No. 21-7

In the Supreme Court of the United States

MERRICK B. GARLAND, ATTORNEY GENERAL, ET AL., PETITIONERS

v.

LEYMIS CAROLINA VELASQUEZ, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

ELIZABETH B. PRELOGAR
Acting Solicitor General
Counsel of Record
BRIAN M. BOYNTON
Acting Assistant Attorney General
CURTIS E. GANNON
Deputy Solicitor General
MICHAEL R. HUSTON
Assistant to the Solicitor General
JEFFREY S. ROBINS
P. ANGEL MARTINEZ
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether, under 8 U.S.C. 1254a(f)(4), a grant of temporary protected status must be treated as an admission into the United States for purposes of a foreign national's application for adjustment to lawful permanent resident status under 8 U.S.C. 1255.

PARTIES TO THE PROCEEDING

Petitioners are Merrick B. Garland, in his official capacity as Attorney General*; Alejandro N. Mayorkas, in his official capacity as Secretary of Homeland Security*; Tracy L. Renaud, in her official capacity as Acting Director of United States Citizenship and Immigration Services (USCIS)*; Donald Neufeld, in his official capacity as Associate Director, Service Center Operations, USCIS; Terri Robinson, in her official capacity as Director, National Benefits Center, USCIS*; Leslie Tritten, in her official capacity as Director, St. Paul Field Office, USCIS; the United States Department of Homeland Security; and USCIS.

Respondents are Leymis Carolina Velasquez and Sandra Ortiz, who were plaintiffs in the district court in No. 18-cv-00733 and appellees in the court of appeals in No. 19-1148; and Gilma Geanette Melgar and Aurelia Concepcion Martinez, who were plaintiffs in the district court in No. 18-cv-1956 and appellees in the court of appeals in No. 19-2130.

---

* Attorney General Garland is automatically substituted for his predecessor under this Court's Rule 35.3. In the courts below, defendants-appellants included Jefferson B. Sessions III, Matthew G. Whitaker, and William P. Barr.

Secretary Mayorkas is automatically substituted for his predecessor under this Court's Rule 35.3. In the courts below, defendants-appellants included Kirstjen Nielsen and Chad F. Wolf.

Acting Director Renaud is automatically substituted for her predecessor under this Court's Rule 35.3. In the courts below, defendants-appellants included Lee Cissna.

Director Robinson is automatically substituted for her predecessor under this Court's Rule 35.3. In the courts below, defendants-appellants included Robert Cowan.

RELATED PROCEEDINGS

United States District Court (D. Minn.):

Leymis V. v. *Whitaker*, No. 18-cv-733 (Nov. 21, 2018)

Melgar v. *Barr*, No. 18-cv-1956 (Apr. 2, 2019)

United States Court of Appeals (8th Cir.):

Velasquez v. *Barr*, No. 19-1148 (Oct. 27, 2020), pet. for reh'g denied (Feb. 3, 2021)

Melgar v. *Barr*, No. 19-2130 (Oct. 27, 2020), pet. for reh'g denied (Feb. 3, 2021)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued Page

Statutes and regulation:

Miscellaneous:

In the Supreme Court of the United States

No. 21-7

MERRICK B. GARLAND, ATTORNEY GENERAL, ET AL., PETITIONERS

v.

LEYMIS CAROLINA VELASQUEZ, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of Attorney General Merrick B. Garland, et al., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case. This Court should grant the petition, vacate the judgment below, and remand for further proceedings in light of its decision in *Sanchez* v. *Mayorkas*, No. 20-315 (June 7, 2021).

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-26a) is reported at 979 F.3d 572. The opinion of the district court in No. 18-cv-733 (App., *infra*, 27a-37a) is reported at 355 F. Supp. 3d 779. The opinion of the district court in No. 18-cv-1956 (App., *infra*, 38a-52a) is reported at 379 F. Supp. 3d 783. The decisions of United States Citizenship and Immigration Services (USCIS)

denying respondents' applications for adjustment of status (App., *infra*, 53a-56a, 57a-60a, 61a-64a, 65a-68a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 27, 2020. A petition for rehearing was denied on February 3, 2021 (App., *infra*, 69a-70a). On March 19, 2020, this Court extended the time within which to file a petition for a writ of certiorari to 150 days from the date of the order of a court of appeals denying a timely petition for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reprinted in an appendix to this petition. App., *infra*, 71a-75a.

