee.”).

*Sanchez* provides still more support for construing MTINA to allow “inspection and admission” in temporary protected status. As discussed above, the Court held that “the conferral of TPS does not make an unlawful entrant (like *Sanchez*) eligible under [INA § 245] for adjustment to LPR status,” emphasizing that “[l]awful status and admission . . . are distinct concepts in immigration law.”<sup>118</sup> The Court’s reasoning, however, focused on whether a grant of TPS (or of a nonimmigrant status) by itself necessarily constitutes an admission, not whether TPS was a status into which one could be admitted following authorized travel. The Court cited two examples of nonimmigrant statuses that may be granted without lawful admission.<sup>119</sup> One of these examples—U nonimmigrant status—is particularly instructive for our purposes. The Court noted that individuals may be granted U nonimmigrant status from within the United States, without effecting an admission, but they may also be admitted into U nonimmigrant status if their petition is approved while overseas.<sup>120</sup> Taken together, these examples provide strong evidence that although a grant of TPS status is not in and of itself an admission, neither must it prevent a TPS recipient from being admitted in TPS after an authorized trip abroad.<sup>121</sup>

It is true that the framework presented by this interpretation could be seen as being in tension with the general understanding that TPS was not meant to improve recipients’ immigration standing in the United States, but rather to ensure that they were not disadvantaged by the circumstances surrounding the designation.<sup>122</sup> It could be deemed arbitrary to advantage a certain class of TPS recipients simply by virtue of their return from authorized travel abroad if MTINA is believed to have been motivated by a desire to strictly maintain the status quo. As the AAO observed in *Matter of Z-R-Z-C-*, admitting or paroling returning TPS recipients may well result in improving their immigration posture—especially those who had previously entered the United States without inspection—simply by virtue of their authorized departure and return, so long as they meet all other requirements for adjustment of status. Yet, ascribing to Congress the narrow intention of merely preserving the status quo in MTINA when it used language well understood in immigration law at the time to have greater effect seems to disregard the statutory text itself.<sup>123</sup> That is perhaps why it was the uninterrupted (though not entirely consistent)

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<sup>118</sup> *Sanchez*, 141 S. Ct. at 1812-13.

<sup>119</sup> *Id.* at 1813-15.

<sup>120</sup> *Id.* at 1814.

<sup>121</sup> One aspect of the 1992 Genco Opinion does give us pause. The concluding paragraph states, “Pursuant to the above technical amendments, TPS (and family unity) aliens granted authorization ‘to travel’ must be readmitted to the United States in the same immigration status they had at the time of departure. They should not be given advance parole, or be paroled upon return, *unless they are already in parole status.*” (Emphasis added.) The final sentence could be read as implying that because parolees cannot be admitted, they should not be admitted notwithstanding the MTINA directive. We do not believe that the one-sentence reference to parolees compels a particular interpretation of MTINA and, in any event, the DHS General Counsel may issue opinions that supersede INS General Counsel opinions in whole or in part, as has been done on occasion, and chooses to do so here.

<sup>122</sup> See *H-G-G-*, 27 I&N Dec. at 627 (“The plain language of the statute does not reflect any intent to confer advantages to those persons without lawful status beyond providing temporary protection from removal; instead, it is clear that Congress sought an orderly departure regime.”).

<sup>123</sup> In terms of adjustment-of-status eligibility, switching from parole to admission under MTINA would provide the further benefit of allowing certain individuals to qualify for adjustment under section 245(k) of the INA, which is a special provision for certain employment-based immigrant visa beneficiaries and requires physical presence in the United States “pursuant to a lawful admission.” See *Sanchez*, 141 S. Ct. at 1811 n.1.

practice of INS and this Department for thirty years to permit adjustment of status following return on parole until *Matter of Z-R-Z-C-* was issued and adopted only one year ago.

Moreover, it bears recalling that any international travel by a TPS holder occurs only with the express permission of the Secretary. Thus, to the extent there is concern about individual TPS holders inappropriately seeking to advance their immigration situation by engaging in overseas travel, the statutory framework does not explicitly forbid it; rather, it vests in the Secretary the means to prevent it, should the Secretary so choose.

