



October 26, 2018

L. Francis Cissna, Director
U.S. Citizenship and Immigration Services
111 Massachusetts Avenue, NW
Washington, D.C. 20008

RE: HAITIAN, SALVADORAN, AND SYRIAN TPS PROCESSING DELAYS AND AUTOMATIC WORK AUTHORIZATION EXTENSIONS

Director Cissna:

We write regarding U.S. Citizenship and Immigration Services (USCIS) processing delays that have resulted in certain Temporary Protected Status (TPS) applicants not receiving Employment Authorization Documents (EADs) prior to the expiration dates of their respective 180-day automatic work authorization periods. We respectfully request an in-person engagement to discuss how these delays are affecting Haitian, Salvadoran, and Syrian TPS holders, their families, and their employers as well as the compounding issues surrounding USCIS' new automatic extension of work authorization process.

The Catholic Legal Immigration Network, Inc. (CLINIC) supports a network of over 330 immigration legal services organizations across the country, the vast majority of which serve TPS holders. Some of these charitable organizations are also employers of TPS holders. The issues surrounding TPS EAD processing delays came to our attention through our network as well as partner organizations. Based on the information collected, the most efficient way to relay this information would be an in-person engagement, during which we hope to: (a) discuss the extent of the delays and related issues; (b) share feedback from legal service providers regarding challenges and recommendations on best practices; and (c) identify strategies to increase operational efficiency, improve communication, and prevent reoccurrence of the delays. Specifically, we seek a productive dialogue on the following:

I. Clarification regarding USCIS resolution to TPS processing delays and the decision to depart from past practice

We are aware of at least three situations in the past 16 years in which USCIS was unable to process TPS-related EAD applications (Form I-765) during 180-day automatic extensions of work authorization associated with a TPS designation decision.¹ In these situations, USCIS published Federal Register Notices

¹ 66 Fed. Reg. 35270 (July 3, 2001), www.federalregister.gov/documents/2001/07/03/01-16745/automatic-extension-of-work-authorization-for-hondurans-and-nicaraguans-under-temporary-protected; 70 Fed. Reg. 39325 (July 5, 2005), www.federalregister.gov/documents/2005/07/07/05-13401/automatic-extension-of-employment-authorization-documentation-for-honduran-and-nicaraguan-tps; 82 Fed. Reg. 12629 (March 6, 2017),



granting subsequent automatic extensions of work authorization to ensure TPS holders did not lose work authorization because of unusual case processing delays.² Today, backlogs in processing have become routine for USCIS. This is despite increasing in filing fees (borne by applicants) that have been justified by the need for additional resources to address backlogs.³

In the most recent cases for Haiti, El Salvador, and Syria TPS applicants, which occurred in late July and September, USCIS notably departed from the past practice of resolving its failure to timely process pending EAD applications by publishing a new automatic extension in the Federal Register. Instead, USCIS posted an update on the TPS section of its website and physically mailed individual Notices of Continued Evidence of Work Authorization to self-identified, affected applicants, a practice not authorized by the statute establishing TPS or associated regulations, or referenced in USCIS guiding documents such as USCIS' Handbook for Employers M-274.⁴ We understand that this issue affected over 4,500 Haitian TPS holders, approximately 20,000 Salvadoran TPS holders, and over 300 Syrian TPS holders.

We seek clarification from USCIS as to the rationale for its significant deviation from past practice. We recommend USCIS issue Federal Register Notices for the subsequent Haiti, El Salvador, and Syria TPS work authorization automatic extensions, and should this situation occur again with other TPS applications, issue a Federal Register Notice with full instruction to applicants and employers to resolve this issue, based on the below.