STATEMENT

1. In 8 U.S.C. 1255, a provision of the Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*, Congress has "provide[d] a way for a 'nonimmigrant'—a foreign national lawfully present in this country on a designated, temporary basis—to obtain an '[a]djustment of status' making him" a lawful permanent resident (LPR). *Sanchez* v. *Mayorkas*, No. 20-315 (June 7, 2021), slip op. 1 (quoting 8 U.S.C. 1255) (second set of brackets in original). Under Section 1255, "a nonimmigrant's eligibility for such an adjustment to permanent status depends (with exceptions not relevant here) on an 'admission' into this country. And an 'admission' is defined as 'the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.'" *Id.* at 1-2 (quoting 8 U.S.C. 1101(a)(13)(A)). As most relevant here, Section 1255(a) "states that a nonimmigrant may become an LPR only if he has been 'in-

spected and admitted or paroled into the United States.'" *Id.* at 2 (quoting 8 U.S.C. 1255(a)).

Congress has also authorized the Secretary of Homeland Security to grant temporary protected status (TPS) to foreign nationals from a country that is suffering conditions that would make the return of its citizens unsafe or unmanageable. See 8 U.S.C. 1254a. "That status protects [recipients] from removal and authorizes them to work here for as long as the TPS designation lasts." *Sanchez*, slip op. 2. "A person's unlawful entry into the United States will usually not preclude granting him TPS." *Ibid.*; see 8 U.S.C. 1254a(c)(2)(A)(ii); 8 C.F.R. 244.3.

The TPS statute provides that, "[d]uring a period" of TPS, "for purposes of adjustment of status under [Section 1255] * * * , the [TPS recipient] shall be considered as being in, and maintaining, lawful status as a nonimmigrant." 8 U.S.C. 1254a(f)(4). The Executive Branch has long understood Section 1254a to enable a TPS recipient to demonstrate lawful status during a TPS period for purposes of Section 1255(c), but not to alter the inspection-and-admission requirement in Section 1255(a); therefore "[a]n alien who entered the United States without inspection" and later received TPS "cannot satisfy" Section 1255(a) and is "not * * * eligible to adjust" to LPR status on the basis of the TPS grant. 56 Fed. Reg. 23,491, 23,495 (May 22, 1991); see, *e.g.*, *In re H-G-G-*, 27 I. & N. Dec. 617, 621-622, 641 (A.A.O. 2019).

2. Respondents Leymis Carolina Velasquez and Sandra Ortiz (plaintiffs in district court case No. 18-cv-733) are citizens of El Salvador who entered the United States without inspection in 2000 and 1993, respectively. App., *infra*, 29a. They received TPS in 2001 and have held that status continuously since then. *Id.* at

54a, 58a. Respondents Gilma Geanette Melgar and Aurelia Concepcion Martinez (plaintiffs in district court case No. 18-cv-1956) are citizens of El Salvador and Honduras, respectively. *Id.* at 39a-40a. Melgar entered the United States without inspection in 1992, received TPS in 2002, and has maintained TPS since then. See *id.* at 62a-63a. Martinez entered the United States without inspection in 1996, received TPS in 2000, and has held TPS ever since. *Id.* at 66a-67a.

All four respondents applied to USCIS for adjustment to LPR status under Section 1255 based on their immediate-relative relationships with United States citizens. See App., *infra*, 4a. In an attempt to establish that they had been lawfully "inspected and admitted" for purposes of eligibility under Section 1255(a), respondents submitted proof of their TPS status. See *id.* at 4a-5a. USCIS denied respondents' applications, determining that their receipt of TPS was not an inspection or admission for purposes of adjusting status under Section 1255(a). See *id.* at 5a; see also *id.* at 53a-56a, 57a-60a, 61a-64a, 65a-68a.

Respondents sued, claiming that USCIS's denials of their applications for adjustment of status were contrary to law and thus in violation of the Administrative Procedure Act, 5 U.S.C. 701 *et seq*. See App., *infra*, 5a. The district court in both cases granted summary judgment in favor of respondents, concluding that TPS recipients are deemed "inspected and admitted" by Section 1254a(f)(4) and are therefore eligible for adjustment to LPR status. See *ibid.*; see also *id.* at 27a-37a, 38a-52a.

