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 Cisnna:

The undersigned 70 law professors and scholars 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, Haiti, and Syria nationals 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. 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. 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.

1 All institutional affiliations are for identification purposes only and do not signify institutional endorsement of this letter.
6 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.”). 
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; (b) 4,500 Haitians; and (c) 335 Syrians. 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; January 17, 2019 for Haitian TPS holders; and March 26, 2019 for Syrian TPS holders. 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.

Validity for Employment Authorization Verification. Initially, neither Form I-9 nor the Instructions for Form I-9 directs employers to accept Extension Notices as evidence of employment authorization. Form I-9 directs employers to accept expired EADs only when they have “been extended by regulation or a Federal Register Notice.” 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. Already, legal service providers reported instances of employers terminating TPS holders because the employer did not understand or accept the Extension Notice.

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


8 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.”).

9 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).”).


11 USCIS TPS El Salvador Webpage, supra note 2.

12 USCIS TPS Haiti Webpage, supra note 3.

13 USCIS TPS Syria Webpage, supra note 4.

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


16 Form I-9 Instructions, supra note 15.


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

capricious, an abuse of discretion, or otherwise not in accordance with law.”

Even if a new policy is seemingly permissible, “it may still be an unjustified shift from earlier practice.” 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.” Under the APA, an agency cannot alter its previous practice or policy without acknowledging that change or providing a rationale. 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. 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).

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. 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. 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. 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.

20 _Id. at (A), (E); Judulang v. Holder_, 565 U.S. 42 (2011).
21 _Gulf Restoration Network v. McCarthy_, 783 F.3d 227, 243 (5th Cir. 2015) (emphasis added); _Centro Presente v. United States Dept 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.’’)._
24 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.”).

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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.

Sincerely,

Jayesh Rathod  
Professor of Law  
American University Washington College of Law

Shoba Sivaprasad Wadhia  
Samuel Weiss Faculty Scholar and Clinical Professor of Law  
Penn State Law in University Park

Jill E. Family  
Commonwealth Professor of Law and Government  
Widener University Commonwealth Law School

A. Naomi Paik  
Assistant Professor  
University of Illinois, Urbana-Champaign

Alan Hyde  
Distinguished Professor  
Rutgers Law School

Anna Welch  
Distinguished Professor  
University of Maine School of Law

Beth Lyon  
Clinical Professor of Law  
Cornell Law School

Bill Ong Hing  
Professor of Law and Migration Studies  
University of San Francisco School of Law

Carolyn Patty Blum  
Clinical Professor of Law, Emerita  
Berkeley Law, University of California
Dale Rubin  
Professor Emeritus  
Appalachian School of Law

David Baluarte  
Associate Clinical Professor of Law  
Washington and Lee University School of Law

Deborah S. Gonzalez  
Director of the Immigration Law Clinic and Associate Clinical Professor of Law  
Roger Williams University School of Law

Denise Gilman  
Director, Immigration Clinic  
University of Texas School of Law

Diane Uchimiya  
Professor of Law and Director of the Justice and Immigration Clinic  
University of La Verne College of Law

Eduardo R.C. Capulong  
Professor of Law  
University of Montana School of Law

Elissa Steglich  
Clinical Professor  
University of Texas School of Law

Elizabeth Keyes  
Associate Professor  
University of Baltimore School of Law

Elizabeth McCormick  
Associate Clinical Professor of Law  
University of Tulsa College of Law

Elora Mukherjee  
Jerome L. Greene Clinical Professor of Law  
Columbia Law School

Emily Torstveit Ngara  
Visiting Assistant Clinical Professor of Law & Director, Deportation Defense Clinic  
Maurice A. Deane School of Law at Hofstra University

Erica Britt Schommer  
Clinical Associate Professor of Law  
St. Mary’s University School of Law
Ericka Curran  
Professor of Professional Skills  
Florida Coastal School of Law

Estelle M. McKee  
Clinical Professor  
Cornell Law School

Geoffrey A. Hoffman  
Director, Immigration Clinic  
The University of Houston Law Center

