



Employment Authorization Issues for Temporary Protected Status, Asylees, and Refugees

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I. What is TPS and how do Employers confirm Employment Authorization?

Verifying whether employees in TPS status have current authorization to work is a difficult burden for employers, due to the constantly changing nature of the TPS program. This memorandum is an overview of employment authorization for individuals in Temporary Protected Status ("TPS").

The current list of TPS designated countries includes **El Salvador, Honduras, Nicaragua, Liberia, Somalia, and Sudan**. This list is subject to change, and no action should be taken without first consulting the federal government's current list of TPS designated countries.

The list of TPS designated countries changes frequently, as the Attorney General must renew a country's eligibility for TPS approximately every two years, and can cancel the eligibility at any time. Announcements about changes to important deadlines are only published in the Federal Register, which few employers read. Employers must therefore rely upon news articles and legal bulletins to stay informed of current developments regarding the TPS program.

Perhaps the most complicated issue for employers is the unique "auto-extension" of Employment Authorization Documents under TPS. This phenomenon, found nowhere else in U.S. immigration law, occurs because changes in the TPS program occur faster than the federal immigration service is able to process the resulting paperwork. Under the auto-extension system, it is possible that an Employment Authorization Document that has clearly expired on its face may nevertheless be valid due to an announcement published in the Federal Register. Employers must therefore be very cautious before taking any adverse employment action against an employee for perceived lack of work authorization.

Current List of Designated Countries

Countries that are currently designated by the Attorney General to be part of the Temporary Protected Status program:

Country	Periods of required initial registration	Must have been physically present in the U.S. on or before this date	Must have continuously resided in the U.S. since this date	TPS currently extended until:	EADs auto-extended until:
Burundi	11/4/1997 – 11/2/1999	11/4/1997	11/4/1997	5/2/2009	-

TPS terminated
and not
renewed

El Salvador	3/9/2001 – 9/9/2002	3/9/2001	2/13/2001	9/9/2010	9/9/2009
Honduras & Nicaragua	1/5/1999 – 8/20/1999	1/5/1999	12/30/1998	7/5/2010	7/5/2009
Liberia	-	-	-	3/31/2010	Unclear; announcement expected from DHS.
Somalia	9/16/1991 – 9/16/1992	9/16/1991	9/16/1991	3/17/2011	3/17/2010 -
(re- designation)	-	-	-	-	-
Sudan	11/4/1997- 11/3/1998	-	-	5/2/2010	5/2/2009
(re- designation)	-	-	-	-	-
	10/7/2004 – 4/5/2005				

A. Introduction to Temporary Protected Status

Temporary Protected Status is a form of legal immigration status that allows individuals from certain countries to remain in the U.S. temporarily due to unsafe or turbulent circumstances in their home country. Individuals present in the U.S. can only qualify for TPS if the U.S. Attorney General has made a public determination that their home country has been stricken by a serious disruption, such as war, a natural disaster, famine, or disease. During the time that an individual's home country is covered by a TPS designation, the individual cannot be deported to that country and will be permitted to live and work in the U.S.

There are several circumstances under which the Attorney General may determine that a country has qualified for a TPS designation. These include an on-going armed conflict that poses a serious threat to safety, a natural disaster or epidemic of disease, or an extraordinary and temporary condition that prevents citizens of that country from returning home safely. In some cases, the Attorney General will designate the country for TPS based on one of the above factors, and then a second circumstance will arise causing the Attorney General to re-designate the country based upon the new occurrence. This "re-designation" results in new deadlines being issued, and a new

category of individuals being eligible for TPS from that particular country. Such re-designations of TPS are announced by the Attorney General in the Federal Register.

One major downside to TPS is that once the Attorney General determines that conditions in the individual's home country have improved sufficiently, the country's TPS designation can be terminated. Once this termination occurs, any citizen of that country present in the United States in TPS must return home, unless that individual qualifies for legal immigration status on another basis.

B. Application Procedure

An individual must affirmatively apply for TPS by submitting an application to the U.S. Citizenship and Immigration Services, a division of the Department of Homeland Security. Only citizens of countries that have been designated for TPS by the Attorney General are eligible to apply. The applicant must also have been physically present in the U.S. on a specific date determined by the Attorney General, and must have been continuously residing in the U.S. for a certain period of time. Applicants who have committed certain crimes may be deemed ineligible for TPS. USCIS will grant TPS for a period ranging from 6 to 18 months. During the validity period of the TPS, the individual may travel abroad only if he or she first applies for and is granted a special travel document called "advance parole."

An individual must submit an application for TPS during the "registration period," which is a certain window of time announced by the Attorney General through a notice in the Federal Register. If an individual fails to apply for TPS during this time, it will be very difficult to submit an application at a later date. A very limited exception exists for individuals to apply late, through a process called "late registration." To apply after the registration period has closed, the individual must have been in one of several specifically enumerated immigration statuses, had that status expire, and had applied for TPS within 60 days after the expiration of that status.

An individual may apply for TPS at any time if he or she is the spouse or child of a person already granted TPS, so long as that relationship existed at the time that the spouse or parent originally applied for TPS.