3. The court of appeals consolidated both appeals and affirmed in a divided decision. App., *infra*, 1a-26a. The majority "conclude[d] that § 1254a(f)(4) unam-

biguously requires that TPS recipients be considered 'inspected and admitted' for purposes of adjusting their status under § 1255." *Id.* at 7a. The court observed that Section 1254a(f)(4) provides that TPS recipients "shall be considered as being in, and maintaining, lawful status as a *nonimmigrant*," *id.* at 7a-8a (citation omitted), and it reasoned that "every person with lawful status as a nonimmigrant has been 'admitted' into the United States," *id.* at 8a. As support for that reasoning, the panel majority pointed primarily (*ibid.*) to 8 U.S.C. 1184(a)(1), which provides that "[t]he admission to the United States of any alien as a nonimmigrant shall be for such time and under such conditions as the Attorney General may by regulations prescribe." The court disagreed with those courts of appeals that had reached the opposite conclusion about whether a grant of TPS constitutes an admission, including the Third Circuit's decision in *Sanchez* v. *Secretary United States Department of Homeland Security*, 967 F.3d 242 (2020), aff'd, *Sanchez*, *supra*, No. 20-315. See App., *infra*, 16a n.5.

Judge Loken dissented, reasoning that the government's construction of Section 1254a(f)(4) was reasonable and entitled to deference. App., *infra*, 16a-26a.

After this Court granted the petition for a writ of certiorari in *Sanchez*, *supra*, the government filed a petition for panel rehearing here and a request to hold that petition pending this Court's decision. The court of appeals denied that petition. App., *infra*, 69a-70a.

REASONS FOR GRANTING THE PETITION

This Court should grant a writ of certiorari, vacate the judgment below, and remand for further proceedings (GVR) in light of its recent decision in *Sanchez* v. *Mayorkas*, No. 20-315 (June 7, 2021). The court of appeals affirmed summary judgments for respondents

because it concluded that 8 U.S.C. 1254a(f)(4) requires the government to treat TPS recipients who entered the United States without inspection or admission as having been "inspected and admitted" for purposes of eligibility for adjustment of status under 8 U.S.C. 1255(a). See App., *infra*, 7a-9a. This Court has since reached the opposite conclusion, holding that "[t]he TPS statute * * * deems [a recipient] in nonimmigrant status for purposes of applying to become an LPR. But the statute does not constructively 'admit' a TPS recipient." *Sanchez*, slip op. 6. "So the conferral of TPS does not make an unlawful entrant (like [respondents]) eligible under § 1255 for adjustment to LPR status." *Id.* at 4. A GVR is warranted because this Court's decision in *Sanchez* demonstrates "that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration." *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996) (per curiam).

Indeed, this Court in *Sanchez* rejected the core premise on which the court of appeals relied in this case: that there is an "indissoluble relationship between admission and *nonimmigrant* status." Slip op. 6 (citation omitted). The decision below read 8 U.S.C. 1184(a)(1) to mean that "every person with lawful status as a nonimmigrant has been 'admitted' into the United States." App., *infra*, 8a. But this Court has now explained that "nothing in § 1184 (or any other section) states that admission is a prerequisite of nonimmigrant status—or * * * that the former is a necessary incident of the latter." *Sanchez*, slip op. 7. And "without such an indissoluble link, there is no reason to view the TPS provision's conferral of nonimmigrant status as also a conferral of admission." *Ibid.* (citation and quotation marks omitted). The Court also explained that certain

individuals can "have * * * nonimmigrant status without admission." *Ibid.* Thus, in contrast to the decision below in this case, *Sanchez* found that there is "daylight between nonimmigrant status and admission." *Id.* at 8.

There are no material differences between *Sanchez* and this case, and no independent grounds that could sustain the judgment below. Like the petitioners in *Sanchez*, respondents here are all foreign nationals who entered the United States without inspection or admission and later received TPS. See App., *infra*, 4a. All four respondents attempted to rely solely on their receipt of TPS to establish that they had been inspected and admitted for purposes of eligibility for adjustment to LPR status under Section 1255(a). See *id.* at 4a-5a. The court of appeals adopted respondents' view in holding that USCIS had unlawfully denied each respondent's application for adjustment of status. See *id.* at 7a-9a. This Court's decision in *Sanchez* establishes that the court of appeals erred.

