

November 28, 2018

The Honorable Kirstjen Nielsen  
Secretary of U.S. Department of Homeland Security  
3801 Nebraska Avenue NW  
Washington, D.C. 20530

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

**RE: LEGAL ISSUES WITH NOTICES OF CONTINUED EVIDENCE OF WORK AUTHORIZATION FOR TPS**

Dear Secretary Nielsen and Director Cissna:

The undersigned 70 law professors and scholars<sup>1</sup> write to urge U.S. Citizenship and Immigration Services (USCIS) to employ Federal Register Notices (FRNs), instead of Notices of Continued Evidence of Work Authorization (Extension Notices), to extend employment authorization documents (EADs) for individuals with pending applications for Temporary Protected Status (TPS). USCIS' use of Extension Notices for El Salvador,<sup>2</sup> Haiti,<sup>3</sup> and Syria nationals<sup>4</sup> raises questions regarding their legal sufficiency for employment verification purposes; contributes to the termination of lawfully authorized workers from employment; and violates the Administrative Procedures Act (APA). We urge that USCIS return to the historical practice of employing FRNs to extend EADs.

Generally, DHS provides EADs to TPS holders and, when extending TPS, requires re-registration to maintain TPS prospectively.<sup>5</sup> Upon extending TPS for a country, USCIS regularly issues FRNs to automatically, and for a short term, extend EADs for TPS holders, as USCIS cannot process all re-registrations before the previous grant of TPS expires.<sup>6</sup> TPS holders may present their expired EAD and the FRN to their employer as proof of continued evidence of employment authorization. Historically, USCIS also issued additional automatic extensions through FRNs when the initial automatic extension was not sufficient to process outstanding re-registration applications.<sup>7</sup>

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<sup>1</sup> All institutional affiliations are for identification purposes only and do not signify institutional endorsement of this letter.

<sup>2</sup> U.S. CITIZENSHIP AND IMMIGRATION SERVICES, U.S. DEPARTMENT OF HOMELAND SECURITY, Temporary Protected Status Designated Country: El Salvador (Aug. 31, 2018), <https://www.uscis.gov/humanitarian/temporary-protected-status/temporary-protected-status-designated-country-el-salvador> [hereinafter "USCIS TPS El Salvador Webpage"].

<sup>3</sup> U.S. CITIZENSHIP AND IMMIGRATION SERVICES, U.S. DEPARTMENT OF HOMELAND SECURITY, Temporary Protected Status Designated Country: Haiti (Aug. 31, 2018), <https://www.uscis.gov/humanitarian/temporary-protected-status/temporary-protected-status-designated-country-haiti> [hereinafter "USCIS TPS Haiti Webpage"].

<sup>4</sup> U.S. CITIZENSHIP AND IMMIGRATION SERVICES, U.S. DEPARTMENT OF HOMELAND SECURITY, Temporary Protected Status Designated Country: Syria (Oct. 11, 2018), <https://www.uscis.gov/humanitarian/temporary-protected-status/temporary-protected-status-designated-country-syria> [hereinafter "USCIS TPS Syria Webpage"].

<sup>5</sup> 8 U.S.C. § 1254(a)(1), (b)(3)(C) (West 2018).

<sup>6</sup> U.S. CITIZENSHIP AND IMMIGRATION SERVICES, U.S. DEPARTMENT OF HOMELAND SECURITY, Temporary Protected Status (Oct. 31, 2018), <https://www.uscis.gov/humanitarian/temporary-protected-status> ("Sometimes DHS must issue a blanket automatic extension of the expiring EADs for TPS beneficiaries of a specific country in order to allow time for EADs with new validity dates to be issued. If your country's EADs have been automatically extended, it will be indicated on your country specific pages to the left.").

<sup>7</sup> For example, on July 7, 2005, USCIS published a FRN that, for a subsequent grant, extended the validity of EADs issued to Honduran and Nicaraguan nationals because it could not process and re-issue new EADs for all applicants. In 2017, USCIS issued a FRN that extended the validity of EADs for Salvadoran TPS holders a second time after an extension. See 70 Fed. Reg. 39325 (July 5, 2005), *available at* [www.federalregister.gov/documents/2005/07/07/05-13401/automatic-extension-of-employment-authorization-documentation-for-honduran-and-nicaraguan-tps](http://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), *available at*

For the most recent extensions for El Salvador, Haiti, and Syria, USCIS issued an initial six-month FRN extension but subsequently failed to adjudicate close to 30,000 timely filed re-registrations. These delays affected: (a) upwards of 20,000 Salvadorans;<sup>8</sup> (b) 4,500 Haitians;<sup>9</sup> and (c) 335 Syrians.<sup>10</sup> Instead of abiding by historical precedent and issuing additional FRNs to automatically extend EADs, USCIS issued Extension Notices to extend EADs through March 4, 2019 for Salvadoran TPS holders;<sup>11</sup> January 17, 2019 for Haitian TPS holders;<sup>12</sup> and March 26, 2019 for Syrian TPS holders.<sup>13</sup> Based on our review of past FRNs and interviews with service providers providing decades-long service to TPS recipients, it is our understanding that USCIS has *never* employed Extension Notices to automatically extend EADs for TPS holders.<sup>14</sup>