## 2. The Legislative Intent Supports Treating TPS as a Status

There is good reason to believe that the text of the MTINA travel provision is a straightforward expression of legislative intent. Two forms of permission to come into the United States lawfully were available at the time of MTINA: admission and parole. Congress in MTINA elected not to parole these individuals. Admission was the obvious alternative. If Congress did not intend an actual admission, it could have used different terminology such as “shall be restored” or “shall resume” rather than a well-known term of art from the adjustment of status statute.<sup>124</sup> We should not attribute to Congress the incongruous intent to use the technical term “admission” to mean something other than its ordinary understanding in immigration law.<sup>125</sup>

Having just created the TPS and FUP statuses—and designated El Salvador for TPS—the year before, and having referenced that El Salvador designation in MTINA, we must assume that Congress was aware that a significant portion of individuals covered by the MTINA travel provisions had originally entered the country without inspection prior to receiving TPS or benefits under the FUP.<sup>126</sup> Moreover, having statutorily authorized Salvadoran TPS holders—including those who previously entered without inspection—to receive advance parole, it is reasonable to assume that Congress supported (or at least accepted) the idea that travel-and-return by such TPS holders could satisfy the “inspected and admitted or paroled” requirement for purposes of adjustment of status and allow some such individuals to adjust status if they were otherwise eligible to do so. It is certainly true that if Congress intended to create a pathway to adjustment of status for this population, it could have done so more explicitly.<sup>127</sup> But Congress’s

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<sup>124</sup> Cf., e.g., INA § 223(b) (“resume the status existing at the time of his departure for such visit [abroad]”). See generally *Trump v. Hawaii*, 138 S. Ct. 2392, 2414 (2018) (observing that had Congress intended a different policy, “it could easily have chosen language directed to that end” as it had done in other INA provisions).

<sup>125</sup> See, e.g., *Cochise Consultancy, Inc. v. United States ex rel. Hunt*, 139 S. Ct. 1507, 1512 (2019) (observing that “interpretations that would attribute different meanings to the same phrase” should be “avoid[ed]” (quotation marks omitted)); see also *supra* notes 107 & 109.

<sup>126</sup> See IMMACT90 § 303; MTINA § 304(c)(2)(B).

<sup>127</sup> Congress did specifically address pathways to adjustment of status in the TPS statute, but not in relation to the travel provisions of MTINA. Section 244(f)(4) states that for purposes of change of status and adjustment of status, a TPS recipient “shall be considered as being in, and maintaining, lawful status as a nonimmigrant.” Congress also limited its ability to pass future legislation that “provides for adjustment to lawful temporary or permanent resident alien status for any alien receiving temporary protected status under this section,” requiring that any such bills must pass with a supermajority of sixty Senators. INA § 244(h). That provision is of little relevance to the question at issue here, or specifically to the passage of MTINA, because the interpretation of MTINA’s travel-and-return provision proposed in this memorandum would not by itself provide for adjustment of status to lawful permanent residence to TPS recipients. Rather, were the Department to adopt this interpretation, for a TPS recipient to adjust

awareness that many FUP and Salvadoran TPS recipients likely entered without inspection supports the argument that increased access to adjustment of status was an intended result based on the choice in MTINA to mimic the language of INA § 245(a) as discussed *supra*. This is particularly true in light of the fact that Congress in MTINA departed from its explicit reference in IMMACT90 to “advance parole” specifically for Salvadoran TPS holders in favor of “inspected and admitted” for the full FUP and TPS populations only one year later.<sup>128</sup>

Congress has maintained the same “inspected and admitted or paroled” language since 1960 and was clearly aware of that language when it crafted the text of the MTINA travel provision.<sup>129</sup> We should not assume that Congress had the peculiar intent of assigning to the phrase “inspected and admitted” in MTINA a meaning distinct from the identical text in INA § 245(a) that it mirrors.<sup>130</sup>

One additional consequence of giving the words used by Congress their ordinary and well-understood meaning is that unadmitted TPS recipients who were previously subject to removal proceedings based on certain grounds of inadmissibility under section 212 and who traveled with advance authorization, would no longer be subject to those inadmissibility charges after admission into TPS upon return. As admitted noncitizens, they instead would be subject only to the grounds of deportability under INA § 237.<sup>131</sup> For noncitizens who are deportable under section 237, DHS could lodge new removal charges and allegations.<sup>132</sup> However,

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status following inspection and admission they would additionally have to have a lawful basis on which to adjust status, such as a certain type of familial relationship or employment offer, and meet a number of other criteria. This interpretation would allow certain TPS recipients to remove one barrier to adjustment of status, but it does not “provide” lawful permanent residence to anyone.