The "Court often 'GVRs' a case * * * when [it] believe[s] that the lower court should give further thought to its decision in light of an opinion of this Court that (1) came after the decision under review and (2) changed or clarified the governing legal principles in a way that could possibly alter the decision of the lower court." *Flowers* v. *Mississippi*, 136 S. Ct. 2157, 2157 (2016) (Alito, J., dissenting from the decision to grant, vacate, and remand); see *Lawrence*, 516 U.S. at 168-169. This case meets that standard. The Court should accordingly grant the petition, vacate the judgment below, and remand the case so that the court of appeals can reverse the district court's grants of summary judgment to respondents.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded for further proceedings in light of *Sanchez* v. *Mayorkas*, No. 20-315 (June 7, 2021).

Respectfully submitted.

ELIZABETH B. PRELOGAR
Acting Solicitor General
BRIAN M. BOYNTON
Acting Assistant Attorney General
CURTIS E. GANNON
Deputy Solicitor General
MICHAEL R. HUSTON
Assistant to the Solicitor General
JEFFREY S. ROBINS
P. ANGEL MARTINEZ
Attorneys

JULY 2021

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 19-1148

LEYMIS CAROLINA VELASQUEZ; SANDRA ORTIZ, PLAINTIFFS-APPELLEES

v.

WILLIAM P. BARR, ATTORNEY GENERAL OF THE UNITED STATES; CHAD F. WOLF, ACTING SECRETARY, DEPARTMENT OF HOMELAND SECURITY; ROBERT M. COWAN, DIRECTOR, NATIONAL BENEFITS CENTER, U.S. CITIZENSHIP AND IMMIGRATION SERVICES; LESLIE TRITTEN, DIRECTOR, ST. PAUL FIELD OFFICE, U.S. CITIZENSHIP AND IMMIGRATION SERVICES; U.S. CITIZENSHIP AND IMMIGRATION SERVICES; U.S. DEPARTMENT OF HOMELAND SECURITY; LEE CISSNA, DIRECTOR, U.S. CITIZENSHIP AND IMMIGRATION SERVICES; DONALD NEUFELD, ASSOCIATE DIRECTOR, SERVICE CENTER OPERATIONS, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, DEFENDANTS-APPELLANTS

AMERICAN IMMIGRATION COUNCIL; AMERICAN IMMIGRATION LAWYERS ASSOCIATION; NORTHWEST IMMIGRANT RIGHTS PROJECT, AMICI ON BEHALF OF APPELLEE(S)

No. 19-2130

GILMA GEANETTE MELGAR; AURELIA CONCEPCION MARTINEZ, PLAINTIFFS-APPELLEES

v.

WILLIAM P. BARR, ATTORNEY GENERAL OF THE UNITED STATES; CHAD F. WOLF, ACTING SECRETARY, DEPARTMENT OF HOMELAND SECURITY; LEE CISSNA,

DIRECTOR, U.S. CITIZENSHIP AND IMMIGRATION SERVICES; DONALD NEUFELD, ASSOCIATE DIRECTOR, SERVICE CENTER OPERATIONS, U.S. CITIZENSHIP AND IMMIGRATION SERVICES; ROBERT M. COWAN, DIRECTOR, NATIONAL BENEFITS CENTER, U.S. CITIZENSHIP AND IMMIGRATION SERVICES; LESLIE TRITTEN, DIRECTOR, ST. PAUL FIELD OFFICE, U.S. CITIZENSHIP AND IMMIGRATION SERVICES; U.S. CITIZENSHIP AND IMMIGRATION SERVICES; U.S. DEPARTMENT OF HOMELAND SECURITY, DEFENDANTS-APPELLANTS

AMERICAN IMMIGRATION LAWYERS ASSOCIATION; AMERICAN IMMIGRATION COUNCIL; NORTHWEST IMMIGRANT RIGHTS PROJECT, AMICI ON BEHALF OF APPELLEE(S)

Submitted: Feb. 13, 2020
Filed: Oct. 27, 2020

Appeals from the United States District Court
for the District of Minnesota

Before: LOKEN, BENTON, and KELLY, Circuit Judges.

KELLY, Circuit Judge.

In these consolidated cases, Appellants (collectively, the government) appeal the district courts'[1] adverse grants of summary judgment. These cases present the same question of statutory interpretation: whether a noncitizen who entered this country without inspection

---

[1] The Honorable Donovan W. Frank and the Honorable Joan N. Ericksen, United States District Judges for the District of Minnesota.

or admission but later received Temporary Protected Status (TPS) may adjust her status to Lawful Permanent Resident (LPR), when an LPR application requires the noncitizen to have been "inspected and admitted" into the United States. See 8 U.S.C. § 1255(a). The district courts in both cases decided the answer is yes: a TPS recipient is deemed "inspected and admitted" and so may adjust her status. After considering the statutory scheme at issue, we affirm.