**Validity for Employment Authorization Verification.** Initially, neither Form I-9 nor the Instructions for Form I-9 state that employers may accept Extension Notices as evidence of employment authorization.<sup>15</sup> Form I-9 directs employers to accept expired EADs only when they have “been extended by regulation or a Federal Register Notice.”<sup>16</sup> USCIS’ website states that TPS holders who did not receive Extension Notices may show employers a print out of USCIS’ website in the interim, even though the website is similarly insufficient for I-9 purposes.<sup>17</sup> Already, legal service providers reported instances of employers terminating TPS holders because the employer did not understand or accept the Extension Notice.<sup>18</sup>

**Violation of the Administrative Procedures Act.** Secondly, USCIS’ decision to utilize these Notices represent an arbitrary, capricious, and irrational action under the APA.<sup>19</sup> As recently as *Judalang*, the Supreme Court has held that an immigration agency’s actions are impermissible if they are “arbitrary,

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[www.federalregister.gov/documents/2017/03/06/2017-04454/automatic-extension-of-employment-authorization-documentation-for-beneficiaries-under-el-salvadors](http://www.federalregister.gov/documents/2017/03/06/2017-04454/automatic-extension-of-employment-authorization-documentation-for-beneficiaries-under-el-salvadors).

<sup>8</sup> Email Interview with Thomas Boodry, Legislative Correspondent, U.S. Senate (Sept. 12, 2018) (Regarding a response from USCIS to the Senator’s office: “As of August 23, 2018, USCIS has accepted 180,200 applications from Salvadoran nationals seeking to re-register their TPS . . . As of August 23, 2018, USCIS has approved 160,008 applications from Salvadoran nationals seeking to re-register their TPS.”).

<sup>9</sup> Email Interview with Samantha Roberts, Counsel, U.S. Senate (July 20, 2018) (Regarding a response from USCIS to the Senator’s office: “There are approximately 4,650 Haitian TPS beneficiaries with pending employment authorization document (EAD) applications (I-765).”).

<sup>10</sup> Anna Giaritelli, *Trump administration automatically extending work authorizations for 335 Syrians with TPS: USCIS official*, WASHINGTON EXAMINER, Sept. 19, 2018, <https://www.washingtonexaminer.com/news/trump-administration-automatically-extending-work-authorizations-for-335-syrians-with-tps-uscis-official>.

<sup>11</sup> USCIS TPS El Salvador Webpage, *supra* note 2.

<sup>12</sup> USCIS TPS Haiti Webpage, *supra* note 3.

<sup>13</sup> USCIS TPS Syria Webpage, *supra* note 4.

<sup>14</sup> Email Interview with Abel Nuñez, Executive Director, Central American Resource Center (Nov. 7, 2018) (on file with author).

<sup>15</sup> U.S. CITIZENSHIP IMMIGRATION SERVICES, U.S. DEPARTMENT OF HOMELAND SECURITY, Form I-9, July 17, 2017, [www.uscis.gov/i-9](http://www.uscis.gov/i-9) [hereinafter “Form I-9”]; U.S. CITIZENSHIP IMMIGRATION SERVICES, U.S. DEPARTMENT OF HOMELAND SECURITY, Instructions Form I-9 (July 17, 2017), [www.uscis.gov/i-9](http://www.uscis.gov/i-9) [“Form I-9 Instructions”].

<sup>16</sup> Form I-9 Instructions, *supra* note 15.

<sup>17</sup> “USCIS TPS El Salvador Webpage, *supra* note 2 (“Until you receive your Notice of Continued Evidence of Work Authorization, you may show your employer your current EAD and this webpage . . .”); USCIS TPS Haiti Webpage, *supra* note 3; U.S. CITIZENSHIP IMMIGRATION SERVICES, U.S. DEPARTMENT OF HOMELAND SECURITY, Who is Issued This Document? (July 17, 2018), <https://www.uscis.gov/i-9-central/acceptable-documents/who-issued-document>. Importantly, USCIS specifically states “[e]mployers may not request documentation that does not appear on the ‘Lists of Acceptable Documents.’” 83 Fed. Reg. 2654 (Jan. 18, 2018) available at <https://www.federalregister.gov/documents/2018/01/18/2018-00885/termination-of-the-designation-of-el-salvador-for-temporary-protected-status>.

<sup>18</sup> Email Interview with Vanessa McCarthy, Supervising Attorney, Immigration and Refugee Services, Catholic Charities of Central Florida (Sept. 17, 2018) (on file with author).