<sup>128</sup> See *supra* pp. 5-8 and notes 13 & 14.

<sup>129</sup> See *supra* pp. 15-17 and note 34.

<sup>130</sup> Even if there were reason to believe Congress was unaware of the consequences of choosing to use the term “inspected and admitted” in MTINA, “the fact that Congress may not have foreseen all the consequences of a statutory enactment is not a sufficient reason for refusing to give effect to its plain meaning.” *Union Bank v. Wolas*, 502 U.S. 151, 157-58 (1991); see also *Burrage v. United States*, 571 U.S. 204, 218 (2014) (“The role of this Court is to apply the statute as it is written—even if we think some other approach might accord with good policy.” (quotation marks omitted)); cf. *Lamie v. U.S. Trustee*, 540 U.S. 526, 538 (2004) (observing that courts should be “unwilling[ ] to soften the import of Congress’s chosen words even if we believe the words lead to a harsh outcome” and that “[t]here is a basic difference between filling a gap left by Congress’s silence and rewriting rules that Congress has affirmatively and specifically enacted” (quotation marks omitted)); *id.* at 542 (“If Congress enacted into law something different from what it intended, then it should amend the statute to conform it to its intent. It is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think is the preferred result.” (quotation marks omitted)). The Supreme Court has “long rejected” the casting aside of the common meaning of statutory terms as understood at the time of enactment on the ground that “a new application [of those terms has] emerge[d] that is both unexpected and important.” *Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731, 1750 (2020); see also *id.* (“One could easily contend that legislators only intended expected applications or that a statute’s purpose is limited to achieving applications foreseen at the time of enactment. However framed, th[at] logic impermissibly seeks to displace the plain meaning of the law in favor of something lying beyond it.”).

<sup>131</sup> Of course, noncitizens cannot be removed while in TPS, and the grounds for withdrawing an individual’s TPS would often also trigger new section 237 deportability grounds. See 8 C.F.R. § 244.14.

<sup>132</sup> See 8 C.F.R. § 1240.10(e) (“At any time during the proceeding, additional or substituted charges of inadmissibility and/or deportability and/or factual allegations may be lodged by the Service in writing.”); accord 8 C.F.R. § 1003.30. A noncitizen in removal proceedings who travels abroad and returns to the United States may be subject to different charges in those removal proceedings, but that does not compel the termination of

noncitizens with TPS who are not deportable under section 237—for instance, those whose only prior inadmissibility had been under INA § 212(a)(6)(A)(i) for being present without admission or parole—would no longer be amenable to removal proceedings until their TPS is withdrawn or they remain in the country without authorization following the termination of their TPS designation, in which case INA § 237(a)(1)(B) (present in violation of law) or other similar deportability grounds would generally apply.<sup>133</sup>

For the reasons discussed above, it appears that Congress was aware of these potential implications, and the Executive Branch’s role is to implement the law as written. Moreover, this reading would not be contrary to the holding in *Sanchez* and would improve upon the AAO’s effort in *Matter of Z-R-Z-C-* to move away from the use of parole in this arena, which OGC has long found to be contrary to the text and intent of MTINA. This reading would represent a significant departure from how the Department currently treats the effects of travel and return on TPS holders and long-established procedures for facilitating travel authorization and return. It would, however, be consistent with the overlapping statutory provisions that govern grants of TPS, authorized travel for TPS recipients, and adjustment of status, and it would create a consistent, comprehensive framework for reconciling these disparate provisions.<sup>134</sup>

**B. The AAO’s Reading of MTINA in *Matter of Z-R-Z-C-* is Flawed**

In light of the above, it seems clear that the AAO erred in *Matter of Z-R-Z-C-*, when it determined that the language “shall be inspected and admitted in the same immigration status the alien had at the time of departure” means that (1) DHS would not actually “admit” the returning TPS traveler as that term was understood at the time of MTINA’s enactment in 1991 or as now

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proceedings. *See Matter of Brown*, 18 I&N Dec. 324, 325 (BIA 1982) (a noncitizen “cannot compel the termination of deportation proceedings which have been commenced against him merely by effecting a departure and reentry”).