I. Background

These cases concern two provisions of the Immigration and Nationality Act (INA): the designation of TPS under 8 U.S.C. § 1254a, and the adjustment of status to LPR under 8 U.S.C. § 1255(a). The first provision, § 1254a, authorizes the Attorney General to grant TPS to noncitizens from countries experiencing armed conflict, natural disaster, or other extraordinary circumstances. 8 U.S.C. § 1254a(b)(1)(A)-(B). Individuals with TPS receive temporary protection from removal and authorization to work. Id. § 1254a(a)(1)-(2). TPS has other positive consequences. Relevant here, "for purposes of adjustment of status under section 1255," a TPS beneficiary "shall be considered as being in, and maintaining, lawful status as a nonimmigrant." Id. § 1254a(f)(4).

The second provision, § 1255, governs the adjustment of status to LPR. As a threshold matter, § 1255 requires an applicant to have been "inspected and admitted" into the United States before she can adjust her status. Id. § 1255(a). This provision also bars several classes of persons from adjustment, including certain noncitizens "in unlawful immigration status on the date of filing the application for adjustment of status" and

those who have "failed . . . to maintain continuously a lawful status since entry into the United States." Id. § 1255(c)(2).

The parties disagree as to whether a grant of TPS satisfies § 1255(a)'s threshold "inspected-and-admitted" requirement. Appellees contend that the plain language of § 1254a(f)(4) means that TPS beneficiaries are considered "inspected and admitted" for purposes of § 1255(a). The government disagrees, asserting that because § 1254a(f)(4) does not specifically include § 1255(a)'s "inspected-and-admitted" language, a TPS beneficiary must be separately inspected and admitted to adjust her status under § 1255.

Appellees are TPS beneficiaries whose LPR applications were denied by U.S. Citizenship and Immigration Services (USCIS). Aurelia Concepcion Martinez is a citizen of Honduras who entered the United States without inspection in 1996. After the Attorney General designated Honduras as a TPS country in 1999, she applied for and received TPS. Gilma Geanette Melgar, Sandra Ortiz, and Leymis Carolina Velasquez are citizens of El Salvador who entered the United States without inspection in 1992, 1993, and 2000, respectively. After the Attorney General designated El Salvador as a TPS country in 2001, they applied for and received TPS.

After becoming TPS beneficiaries, Appellees applied to adjust their status to LPR based on having immediate relatives who are United States citizens. USCIS requested evidence of lawful admission pursuant to 8 U.S.C. § 1255(a). Appellees provided proof of their TPS and a copy of Bonilla v. Johnson, 149 F. Supp. 3d 1135 (D. Minn. 2016), where the district court decided a

grant of TPS satisfies § 1255(a)'s "inspected-and-admitted" requirement. Id. at 1142. USCIS nevertheless denied Appellees' adjustment applications, asserting that TPS is not an "admission" for purposes of § 1255(a). USCIS told Appellees there was no administrative appeal, so they brought two separate lawsuits under the Administrative Procedure Act (APA) in the United States District Court for the District of Minnesota. See 5 U.S.C. § 706(2)(A).

The district courts in both cases decided that, based on the INA's unambiguous language, a grant of TPS satisfies § 1255(a)'s "inspected-and-admitted" requirement. This is because TPS recipients are considered inspected and admitted for purposes of § 1255. See 8 U.S.C. § 1254a(f)(4). The district courts found USCIS's contrary interpretation unlawful, reversed its denial of the LPR applications, and granted summary judgment to Appellees. The government timely appealed.

II. Discussion

This court has not yet decided whether TPS recipients who entered the United States without inspection are nevertheless deemed "inspected and admitted" and thus eligible for adjustment of status under 8 U.S.C. § 1255(a). There is a split of authority on the issue. Compare Sanchez v. Sec'y U.S. Dep't of Homeland Sec., 967 F.3d 242, 251-52 (3d Cir. 2020) (holding that a noncitizen who receives TPS is not deemed "inspected and admitted"), petition for cert. filed, No. 20-315 (U.S. Sept. 10, 2020), and Serrano v. U.S. Att'y Gen., 655 F.3d 1260, 1265 (11th Cir. 2011) (per curiam) (same), with Ramirez v. Brown, 852 F.3d 954, 959 (9th Cir. 2017) (holding that, because a TPS recipient must be treated as a nonimmigrant for adjustment purposes, she is

deemed to have met all requirements for nonimmigrant status, including inspection and admission), and Flores v. USCIS, 718 F.3d 548, 552-53 (6th Cir. 2013) (same).