Howard S. (Sam) Myers III  
Adjunct Professor of Law  
University of Minnesota Law School

Irene Scharf  
Professor of Law  
University of Massachusetts School of Law

Jacqueline Brown Scott  
Assistant Professor and Supervising Attorney  
University of San Francisco School of Law

Jaya Ramji-Nogales  
I. Herman Stern Research Professor  
Temple Law School

Jennifer Gordon  
Professor of Law  
Fordham University School of Law

Jennifer Lee  
Associate Clinical Professor of Law  
Temple University Beasley School of Law

Jennifer Lee Koh  
Professor of Law  
Western State College of Law

Jonathan Weinberg  
Associate Dean for Research & Faculty Development and Professor of Law  
Wayne State University

Karen Musalo  
Professor and Bank of America Chair in International Law  
University of California, Hastings
Kate Griffith
Associate Professor of Labor & Employment Law
Cornell Law School

Katherine A. Rodriguez
Associate Professor, Immigration Clinic
Barry University School of Law

Kathy Khommarath
Staff Attorney, Program Manager for the Southwestern Law School Pro Bono Removal Defense Program
Southwestern Law School Pro Bono Removal Defense Program

Laila L. Hlass
Professor of Practice
Tulane Law School

Laura A. Hernández
Professor of Law
Baylor Law School

Lauren Gilbert
Professor of Law
St. Thomas University School of Law

Lynn Marcus
Director, Immigration Law Clinic
University of Arizona Rogers College of Law

M. Isabel Medina
Ferris Family Distinguished Professor of Law
Loyola University New Orleans College of Law

Margaret H. Taylor
Professor of Law
Wake Forest University School of Law

Mariela Olivares
Associate Professor of Law
Howard University School of Law

Marisa S. Cianciarulo
Associate Dean for Academic Affairs, Doy & Dee Henley Chair in Law
Chapman University Fowler School of Law

Marjorie Cohn
Professor Emerita
Thomas Jefferson School of Law
Mark E. Wojcik  
Professor of Law  
The John Marshall Law School

Mary Holper  
Associate Clinical Professor  
Boston College Law School

Matthew Hirsch  
Adjunct Professor of Immigration and Nationality Law  
Delaware Law School

Maureen A Sweeney  
Law School Associate Professor  
University of Maryland Carey School of Law

Michael A. Olivas  
William B. Bates Distinguished Chair in Law  
University of Houston Law Center

Michael Sharon  
Adjunct Professor of Law  
Case Western Reserve University School of Law

Paula J. Duthoy  
Adjunct Clinical Instructor  
Mitchell Hamline School of Law

Rachel E. Rosenbloom  
Professor of Law  
Northeastern University School of Law

Rachel Settlage  
Associate Professor of Law  
Wayne State Law School

Ragini Shah  
Clinical Professor of Law  
Suffolk University Law School

Raquel E. Aldana  
Professor of Law  
UC Davis School of Law

Rev. Craig B. Mousin  
Adjunct Faculty  
DePaul University College of Law
Richard A. Boswell  
Professor of Law & Director, Immigrant Rights Clinic  
University of California, Hastings

Sabi Ardalan  
Assistant Clinical Professor  
Harvard Law School

Sabrina Balgamwalla  
Assistant (Clinical) Professor  
Wayne State Law School

Sarah Rogerson  
Clinical Professor of Law  
Albany Law School

Shruti Rana  
Professor of International Law Practice and Director, International Law & Institutions Program  
Indiana University Bloomington

Stephen Yale-Loehr  
Professor of Immigration Law Practice  
Cornell University Law School

Susan Coutin  
Professor  
UC Irvine

Susan I. Nelson  
Adjunct Professor  
Baylor University School of Law

Susannah Volpe  
Visiting Assistant Clinical Professor  
Seton Hall Law School

Ulysses Jaen  
Director & Asst. Professor  
Ave Maria School of Law

Violeta R. Chapin  
Clinical Professor of Law  
University of Colorado Law School

William Quigley  
Professor of Law  
Loyola University New Orleans College of Law