<sup>133</sup> In fact, the INS General Counsel recommended a similar action for returning TPS recipients in the May 1991 opinion described *supra* note 18. *Cf. Matter of Arrabally and Yerrabelly*, 25 I&N Dec. 771, 780 (BIA 2012) (“[I]t is well settled that an alien who leaves the United States and returns under a grant of advance parole is subject to the grounds of inadmissibility once parole is terminated, even if he had been ‘deportable’ rather than ‘inadmissible’ before the trip’s commencement.”).

<sup>134</sup> There has been some discussion of a third alternative, where noncitizens who held lawful immigration status at the time of their departure (e.g., nonimmigrants) would be readmitted into that status, while individuals who had entered without inspection, or whose prior status had expired, would be paroled. This would still allow such individuals to meet the requirements of INA § 245(a), although it would not provide protection from the limitations of § 245(c) and (k) regarding unlawful presence and employment. Because such a “hybrid” model relies in part on parole, we believe it is irreconcilable with MTINA, particularly after Congress in that Act seemingly moved away from the advance parole construct used just one year earlier for Salvadoran nationals granted TPS pursuant to the designation contained in IMMACT90. Moreover, it conflicts with the plain meaning of the term “Temporary Protected Status” by refusing to treat TPS as a lawful immigration status itself. Finally, such an approach would frustrate the intent of the provision at the time of enactment to spare TPS travelers—both admitted nonimmigrants and those who effected an entry without inspection—the adverse immigration consequences of parole, *i.e.*, forfeiting the procedural safeguards and forms of relief available only in deportation proceedings. *See, e.g., United States v. Bryant*, 996 F.3d 1243, 1256 (11th Cir. 2021) (“As between two competing interpretations, we must favor the ‘textually permissible interpretation that furthers rather than obstructs’ the statute’s purposes.” (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* § 4, at 63 (2012))). It is therefore difficult to find support for this alternative interpretation in the text and context of MTINA. This approach is potentially distinguishable from the reliance on parole that preceded *Matter of Z-R-Z-C-* because it is limited to those without a lawful “status” to return to as envisioned by the MTINA drafters, which may put it on a stronger footing. However, for the reasons described above—and consistent with the advice provided by the INS General Counsel in 1992—OGC advises against any option that relies on DHS’s parole authority in this context.



defined in section 101(a)(13)(A) of the INA (“the lawful entry of the alien into the United States after inspection and authorization by an immigration officer”), and (2) “status” should be interpreted to mean the TPS recipient’s former “temporary status (including all of the incidents attached to that status, e.g., a TPS recipient present in the United States without inspection and admission or inspection and parole).”<sup>135</sup> The AAO reasoned that Congress intended that the TPS traveler be restored to the immigration posture that they held prior to departure rather than be admitted. According to the AAO, “MTINA travel authorization is a unique form of travel authorization and operates as a legal fiction that restores the alien to the *status quo ante* as if the alien had never left the United States.” Under that approach, the AAO observed, the TPS traveler would be in no better and no worse a situation.<sup>136</sup> However, the AAO analysis fails to adequately assign to the terms of the provision their ordinary meanings, especially as they were well understood in immigration law and by Congress at the time of MTINA’s enactment.