A.

We review de novo the grant of summary judgment, including questions of statutory interpretation. Rajasekaran v. Hazuda, 815 F.3d 1095, 1098 (8th Cir. 2016). Under the APA, courts must set aside an agency decision that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). In reviewing an agency decision, we apply the two-step analysis from Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). See Ortega-Marroquin v. Holder, 640 F.3d 814, 818 (8th Cir. 2011). First, we determine "whether Congress has directly spoken to the precise question at issue." Chevron, 467 U.S. at 842, 104 S. Ct. 2778. At this step, we consider "the language [of the statute] itself, the specific context in which that language is used, and the broader context of the statute as a whole." Lovilia Coal Co. v. Harvey, 109 F. 3d 445, 449 (8th Cir. 1997) (cleaned up). If the statute's meaning is clear, then both the courts and agencies "must give effect to the unambiguously expressed intent of Congress." Chevron, 467 U.S. at 842-43, 104 S. Ct. 2778. If, however, we determine that the statute is ambiguous, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." Id. at 843, 104 S. Ct. 2778. Courts may defer to an agency interpretation even when the agency does not exercise its formal rule-making authority. Skidmore v. Swift & Co., 323 U.S. 134, 139-40, 65 S. Ct. 161, 89 L. Ed. 124 (1944); see United States v.

Mead Corp., 533 U.S. 218, 228, 121 S. Ct. 2164, 150 L. Ed. 2d 292 (2001) (explaining that Skidmore deference requires courts to consider agency consistency, along with other factors that have the power to persuade, including the validity of the agency's reasoning).

B.

To adjust their status to LPR under 8 U.S.C. § 1255, Appellees must have been "inspected and admitted" into the United States. See 8 U.S.C. § 1255(a). The INA elsewhere defines "admitted" to mean "the lawful entry . . . into the United States after inspection and authorization by an immigration officer." Id. § 1101(a)(13)(A). The parties disagree on whether TPS satisfies § 1255(a)'s "inspected-and-admitted" requirement.

Under 8 U.S.C. § 1254a, the Attorney General may designate certain nationals of a foreign state as eligible for TPS. TPS beneficiaries may "temporarily remain in and work in the United States" while their home country is covered by the TPS program. De Leon-Ochoa v. Att'y Gen., 622 F.3d 341, 344 (3d Cir. 2010). And "for purposes of adjustment of status under section 1255," a TPS beneficiary "shall be considered as being in, and maintaining, lawful status as a nonimmigrant." 8 U.S.C. § 1254a(f)(4).

Employing the "traditional tools of statutory construction" at Chevron step one, see Chevron, 467 U.S. at 843 n.9, 104 S. Ct. 2778, we conclude that § 1254a(f)(4) unambiguously requires that TPS recipients be considered "inspected and admitted" for purposes of adjusting their status under § 1255. Section 1254a(f)(4) man-

dates that TPS beneficiaries "shall be considered as being in, and maintaining, lawful status as a *nonimmigrant*" for purposes of § 1255. 8 U.S.C. § 1254a(f)(4) (emphasis added). And an individual cannot gain nonimmigrant status without being considered inspected and admitted. That is, by the express provisions of the INA, (1) every person with lawful status as a nonimmigrant has been "admitted" into the United States, and (2) all nonimmigrants are "inspected" before admission.

More specifically, § 1184(a)(1) provides that "[t]he admission to the United States of any [noncitizen] as a nonimmigrant shall be for such time and under such conditions as the Attorney General may by regulations prescribe. . . . " 8 U.S.C. § 1184(a)(1); see also id. § 1182(d)(1) ("Nothing in this section shall be regarded as prohibiting the [government] from instituting removal proceedings against [a noncitizen] admitted as a nonimmigrant . . . for conduct or a condition . . . not disclosed to the Attorney General prior to the [noncitizen]'s admission as a nonimmigrant. . . . "). Accordingly, a nonimmigrant is by definition "admitted" to the United States. In turn, the "admission" of a nonimmigrant necessarily means that they were also "inspected." This is because the INA defines "admission" and "admitted" as "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." Id. § 1101(a)(13)(A). Indeed, the INA consistently treats inspection as a prerequisite to admission. See id. § 1225(a)(1) (an "alien present in the United States . . . shall be deemed . . . an applicant for admission"); id. § 1225(a)(3) (all "applicants for admission . . . shall be inspected by immigration officers"); id. § 1184(b) (every noncitizen