C. Automatic Work Authorization

An individual granted TPS is automatically eligible to work in the United States. To demonstrate this eligibility to work, the individual must apply for an Employment Authorization Document ("EAD"). The EAD is sometimes referred to by its technical name, the "I-766." If an application for the EAD accompanied the original application for TPS, then the EAD will be valid for the period of the TPS designation or for one year, whichever period is shorter. An EAD which is granted based upon an application for TPS will be designated as "A-12" or "C-19" in the "Category" section on the face of the card. The EAD can only be renewed if the TPS designation for the individual's country of citizenship is extended by the Attorney General. The Attorney General announces whether the extension will be granted by placing a notice in the Federal Register.

D. Automatic Extensions of Employment Authorization Documents

One of the most vexing challenges for employers is keeping track of when EADs based upon TPS applications actually expire. This is because of a unique rule which automatically extends the validity period of an EAD if an individual has applied to extend his or her TPS. Perhaps most challenging for employers, the specific date to which the EAD has been extended is announced in the Federal Register, which is not commonly read outside of government. Therefore, employers who do not subscribe to an immigration-related news source may not receive word of the extension. The purpose of the automatic extension is to prevent a gap in employment between the time the individual's EAD expires and a new EAD is produced and mailed to the applicant.

If an employee's EAD has expired, the employer is required to accept as proof of continued work authorization a copy of the Federal Register notice announcing an automatic extension of EADs for TPS holders of a certain nationality. In some cases, the TPS holder will receive a sticker affixed to his or her EAD noting that it has been extended until a replacement card can be issued. Even if no sticker is affixed, the employer is responsible for consulting the Federal Register notice to determine whether this EAD, looking specifically at its eligibility category and date of expiry listed, is auto-extended. According to the Office of Special Counsel for Immigration-Related Unfair Employment Practices, the employer may be penalized for taking adverse employment action upon an employee whose EAD appears to have expired, but which has actually been extended by operation of law.

E. Termination of Temporary Protected Status

Because TPS is granted only for a limited period of 6 to 18 months, an individual must apply to renew his or her TPS status during a specific period of time called "re-registration." The dates of the re-registration period are announced in the Federal Register. An individual can lose TPS by filing a renewal application during the 60 day "re-registration" window. This 60 day window occurs at the end of each 6 to 18 month TPS time period, meaning that TPS holders are required to constantly be alert to announcements regarding the TPS designation relevant to their home country.

The Attorney General also has the authority to terminate a country's designation under the TPS program, meaning that all citizens of that country present in the United States in TPS will be required to leave the country (unless they have a valid immigration status in addition to or apart from TPS). The Attorney General is required to give 60 days notice of termination of a TPS designation, and to publish this notice in the Federal Register. One complicating aspect of the termination process is that even if a country is removed from the list of TPS designated countries, TPS holders from that country can remain in the U.S. until the expiration of their individual grant of TPS. Moreover, an EAD that is based upon a grant of TPS remains valid until the end of its validity period, even if that individual's country of citizenship is removed from the TPS designation list.

II. Employment Authorization for Asylees or Refugees

An individual who has been granted asylum, or who has been admitted into the U.S. as a refugee, has automatic authorization to work in the United States. In the case of a refugee, he or she will be issued a Form I-94 Arrival/Departure Record by the border officer at the port of entry. This I-94

issued a Form I-94 Arrival/Departure Record by the border officer at the port-of-entry. This I-94 card will indicate that the individual has been admitted into the country in refugee status, and automatically gives the refugee 90 days of work authorization. During this 90 days, USCIS will manufacture an Employment Authorization Document that will be sent directly to the refugee. When an employer who has hired a refugee completes a Form I-9 on behalf of the employee, the employer should accept the I-94 card as evidence of 90 days of employment authorization beginning on the day the employee is hired. Upon conclusion of the 90 day period, the refugee must present an EAD to evidence continued authorization to work.

An individual granted asylum in the United States, called an "asylee," is also given automatic authorization to work. An asylee has several options for showing proof of this work authorization. First, the asylee may apply for an Employment Authorization Document from USCIS. Asylees who are using an EAD to show work authorization must remember that the EAD will expire, and work authorization lapses until a replacement EAD is received. Second, the asylee may show an original order from an Immigration Judge granting asylum. This order must be printed on official letterhead of the U.S. Department of Justice, Executive Office of Immigration Review. Third, the asylee may present a Form I-94 Arrival/Departure Record that has been stamped to indicate the grant of asylum. Work authorization stemming from an order from an Immigration Judge granting asylum or a Form I-94 indicating asylee status never expires, in contrast to an EAD which is valid only for a set period of time.

III. Conclusion

Due to the ever-changing nature of TPS designation for the countries of El Salvador, Honduras, Nicaragua, Liberia, Somalia, and Sudan; the need for tracking of auto-extension of employment authorization and the possibility of less-recognized Asylee/Refugee status of foreign nationals, employers must carefully review TPS and Asylee/Refugee documents from individuals for I-9 compliance and consult with legal counsel as needed to determine acceptability for work authorization, if the documents are acceptable based on the current legal guidance and updates from the Department of Homeland Security.