The atextual interpretation of “inspected and admitted” in *Matter of Z-R-Z-C-* is also in tension with the Board’s understanding of the MTINA travel provision. In *Matter of G-A-C-*, the Board held that an asylum applicant who left the United States after having been granted advance parole and who, upon his return, was paroled into this country under section 212(d)(5)(A) was properly placed in exclusion proceedings following the INS’s denial of his asylum application.<sup>137</sup> The Board distinguished Ninth Circuit case law in which the court had expressed concern that noncitizens who otherwise would be afforded the greater rights and relief available in deportation proceedings would have to forfeit those benefits by traveling with advance parole and being paroled upon return.<sup>138</sup>

The Board underscored in *Matter of G-A-C-* that advance parole necessarily “is tied to section 212(d)(5)(A) parole authority because neither the Attorney General, nor the [INS] district director as her delegatee, has authority under law to *admit* an alien into this country unless the law authorizes such admission” and that “[a]bsent readmission, as opposed to parole . . . , the applicant would have no right under the [INA] to have his status tested in deportation proceedings.”<sup>139</sup> By contrast, the Board observed, Congress had expressly provided in the MTINA travel-and-return provision the authority to admit otherwise excludable or inadmissible TPS and FUP recipients who traveled with advance authorization into the United States.<sup>140</sup>

In *Matter of Z-R-Z-C-*, the AAO seemingly explains its decision to treat “inspected and admitted” in a way that diverges from the rest of immigration law by observing that “[a] given term in the same statute may take on distinct characters from association with distinct statutory objects calling for different ways of implementation.”<sup>141</sup> The AAO’s justification for disregarding the common meaning of “inspected and admitted” appears to be that the MTINA

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<sup>135</sup> *Matter of Z-R-Z-C-* at 6. According to the AAO, “‘Immigration status’ in this context includes being subject to a final order of deportation, exclusion, or removal.” *Id.* at \*6 n.8.

<sup>136</sup> This is very similar to the approach taken in the FUP regulations, although the *Matter of Z-R-Z-C-* opinion does not address the FUP. *See supra* pp. 8-10.

<sup>137</sup> *Matter of G-A-C-*, 22 I&N Dec. at 88-91.

<sup>138</sup> *See id.* at 89-91 (considering *Navarro-Aispura v. INS*, 53 F.3d 233 (9th Cir. 1995), and *Barney v. Rogers*, 83 F.3d 318 (9th Cir. 1996)).

<sup>139</sup> *Id.* at 88.

<sup>140</sup> *Id.* at 88 n.4.

<sup>141</sup> *Id.* at 7 (citing *Env’tl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007)).

travel provision “is a specific provision applying to a very specific situation” that should not be controlled by the section 101(a)(13)(A) definition (which was enacted several years after MTINA) or the ordinary usage of those well-understood terms in immigration law even at the time of MTINA’s enactment.<sup>142</sup> We find the AAO’s justification to be quite strained given the long history and understanding of the phrase as a term of art regarding the adjustment of status eligibility criteria, as well as the text, context, purpose, and history of the MTINA travel provision.<sup>143</sup>

The AAO places considerable emphasis on MTINA’s specific instruction that the TPS recipients be admitted “in the same immigration status [they] had at the time of departure.”<sup>144</sup> The AAO reads that phrase as meaning that the individual is to be restored to the same “status” they had prior to departure, as if the individual “never left the United States” and their “immigration status never changed at all.”<sup>145</sup> Accordingly, by the AAO’s reasoning, a TPS recipient who had entered the United States without inspection and admission (or parole) would be restored to the “status” of an inadmissible TPS recipient without any other immigration status.

But, here again, the AAO seems to stray from the more natural meaning of a term (*i.e.*, “same immigration status”). Although not defined in the INA, the Board has held that “status” is a term of art “denot[ing] someone who possesses a certain legal standing, e.g., classification as an immigrant or nonimmigrant.”<sup>146</sup> *Matter of Z-R-Z-C-* does not address Congress’s decision to call TPS a “status” or consider why for this population the “immigration status the alien held before departure” is something other than “temporary protected status.” The opinion notes that under *Matter of H-G-G-* (and now *Sanchez*), a grant of TPS itself is not an “admission” under the INA and concludes that “the inspection and admission required under [MTINA] is for the sole purpose of returning the TPS recipient to his or her temporary status (including all of the incidents attached to that status, e.g., a TPS recipient present in the United States without inspection and admission or inspection and parole).”<sup>147</sup> The AAO did not, however, consider whether, by referring specifically to inspection and admission, Congress intended for a noncitizen with TPS who is returning from authorized travel to be admitted into TPS, which the Supreme Court subsequently recognized in *Sanchez* is an immigration “status,” even if the initial grant of TPS does not itself constitute an admission.<sup>148</sup>

The AAO in *Matter of Z-R-Z-C-* also sought to rely on two contemporaneous INS General Counsel opinions, but those opinions do not appear to offer much support for the AAO’s reading. In a 1993 opinion, the Acting INS General Counsel advised that a TPS recipient who is in deportation proceedings and who travels with advance INS authorization “will upon return to

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<sup>142</sup> *Matter of Z-R-Z-C-* at 7 (quoting *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974)).