"shall be presumed to be an immigrant until he establishes to the satisfaction of . . . the immigration officers, at the time of application for admission, that he is entitled to a nonimmigrant status"). See also 8 C.F.R. § 214.1(a)(3)(i) (a "nonimmigrant['s] . . . admission to the United States is conditioned on compliance with any inspection requirement"). From these provisions, it is clear that a noncitizen who has been granted nonimmigrant status has necessarily been inspected and admitted. And because TPS beneficiaries are "considered" to have nonimmigrant status for purposes of § 1255, they must also be considered "inspected and admitted" under § 1255(a). See 8 U.S.C. § 1254a(f)(4); see also Gomez v. Lynch, 831 F.3d 652, 661 (5th Cir. 2016) (recognizing that, "in select circumstances, admission will be imputed or deemed by operation of law").

The government disagrees with this conclusion. It begins by distinguishing between two separate requirements for adjustment of status: (1) admission and inspection under § 1255(a); and (2) lawful status under § 1255(c)(2).[2] The terms "admission" and "lawful status" mean different things. See, e.g., Gomez, 831 F.3d at 658 (describing "admission" and "status" as "fundamentally distinct concepts"). The government argues that, to meet the first requirement, a person must satisfy the formal definition of "admission," which requires a "lawful entry . . . into the United States." See 8 U.S.C. § 1101(a)(13)(A). Under this reading, TPS

[2] Recall that 8 U.S.C. § 1255(c)(2) precludes adjustment eligibility for certain noncitizens "in unlawful immigration status on the date of filing the application for adjustment of status or who ha[ve] failed . . . to maintain continuously a lawful status since entry into the United States."

beneficiaries who entered this country without inspection are not "admitted" because they did not "lawfully" enter the United States. The government maintains that § 1254a(f)(4) satisfies only the second condition for adjustment of status—that an applicant have lawful status under § 1255(c)(2)—and does not establish that the applicant was inspected and admitted. This has some superficial appeal, given that both § 1254a(f)(4) and § 1255(c)(2) use the phrase "lawful status." See id. § 1254a(f)(4) (TPS beneficiary "shall be considered as being in, and maintaining, *lawful status* as a nonimmigrant" (emphasis added)). And, as the government notes, one can have lawful status in this country without being admitted. See, e.g., Matter of V-X-, 26 I. & N. Dec. 147 (BIA 2013) (holding that a grant of asylee status is not an "admission").

However, the government's argument conflicts with the INA's text. It overlooks meaningful differences between the language used in § 1254a(f)(4) and § 1255(c)(2). Compare 8 U.S.C. § 1254a(f)(4) ("*being in*, and maintaining, lawful status *as a nonimmigrant*" (emphasis added)), with id. § 1255(c)(2) ("maintain continuously a lawful status since entry into the United States"). The TPS statute does not track § 1255(c)(2), and there is no indication that TPS satisfies only the lawful-status requirement in that subsection. Rather, § 1254a(f)(4) unambiguously applies to § 1255 in its entirety, not just § 1255(c)(2). See id. § 1254a(f)(4) ("for purposes of adjustment of status under *section 1255* of this title" (emphasis added)); see also Milner v. Dep't of Navy, 562 U.S. 562, 573, 131 S. Ct. 1259, 179 L. Ed. 2d 268 (2011) (ruling against "taking a red pen to the statute—cutting out some words and pasting in others" (cleaned up)). And by including the word "nonimmigrant" in § 1254a(f)(4),

Congress required that TPS recipients be treated as nonimmigrants when they apply to adjust their status under § 1255. As explained above, this means they are considered "inspected and admitted."

Additionally, Congress enacted § 1255 with the title, "Adjustment of status of *nonimmigrant* to that of person admitted for permanent residence." 66 Stat. 163, 164, 217 § 245 (1952) (emphasis added). This title aids in resolving that § 1254a(f)(4)'s direction to treat TPS recipients as "being in, and maintaining, lawful status as a nonimmigrant," satisfies § 1255(a)'s threshold requirement. See INS v. Nat'l Ctr. for Immigrants' Rights, Inc., 502 U.S. 183, 189, 112 S. Ct. 551, 116 L. Ed. 2d 546 (1991) (explaining that "the title of a statute or section can aid in resolving an ambiguity in the legislation's text").

