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November 17, 2017

The Honorable Elaine C. Duke
Acting Secretary of Homeland Security
U.S. Department of Homeland Security
Washington, D.C. 20528

RE: Criteria for Extension of Temporary Protected Status Designations

Dear Secretary Duke:

I write to express my view, as an immigration law scholar, regarding the criteria that should guide the decisions of the U.S. Department of Homeland Security (DHS) regarding extensions of Temporary Protected Status (TPS) designations. I write this letter in my individual capacity, and not on behalf of American University. As explained below, my reading of the Immigration and Nationality Act, along with interpretations rendered by DHS over the years, strongly suggest that the Department can and should evaluate a broad range of country conditions factors when determining whether to extend TPS for a designated country.

As you are well aware, INA § 244(b)(1) permits the DHS Secretary to designate a country for TPS when one of three circumstances exist in that country: an armed conflict, environmental disaster, or other “extraordinary and temporary conditions.” For purpose of this letter, I will focus on the latter two bases for designation.

For countries designated for TPS on the basis of INA § 244(b)(1)(B) (environmental disasters), the central consideration is whether, in the aftermath of the natural disaster(s), the country can “handle adequately the return to the state” of its nationals who are in the United States. INA § 244(b)(1)(B)(ii). This criterion squarely applies to the initial designation, but also to extension decisions, which must assess whether “the conditions” for the designation “continue to be met.” *Id.* § 244(b)(3)(A). The INA provides no guidance regarding how to measure a state’s ability to handle the return of its nationals, or regarding the precise “conditions” that DHS should examine in extension decisions. Nevertheless, Federal Register notices regarding TPS extensions help complete our understanding of how the law has been interpreted by the Clinton, Bush, and Obama administrations.

I have carefully examined the criteria examined by DHS in TPS extension decisions for countries designated under INA § 244(b)(1)(B). This analysis reveals that the U.S. government has consistently looked to factors beyond the initial natural disaster, and has examined other dimensions of country conditions that affect the state’s ability to absorb the return of its nationals. These factors include subsequent environmental events, infrastructure concerns (including the availability of housing), economic factors (including unemployment and

underemployment), public health considerations, safety and security, as well as general governance concerns. These factors – even if they occurred well after the initial natural disaster – logically affect recovery efforts and the country’s general ability to handle the return of its nationals. Consideration of these factors is compelled not only by an analysis of prior Federal Register notices, but also by a plain reading of the INA.

A similar analysis applies for countries designated for TPS on the basis of INA § 244(b)(1)(C) (“extraordinary or temporary conditions”). Here, too, the statutory language provides guidance for both designation and extension decisions. For a country to be designated under this provision, the conditions must impede “nationals of the state from returning to the state *in safety*[.]” INA § 244(b)(1)(C) (emphasis added). Similar to the environmental disaster provision – which focuses on the state’s ability to “handle adequately” the return of nationals – the central consideration for this designation is whether or not nationals can safely return to the country of origin. It follows that while an initial designation decision under INA § 244(b)(1)(C) may have centered on a specific set of conditions, any extension decision must necessarily evaluate other factors that would prevent the safe return of nationals. Such a reading is also consistent with how the provision has been interpreted by the U.S. government in its Federal Register notices. For example, Haiti was designated for TPS under this provision due to a confluence of environmental and related humanitarian challenges. *Designation of Haiti for Temporary Protected Status*, 75 Fed. Reg. 3476 (Jan. 21, 2010). Subsequent extensions – including the most recent extension decision – have cited independent factors that affect the safe return of nationals, including more recent natural disasters, public health concerns, and endemic infrastructural challenges. In concluding that TPS for Haiti should be extended, former DHS Secretary John Kelly noted the following:

Extreme poverty, corruption, and low levels of education in Haiti challenge its resilience and have contributed to the government’s longstanding inability to adequately provide for the security, health, and safety of its citizenry.

Extension of the Designation of Haiti for Temporary Protected Status for Haiti, 82 Fed. Reg. 23832 (May 24, 2017). These factors clearly extend beyond the core factors that precipitated the initial TPS designation. This type of analysis, however, is permitted (indeed, compelled) by the statute, and is consistent across TPS extension decisions.

In conclusion, I emphasize that the statutory language and prior interpretations strongly suggest that DHS should consider a broad range of country conditions factors when making TPS extension decisions. I appreciate your careful consideration of my viewpoints, and the time and attention you are investing in this important decision.

Very truly yours,

/s/

Jayesh Rathod
Professor of Law, Washington College of Law
Interim Director, Center for Latin American and Latino Studies
American University



U.S. Citizenship
and Immigration
Services

March 20, 2018

Mr. Jayesh Rathod
Professor of Law, Washington College of Law
4300 Nebraska Avenue, NW
Washington, DC 20016

Dear Mr. Rathod:

Thank you for your November 17, 2017 letter to the Department of Homeland Security (DHS). Secretary Nielsen asked that I respond on her behalf.

I appreciate your concern and your interest in extending Temporary Protected Status (TPS) designations. As you are aware, the Secretary of Homeland Security's authority to designate a country for TPS and to extend or terminate a country's existing designation is based upon specific statutory criteria. *See* Immigration and Nationality Act (INA) § 244(b). U.S. Citizenship and Immigration Services is principally responsible for advising the Secretary on TPS issues and implementing the program.

Prior to the current expiration date for a TPS designation, the Secretary must review conditions in the foreign country and, after consultation with other appropriate federal agencies, determine whether the statutory conditions for TPS continue to be met. If the Secretary determines that the conditions are no longer met with respect to a country, she is required to terminate the designation.

Each TPS decision made by the Secretary is undertaken pursuant to the above-described statutorily-prescribed process, taking into account all factors relevant to determining whether the statutory conditions upon which the TPS designation is based continue to be met. As the current expiration date for each existing TPS designation approaches, the Secretary will evaluate each designation and will determine whether an extension or a termination is warranted, in full compliance with the INA. In addition to consultation with appropriate U.S. Government agencies, the Secretary's review may also include discussions with government officials in the designated country and third-party stakeholders, who provide additional input as to the conditions on the ground in the designated country. This review process facilitates the Secretary's full evaluation of the country conditions and any other factors necessary to determine whether a TPS designation should continue.

Since January 2017, DHS has terminated the TPS designations for Sudan, Haiti, Nicaragua, and El Salvador in accordance with the statute.

Mr. Jayesh Rathod

Page 2

Thank you again for your letter and interest in this important issue. Should you wish to discuss this matter further, please do not hesitate to contact me.

Sincerely,

A handwritten signature in blue ink, appearing to read "L. Francis Cissna". The signature is stylized with a large "L" and a cursive "Cissna".

L. Francis Cissna
Director