<sup>143</sup> See *Abramski*, 573 U.S. at 179 (“[W]e must . . . interpret the relevant words in a statute not in a vacuum, but with reference to the statutory . . . history and purpose.” (quotation marks omitted)); see also *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000) (“The meaning . . . of certain words or phrases may only become evident when placed in context.”).

<sup>144</sup> See *id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Matter of Blancas-Lara*, 23 I&N Dec. 458, 460 (BIA 2002).

<sup>147</sup> *Matter of Z-R-Z-C-* at 6.

<sup>148</sup> 141 S. Ct. at 1812; see also *Matter of Fajardo Espinoza*, 26 I&N Dec. 603, 605 (BIA 2015) (“We do not dispute that an alien who was granted FUP benefits has a ‘status’ for immigration purposes.”).

the United States remain subject to deportation for the same reasons as existed prior to his or her departure” and that “[t]he deportation proceedings could go forward on the basis of the order to show cause issued prior to the alien’s departure.”<sup>149</sup> The AAO maintained in *Matter of Z-R-Z-C-* that the 1993 opinion supported its view that travel and return should not affect the individual’s immigration posture, but the opinion offers no support for such a broad statement. The focus of the 1993 opinion was TPS recipients who were in *deportation* proceedings, i.e., persons who had already been admitted or effected an entry. Accordingly, “admitting” them upon return would be of no consequence to the status of their *deportation* proceedings.<sup>150</sup>

The AAO also sought to draw support from the 1992 INS General Counsel opinion, discussed earlier in this memorandum, advising that, following MTINA, TPS and FUP travel no longer should be processed via advance parole and parole. The AAO noted that the INS General Counsel had “concluded that TPS recipients ‘must be given the *same status and the same incidents of status as those possessed before departure*, if they are inspected and admitted’ and that “[d]eportation rights cannot be extinguished by the travel authorization provisions.”<sup>151</sup> We believe that the AAO misread the 1992 opinion, which supports the view that returning TPS travelers be admitted upon return and therefore not be subject to exclusion proceedings.

Indeed, the AAO’s decision in *Z-R-Z-C-* runs in tension with another INS General Counsel opinion issued in 1993.<sup>152</sup> In that opinion, the INS General Counsel advised that a Chinese national seeking to establish eligibility for adjustment of status consistent with the Chinese Student Protection Act of 1992 (CSPA) who had entered without inspection and then traveled with advance parole could meet the “inspected and admitted or paroled” requirement of INA § 245(a) because they would be paroled upon return.<sup>153</sup> The General Counsel clarified, however, that “[o]ut of status [Chinese] nationals cannot be inspected and admitted, since they are not ‘clearly and beyond a doubt entitled to land.’” “Unlike [noncitizens] in TPS,” the General Counsel noted, citing MTINA, “there is no statute which would permit the Service to ‘admit’ these out of status [Chinese] nationals.”<sup>154</sup> The General Counsel also recognized that MTINA “altered” the basis of a 1991 opinion in which the INS General Counsel concluded that because TPS travelers are paroled upon return, they meet section 245(a)’s “inspected and admitted or paroled” requirement, explaining that “[a] TPS [recipient] who travels abroad is now, generally, not paroled upon return but ‘inspected and admitted in the same immigration status the alien had at the time of departure,’” even if they had initially entered without inspection.<sup>155</sup> Accordingly, the General Counsel well understood MTINA as providing for the

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<sup>149</sup> Memorandum from Paul W. Virtue, Acting General Counsel, INS, *Your CO 1810.6-C Memorandum of September 15, 1992: Travel Permission for Temporary Protected Status (TPS) Registrants*, Genco Op. 93-51, 1993 WL 1503998 (Aug. 4, 1993).