A. Individual Notices of Continued Evidence of Work Authorization pose multiple opportunities for error

Unlike Federal Register Notices, which provide blanket and immediate information to all affected applicants and employers simultaneously, Notices of Continued Evidence of Work Authorization are prone to error and delay. Physically mailing a Notice, as opposed to publishing a Federal Register Notice, could result in an eligible TPS holder receiving the Notice late or not at all. In fact, USCIS' Haiti TPS webpage indicates that Notices were not mailed to applicants until *after* the July 21, 2018 expiration date.⁵ This delay created problems for TPS holders trying to demonstrate their work authorization, caused loss of income, jobs, and other consequences. For employers, late Notices cost time, money, and

www.federalregister.gov/documents/2017/03/06/2017-04454/automatic-extension-of-employment-authorization-documentation-for-beneficiaries-under-el-salvadors.

² *Id.*

³ For example, during the last review of fees, USCIS increased the fee for EADs eight percent, from \$380 to \$410. 81 Fed. Reg. 73,292 (Oct. 24, 2017), <https://www.federalregister.gov/documents/2016/10/24/2016-25328/us-citizenship-and-immigration-services-fee-schedule>.

⁴ 8 C.F.R. § 244 (2018); 8 C.F.R. § 274a (2018); USCIS Handbook for Employers M-274 (July 2017), www.uscis.gov/i-9-central/handbook-employers-m-274.

⁵ Temporary Protected Status Designated Country: Haiti, USCIS, www.uscis.gov/humanitarian/temporary-protected-status/temporary-protected-status-designated-country-haiti.



disrupt productivity. Employers undertook human resources analysis, engaged employment counsel, and planned for workers losing work authorization for indeterminate periods of time. The process of issuing individual Notices also creates risks that the Notices will contain incorrect information and appears to have retarded SAVE system updates, which would have consequences for TPS holders who have complied with all requirements for maintaining their work authorization and the families that depend upon their income.⁶

B. Notices of Continued Evidence of Work Authorization are operationally wasteful and inefficient

USCIS' issuance of thousands of individual Notices as opposed to publishing a Federal Register Notice requires considerable resources, including identifying all affected applicants, generating the Notices, the mailing process, and providing customer service for any issues or errors. This is particularly concerning as the problem itself originates from another operational inefficiency within the agency: the inability to process TPS and EAD applications within a six-month period. As noted above, the need to issue a subsequent automatic extension of work authorization for TPS holders is rare in the agency in our examination of the past several decades. Furthermore, these operational issues appear to be part of a larger trend related to TPS. For example, CLINIC is also concerned about the unprecedented, consistent, lengthy delays of TPS decision Federal Register Notices under the current administration, which we have raised to both USCIS and the U.S. Department of Homeland Security (DHS) on multiple occasions.

C. Questions about legal sufficiency of Notices of Continued Evidence of Work Authorization for I-9 purposes

We seek additional information about USCIS' departure with past practice and its position on the legal sufficiency of Notices of Continued Evidence of Work Authorization for I-9 purposes as opposed to resolving this issue via Federal Register Notice. Further, we are concerned as to whether this practice has had time for sufficient inter-agency review. Form I-9 directs employers to accept expired Employment Authorization Documents, or EADs, when they have "been extended by regulation or a Federal Register Notice."⁷ It appears that a Notice of Continued Employment Authorization does not satisfy either of these requirements under the plain language of Form I-9, and employers may not accept this notice as evidence of employment authorization.⁸ If an applicant does not receive a Notice, USCIS asks employers to rely on information posted on a page from the USCIS website. However, the USCIS

⁶ Salvadoran TPS holders are parents to 192,700 U.S. citizen children; Haitian TPS holders are parents to 27,000 U.S. citizen children. Robert Warren and Donald Kerwin, *A Statistical and Demographic Profile of the US Temporary Protected Status Populations from El Salvador, Honduras, and Haiti*, JOURNAL ON MIGRATION AND HUMAN SECURITY, Vol. 5 No. 3 (2017), <http://cmsny.org/publications/jmhs-tps-elsalvador-honduras-haiti/>.

⁷ I-9, Employment Eligibility Verification, www.uscis.gov/i-9.

⁸ *Id.*



website posting, which is not a regulation or Federal Register Notice, does not appear to conform with any employment verification for I-9 purposes.