<sup>19</sup> 5 U.S.C. § 706(2) (West 2018).

capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>20</sup> Even if a new policy is seemingly permissible, “it may still be an *unjustified shift from earlier practice*.”<sup>21</sup> The Supreme Court has held that “unexplained inconsistency in agency policy is a reason for holding an interpretation to be an arbitrary and capricious change from agency practice.”<sup>22</sup> Under the APA, an agency cannot alter its previous practice or policy without acknowledging that change or providing a rationale.<sup>23</sup> Here, USCIS replaced a time-tested, effective, and successful administrative practice (e.g. one that uniformly extended EADs for all TPS recipients immediately and consistently), with one more susceptible to delays, errors, miscommunication.<sup>24</sup> Consequently, the use of the notices represents an unjustified shift from earlier procedure and unexplained inconsistency in agency policy, therefore violating the APA. Indeed, to date, USCIS has provided no explanation for why it adopted this practice. Consequently, this change represents an irrational and unexplained agency action, violating 5 U.S.C. § 716(2)(A).<sup>25</sup>

USCIS’ utilization of the notices is also arbitrary as it continues to collaterally employ FRNs to automatically extend employment authorization for other countries. DHS extended TPS for Yemen and Somalia on July 5, 2018 and July 19, 2018, respectively.<sup>26</sup> In doing so, USCIS automatically extended the employment authorization for nationals from these countries for six months through an FRN publication and not through the use of Extension Notices.<sup>27</sup> As recently as October 31, 2018, USCIS announced compliance with the preliminary injunction in *Ramos v. Nielsen*, which required the extension of TPS for certain countries, by issuing an FRN and not Extension Notices.<sup>28</sup> Thus, DHS is irrationally using two different mechanisms, FRNs and Extension Notices, to automatically extend EADs in similar situations. DHS is attempting to achieve the same policy goal using two disparate mechanisms, one of which is demonstrably less effective and a departure from historical trends—further cementing that the decision to employ Extension Notices is irrational and arbitrary.

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<sup>20</sup> *Id.* at (A), (E); *Judulang v. Holder*, 565 U.S. 42 (2011).

<sup>21</sup> *Gulf Restoration Network v. McCarthy*, 783 F.3d 227, 243 (5th Cir. 2015) (emphasis added); *Centro Presente v. United States Dep’t of Homeland Sec.*, Civil Action No. 18-10340, 2018 U.S. Dist. LEXIS 122509, at \*60 (D. Mass. July 23, 2018) (holding that DHS’ new TPS policy was arbitrary and capricious under the APA because the agency did not “‘at least display awareness that it is changing position,’ ‘show that there are good reasons for the new policy,’ and ‘be cognizant that long standing policies may have engendered serious reliance interests that must be taken into account.’”).

<sup>22</sup> *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016).

<sup>23</sup> *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 513-14 (2009)

<sup>24</sup> Letter from Jill Bussey, Director of Advocacy, Catholic Legal Immigration Network, Inc. to L. Francis Cissna, Director, U.S. Citizenship and Immigration Services (Oct. 26, 2018) (on file with author) (“[Extension Notices] created problems for TPS holders trying to demonstrate their work authorization, caused loss of income, jobs, and other consequences. For employers, [Extension] Notices cost time, money, and disrupt productivity . . . The process of issuing individual Notices also creates risks that the [Extension] 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.”).

<sup>25</sup> 5 U.S.C. § 716(2)(A) (West 2018).

<sup>26</sup> Press Release, U.S. Department of Homeland Security, Secretary of Homeland Security Kirstjen M. Nielsen Announcement on Temporary Protected Status for Yemen (July 5, 2018),

<https://www.dhs.gov/news/2018/07/05/secretary-nielsen-announcement-temporary-protected-status-yemen>; Press Release,

U.S. Department of Homeland Security, Secretary of Homeland Security Kirstjen M. Nielsen Announcement on Temporary Protected Status for Somalia (July 19, 2018),

<https://www.dhs.gov/news/2018/07/19/secretary-homeland-security-kirstjen-m-nielsen-announcement-temporary-protected-status-somalia>.

<sup>27</sup> U.S. CITIZENSHIP AND IMMIGRATION SERVICES, U.S DEPARTMENT OF HOMELAND SECURITY, Temporary Protected Status Designated Country: Yemen (Aug. 24, 2018),

<https://www.uscis.gov/humanitarian/temporary-protected-status/temporary-protected-status-designated-country-yemen>;

U.S. CITIZENSHIP AND IMMIGRATION SERVICES, U.S DEPARTMENT OF HOMELAND SECURITY, Temporary Protected Status Designated Country: Somalia (Aug. 27, 2018),

<https://www.uscis.gov/humanitarian/temporary-protected-status/temporary-protected-status-designated-country-somalia>.

<sup>28</sup> See 83 Fed. Reg. 54764 (October 31, 2018), available at

<https://www.federalregister.gov/documents/2018/10/31/2018-23892/continuation-of-documentation-for-beneficiaries-of-temporary-protected-status-designations-for-sudan>.

We strongly encourage the administration to discontinue the untested and insufficient practice of issuing Extension Notices and adhere to its historical use of FRNs. We ask that USCIS issue FRNs for Haiti, El Salvador, and Syria, and prospectively employ FRNs when automatically extending employment authorization. We also ask you to provide clarification as to why USCIS chose to depart from past practices and the legal rationale for doing so.

Thank you for your consideration of this request. If you have any questions regarding this letter, please do not hesitate to contact [advocacy@masadc.com](mailto:advocacy@masadc.com).

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