<sup>150</sup> By contrast, were a TPS recipient who was the subject of ongoing *exclusion* proceedings to travel and be “admitted” upon return under MTINA, the INS likely would have had to move to terminate the exclusion proceedings and commence deportation proceedings.

<sup>151</sup> *Matter of Z-R-Z-C-* at 8 (quoting 1992 Genco Op. 92-10 at 1) (emphasis added in *Matter of Z-R-Z-C-*).

<sup>152</sup> Memorandum from Paul W. Virtue, Acting General Counsel, INS, Genco Op. No. 93-56, *Your HQ 245-C Request for Legal Opinion Regarding Eligibility for Adjustment of Status under CSPA of Person Who Entered Without Inspection* (Aug. 10, 1993).

<sup>153</sup> *Id.* at 4.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 3.

inspection and *admission* of TPS recipients who had initially entered without inspection and now were returning from authorized travel abroad and that such inspection and admission satisfied section 245(a).

Of course, satisfying section 245(a)'s inspection and admission or parole requirement does not mean that the individual will be eligible for adjustment of status. Section 245 imposes several other eligibility requirements. The applicant, for example, must demonstrate that they have an immigrant visa immediately available to them and that they are admissible to the United States. That they were admitted into TPS upon return from authorized TPS travel does not eliminate or waive section 245's admissibility requirement.

C. Use of Parole Procedures for TPS Travelers is Contrary to MTINA

Although we have serious concerns about the legal viability of the holding in *Matter of Z-R-Z-C-*, we find merit in the AAO's view that MTINA is best understood as precluding the continued use of DHS's parole authority and procedures as the mechanism to allow TPS travelers to re-enter the United States. For the reasons explained above,<sup>156</sup> we agree that despite the long history of using parole to facilitate travel for TPS recipients, that practice is difficult to reconcile with MTINA.<sup>157</sup>

The Policy Memorandum that accompanied the *Matter of Z-R-Z-C-* decision correctly noted that individuals who had traveled in the past with the understanding that they would be paroled back into the United States, with attendant consequences for eligibility for adjustment of status, had engendered significant reliance interests in the previous policy, and made the decision's holding only applicable to trips abroad that took place after its adoption.<sup>158</sup> However, nothing in the opinion or subsequent DHS policies altered the process going forward for TPS recipients seeking to travel overseas, meaning that even now they apply for and receive an advance parole document using Form I-131 and are treated as parolees when they arrive at a port of entry. *Matter of Z-R-Z-C-* instructs USCIS, when adjudicating applications for adjustment of status, to deem such noncitizens as not having been paroled into the country despite the fact that they applied for advance parole before travel and were, in fact, paroled in by CBP upon return. That approach is not only legally suspect but also confusing and counterintuitive. It is not logical to simply say that the Department is no longer treating these travelers as parolees for one

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<sup>156</sup> See pp. 15-17, note 121 supra.

<sup>157</sup> The canon of congressional acquiescence or ratification, which the Supreme Court has employed only in limited circumstances and only "with extreme care," is of little assistance here. *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 169 (2001). Although Congress did amend section 304(c) of MTINA in IIRIRA, it did so only by making minor conforming updates to the statutory citations to the newly designated TPS and cancellation-of-removal provisions. See IIRIRA § 308(g)(1), (8)(A)(ii), (8)(C); see also *Pub. Citizen, Inc. v. U.S. Dep't of Health and Human Servs.*, 332 F.3d 654, 668 (D.C. Cir. 2003) (contrasting *Alexander v. Sandoval*, 532 U.S. 275, 292 (2001) ("[W]hen Congress has not comprehensively revised a statutory scheme but has made only isolated amendments, ... [i]t is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of the [agency's] statutory interpretation." (quotation marks omitted)), and *Barnhart v. Walton*, 535 U.S. 212, 220 (2002) (according weight where "Congress has frequently amended or reenacted the relevant provisions without change" (emphasis added))). Moreover, there is no evidence that Congress was familiar with the administrative practice at the time, let alone that it endorsed in any way the former INS's continued use of parole in lieu of admission. See *Pub. Citizen*, 332 F.3d at 669.

