



Management Alert



TPS Ending for El Salvador, Haiti & Nicaragua, and a Short Reprieve for Hondurans Still Waiting to Know Their Fate - Now What?

By Dawn Lurie and Alexander Madrak

Seyfarth Synopsis: *The Department of Homeland Security ends Temporary Protected Status for El Salvador, Nicaragua, and Haiti, affecting close to 300,000 individuals. Employers should be prepared to handle the influx of work authorization automatic extensions, expiring work authorizations, and other Form I-9 issues that may arise.*

What Happened?

On Monday, January 8, 2018, Secretary of Homeland Security Kirstjen M. Nielsen announced the termination of Temporary Protected Status (TPS) for El Salvador. El Salvador's TPS designation was set to expire on March 9, 2018, but Secretary Nielsen delayed termination for 18 months to September 9, 2019 in order to "provide for an orderly transition." This decision affects an estimated 200,000 Salvadoran foreign nationals.

Similarly, Nicaragua's TPS was set to expire on January 5, 2018, but was extended to January 5, 2019. The Department of Homeland Security (DHS) also previously announced the termination of TPS for Haiti. Haiti's TPS termination was delayed for 18 months from the original expiration, with TPS now terminating on July 22, 2019. Together, these decisions affect an estimated 5,300 Nicaraguan and 59,000 Haitian foreign nationals.

DHS has delayed its decision related to the future of TPS for Honduras, a country with an estimated 86,000 TPS beneficiaries. Instead, USCIS published another Federal Register notice, extending Honduras' TPS designation for six months until July 5, 2018.

With the termination of TPS for El Salvador, Nicaragua, and Haiti, fewer than 100,000 persons will remain beneficiaries of TPS. Current TPS beneficiaries may remain in the United States, if eligible to seek an alternative immigration status. For some Salvadorans in particular, this may be possible as there are an estimated 190,000 U.S. citizen children of Salvadoran TPS beneficiaries. As some of them near the age of 21, they will be old enough to file family-based immigration petitions for their parents.

What is TPS and What Should Employers Know About It?

TPS allows foreign nationals to live and work in the United States if the Secretary of Homeland Security designates that the conditions in the foreign country prevent the country's nationals from returning safely, or if the country is unable to handle the return of its nationals. Because decisions to extend TPS have historically taken place with little notice and new Employment Authorization Documents (EADs) take many months to be issued, existing TPS EADs are automatically extended in order to allow for continued work authorization and limit disruption to the workforce.

Form I-9

Human Resources professionals and other individuals performing I-9 related duties should be familiar with how to complete the Form I-9 for individuals with TPS automatic extensions. Where DHS automatically extends the validity date of the employee's EAD, the employee does not need to also present an I-797C, Notice of Action (I-797C). According to a recent notice issued by the Department of Justice, Immigrant and Employee Rights Section (IER) "if your employee has an Employment Authorization Document with an original expiration date of January 5, 2018 and containing the category code 'A-12' or 'C-19,' this EAD is automatically extended and the employee may continue to work without a new one (and without a receipt notice) through the end of the automatic extension period." TPS Honduras EADs have been automatically extended for six months, through July 4, 2018. TPS Nicaragua EADs have been automatically extended for 60 days, through March 6, 2018." USCIS has not yet posted on auto-extensions for El Salvador.

Information on when an employee may choose to show their EAD and I-797C is available in this [USCIS Fact Sheet](#). An I-797C comes in many forms, and the specific type that an employer should watch for is also known as a "Receipt Notice." Further discussion of how to complete a Form I-9 based on an automatic extension will be posted shortly on the [Seyfarth Immigration Blog](#).

What Should Employers Do Now?

To the extent possible, employers with large TPS populations should encourage their employees to file applications for EADs as early as possible; for Salvadorans, it is important they receive the Form I-797C, before March 6, 2018, pending further guidance from USCIS. USCIS has reminded employers that "filing early will help them avoid lapses in their employment authorization documentation."

Furthermore, understanding how to complete, update and maintain the Form I-9 is at the core of immigration compliance. Timely completion and reverification, including recording an automatic extension, are essential to avoid fines and penalties by Immigration and Customs Enforcement (ICE). For a detailed review of how to record TPS and other automatic extensions, visit the posted guidelines on the [USCIS website](#). The automatic extension is an interim (and potentially complicated) step, necessitating additional follow up after the automatic extension expiration and Section 3 updates.

Employers utilizing electronic Forms I-9 should ensure that these interim updates are recorded correctly by the software, both on the I-9 printout and in the electronic audit trail. The immigration regulations at 8 CFR 274a.2 require that whenever an electronic I-9 is created, completed, updated, modified, altered or corrected, an electronic I-9 system must create a secure and permanent record that establishes the date accessed, who accessed it, and what action was taken. Not all electronic I-9 vendors correctly support the complicated process that USCIS requires to record automatic extensions and relevant updates. Accordingly, employers should ensure their vendors are actually adhering to compliance on an ongoing basis, not just taking for granted that everything is correct.

What Should Employers Consider Going Forward?

U.S. companies may wish to conduct an assessment of the number of potentially affected individuals in their employ. As discussed, recent Form I-9 guidance and auto-extension rules generally require employers to now review and match employment eligibility basis codes with I-797C. Reviewing, and perhaps tracking these category codes, which are listed on employment authorization documents, may provide a starting point to assess the impact of the loss of TPS beneficiaries on the workforce. While a discussion of Deferred Action for Childhood Arrivals (DACA) is beyond the scope of this article, some companies are also considering a similar review of Forms I-9 in order to determine the number of employees in DACA status in an effort to plan with an eye towards ensuring workforce stability. Such an undertaking should be implemented with the assistance of competent counsel to ensure that there are no anti-discrimination-based missteps.

With the recent termination of several TPS programs, including that of El Salvador and the possibility of termination for Honduras, the number of potentially affected individuals exceeds 300,000, with some being in the U.S. for two decades. Despite respective countries lobbying the White House, Congress, and other stakeholders to retain their TPS designations, these recent decisions have demonstrated the administration's continued interest in terminating the TPS program. Coupled with the scheduled staggered termination of the DACA program, hundreds of thousands of individuals are set to lose their work authorization throughout 2019. The Seyfarth Immigration Compliance and Enforcement Team will continue to keep employers up to date on Form I-9 obligations as well as the latest news from DHS. Subscribe to our blog [here](#).

If you would like further information, please contact [Dawn Lurie](#) at dlurie@seyfarth.com, or [Alexander Madrak](#) at amadrak@seyfarth.com.

www.seyfarth.com

Attorney Advertising. This Management Alert is a periodical publication of Seyfarth Shaw LLP and should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general information purposes only, and you are urged to consult a lawyer concerning your own situation and any specific legal questions you may have. Any tax information or written tax advice contained herein (including any attachments) is not intended to be and cannot be used by any taxpayer for the purpose of avoiding tax penalties that may be imposed on the taxpayer. (The foregoing legend has been affixed pursuant to U.S. Treasury Regulations governing tax practice.)

Seyfarth Shaw LLP Management Alert | January 10, 2018

©2018 Seyfarth Shaw LLP. All rights reserved. "Seyfarth Shaw" refers to Seyfarth Shaw LLP (an Illinois limited liability partnership). Prior results do not guarantee a similar outcome.