II. Lack of USCIS communications, outreach, and consequences as a result of USCIS processing delays and lack of notice

USCIS' failure to timely process TPS-related EAD applications, provide advance notice that cases would not be processed in time, and the departure from past practice in resolving this issue is harmful to TPS holders, the families that depend upon their wages, and American businesses who depend upon skilled and reliable workers. TPS holders have paid \$485 to DHS for the Form I-765 processing and biometrics fees and complied with re-registration requirements. In the case of the Haitian TPS automatic extension that expired on Saturday, July 21, 2018, USCIS' action and communication came too late for many workers, employers, and legal representatives to action appropriately.⁹ For employers who rely upon workers during the weekend, but have human resources staff that work more traditional hours during the week, this presented a significant challenge. In the case of Haiti, the USCIS posting of an update to its website *the day before* the automatic extension expiration date was a sharp departure from prior practice and required legal analysis regarding sufficiency and processes for I-9 reverification. As we understand, USCIS did not mail Notices of Continued Evidence of Work Authorization until the day *after* the automatic extension expiration date. Because the mailing was sent via U.S. Postal Service, many applicants did not receive their Notices until 7 – 10 days later.

In the case of El Salvador, USCIS chose to follow a similar process of issuing individual Notices of Continued Work Authorization, despite concerns raised by advocates and employers. In this case, such concerns were escalated in advance of the impending Labor Day holiday which was just prior to the automatic extension expiration on September 5, 2018. The USCIS webpage update came just four days before the automatic extension expiration date with Notices of Continued Evidence of Work Authorization potentially not arriving until the day before the expiration date.¹⁰ Despite desperate calls by Salvadoran TPS holders, representatives, and employers, USCIS appeared unable to troubleshoot the issue despite the recent experience with Haitian applicants and unable to prevent this from happening to another cohort of applicants. When the issue repeated yet again at the next auto-extension expiration date for Syria, on September 27, 2018, USCIS only gave the affected population seven days to

⁹ Temporary Protected Status Designated Country: Haiti, USCIS, www.uscis.gov/humanitarian/temporary-protected-status/temporary-protected-status-designated-country-haiti.

¹⁰ Temporary Protected Status Designated Country: El Salvador, USCIS, www.uscis.gov/humanitarian/temporary-protected-status/temporary-protected-status-designated-country-el-salvador.



address any issues with Notices of Continued Work Authorization.¹¹ If USCIS is not able to complete processing in six months, it should offer solutions well in advance, not on the brink of expiration.

Notably, USCIS has failed to conduct national stakeholder engagements to share information regarding the use of the Notices nor has it conducted any social media outreach.¹² USCIS' last-minute and insufficient actions caused needless stress and anxiety to an already vulnerable population and negatively impacted American businesses. We recommend that USCIS schedule stakeholder engagements and develop a comprehensive outreach plan regarding its course of action (which again deviated from past practice) in order to mitigate harm and answer questions related to loss of income, employment, driver's licenses, etc.

We appreciate your consideration of our request and look forward to your response. Again, we request in-person engagement to discuss these issues in detail, troubleshoot together, and work to ensure additional TPS applicants are not impacted.

Sincerely,

Jill Marie Bussey
Director of Advocacy
Catholic Legal Immigration Network

cc: Kirstjen Nielsen, Secretary of Homeland Security
Julie Kirchner, Citizenship and Immigration Services Ombudsman

¹¹ The USCIS Syria TPS page states, "If you have a pending EAD application and believe you are eligible for the additional automatic extension but do not receive the Notice of Continued Evidence of Work Authorization by Sept. 20, 2018, please contact USCIS at 202-272-8377." The automatic extension expiration date was Sept. 27, 2018. Temporary Protected Status Designated Country: Syria, USCIS, www.uscis.gov/humanitarian/temporary-protected-status/temporary-protected-status-designated-country-syria.

¹² USCIS (@USCIS), Twitter <https://twitter.com/USCIS> (displaying no tweets regarding the notices); *Notes from Previous Engagements*, USCIS, www.uscis.gov/outreach/notes-previous-engagements (last visited Oct. 25, 2018) (indicating no engagements addressed notices).