<sup>158</sup> USCIS Policy Memorandum PM-602-0179 (Aug. 20, 2020).

purpose while continuing to call them parolees and to use the same forms, terminology, and processes at ports of entry.

As noted previously, the existing TPS travel regulation at 8 C.F.R. § 244.15 continues to refer to advance parole as the required means of requesting and granting permission to travel.<sup>159</sup> That regulation was promulgated prior to the passage of MTINA and has not been amended to conform with MTINA. Although agencies generally are bound by their own regulations,<sup>160</sup> this regulation was abrogated by the MTINA travel provision.<sup>161</sup> It is well settled that a statute overrides a preexisting regulation when the “regulation conflicts with [the] subsequently enacted statute.”<sup>162</sup> “Even a regulation that is not ‘technically inconsistent with the statutory language’ is invalid ‘when that regulation is fundamentally at odds with the manifest congressional design.’”<sup>163</sup> That said, regardless of whether the agency elects to retain the *Matter of Z-R-Z-C-* policy, DHS should make clarifying and conforming amendments to section 244.15.<sup>164</sup> In the meantime, the regulation’s references to advance parole may reasonably be construed to encompass any other advance, discretionary travel authorization, which presumably also will be included in a modified version of the Form I-131 and its instructions or a new TPS-specific variation of that form.

## V. CONCLUSION

A careful review of relevant statutes, legislative history, case law, context, and past practice indicates that inspecting and admitting eligible travelers into TPS is the correct and, in any event, best available reading of the statutory provisions that address authorized travel by TPS recipients. Although the traditional approach to TPS travel, utilizing DHS’s parole authorities, was generally accepted for thirty years, it was implemented against the advice of counsel and is very likely not a permissible reading of the statute. The interpretation set forth in *Matter of Z-R-Z-C-* and adopted as USCIS policy likewise appears contrary to the text of MTINA and INA § 245 given the well-understood meaning of “inspected and admitted” and immigration “status” at the time of MTINA’s enactment, and as such is highly likely to be rejected by reviewing courts as impermissible or unreasonable.

We recognize that the legal advice provided in this memorandum likely raises significant policy and operational considerations, including whether relevant regulations and policy guidance should be revised and whether a new interpretation could or should be implemented retroactively (which we do not address here). Whatever approach is chosen, any significant change in policy regarding the effects of travel under MTINA would need to be explicitly and

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<sup>159</sup> There is a cognate EOIR regulation at 8 C.F.R. § 1244.15, but EOIR has no role in considering requests for advance permission to travel.

<sup>160</sup> See *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 266-68 (1954).

<sup>161</sup> See *Duarte*, 27 F.4th at 1060 n.13 (“Parole has a specific meaning within the statutory framework governing immigration, see 8 U.S.C. § 1182(d)(5)(A), and applying that meaning in the context of TPS beneficiaries returning from travel abroad is squarely contrary to MTINA’s requirement that such aliens be ‘admitted in the same immigration status’ they held prior to departure. Thus, to the extent promulgated regulations call for or authorize paroling returning TPS beneficiaries into the country, those regulations are invalid.”).

<sup>162</sup> *Farrell v. United States*, 313 F.3d 1214, 1219 (9th Cir. 2002).

<sup>163</sup> *United States v. Kahn*, 5 F.4th 167, 174-75 (3d Cir. 2021) (quoting *United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 26 (1982)).

<sup>164</sup> We similarly recommend this course of action with respect to the FUP travel regulation at 8 C.F.R. § 236.16.

sufficiently justified as agency action. The APA and subsequent case law require that the Department carefully consider all “important aspect[s] of the problem.”<sup>165</sup> This can include the advantages and disadvantages of the proposed change, including the policy implications and effects on TPS recipients who may have relied on the previous interpretations, as well as the legal arguments described above.<sup>166</sup> OGC stands by to assist with these and any other legal questions that may arise as the Department considers these important questions.

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<sup>165</sup> *Motor Vehicle Mfrs. Ass’n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

<sup>166</sup> See *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020); *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221-22 (2016); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).