Not satisfied with the connection between "nonimmigrant" status and "inspection and admission," the government lodges several additional arguments against our conclusion. We consider each in turn.

First, the government notes that Congress has provided express exceptions to § 1255(a)'s "inspected-and-admitted" requirement, and TPS is not listed.[3] See 8

---

[3] The dissent takes a similar position, concluding this is a case of statutory silence that results in ambiguity for purposes of Chevron, thus requiring us to determine whether the agency's construction of the statute is a permissible one. Respectfully, we disagree. The determination of whether a statute is "silent or ambiguous" requires looking not only at the "particular statutory language at issue," but also at "the language and design of the statute as a whole." Fort Stewart Schs. v. Fed. Lab. Rels. Auth., 495 U.S. 641, 645, 110 S. Ct. 2043, 109 L. Ed. 2d 659 (1990). Here, the INA is neither silent nor ambiguous because the statutory scheme—and the way in which the

U.S.C. § 1255(h), (i). However, there is no reason for Congress to expressly exempt TPS beneficiaries from § 1255(a)'s requirements, given the plain language in § 1254a(f)(4). See Ramirez, 852 F.3d at 963 (explaining "there is no requirement that Congress draft an elegant statute").

Second, the government relies on what it suggests is § 1254a(f)(4)'s purpose: "to bridge the gap created when [a noncitizen], who was admitted at a port of entry as a nonimmigrant, later applies for and accepts TPS, but then falls out of the status provided by the previous nonimmigrant admission." As amici curiae note, this would allow only a small number of TPS grantees to benefit from § 1254a(f)(4)'s protections. As support for its narrow view of the statute's scope, the government cites a 1991 legal opinion from the former Immigration and Naturalization Service, issued after the TPS statute became law. See generally INS Genco Op. No. 91-27, 1991 WL 1185138 (INS Mar. 4, 1991); see also Matter of H-G-G-, 27 I. & N. Dec. 617 (AAO 2019).[4] At least one

---

relevant terms are used throughout—makes it plain that TPS beneficiaries satisfy § 1255(a)'s threshold requirement. This conclusion no doubt involves an intricate comparative analysis of the pertinent provisions of the statute. But on this issue, the statute is unambiguous nevertheless.

[4] The dissent urges deference to Matter of HG-G-, a decision of the Administrative Appeals Office (AAO) of the U.S. Department of Homeland Security that addressed this very issue and arrived at a contrary conclusion. We are not persuaded. As the dissent notes, it is not clear whether Matter of H-G-G- is in fact precedential and binding on the Executive Office for Immigration Review, and thus, whether it is subject to Chevron deference at all. In any event, because the statute unambiguously treats TPS recipients as "inspected and admitted" for purposes of § 1255(a)'s threshold requirement,

other court has rejected the government's proposed narrow purpose as inconsistent with § 1254a(f)(4)'s text, which indicates that the provision "benefits all TPS grantees." Ramirez, 852 F.3d at 962. In any event, we need not resolve this dispute over purpose because the statutory language is unambiguous. See NLRB v. SW Gen., Inc., — U.S. —, 137 S. Ct. 929, 942, 197 L. Ed. 2d 263 (2017) (explaining that where "[t]he text is clear," courts "need not consider this extra-textual evidence").

Third, the government argues that § 1254a(f)(4) does not confer *actual* nonimmigrant status on TPS beneficiaries; rather, it merely *considers* them as nonimmigrants for adjustment purposes. This is based on § 1254a(f)(4)'s instruction that TPS beneficiaries "shall be *considered as* being in, and maintaining, lawful status as a nonimmigrant." 8 U.S.C. § 1254a(f)(4) (emphasis added). According to the government, it is therefore irrelevant that all nonimmigrants are inspected and admitted into the United States. Because TPS beneficiaries are not *actual* nonimmigrants, they are not "inspected and admitted" under § 1255(a).

Matter of H-G-G- is contrary to law. Moreover, the AAO's explanation that "[w]hile it is true that inspection and admission generally lead to lawful immigration status, it does not follow that having a lawful status results in one's inspection and admission" is not particularly helpful. Recall that under § 1254a(f)(4), a TPS beneficiary "shall be considered as being in, and maintaining, lawful status as *a nonimmigrant*" for purposes of § 1255. 8 U.S.C. § 1254a(f)(4) (emphasis added). So while the AAO is right that having lawful status does not necessarily result in inspection and admission—as demonstrated by the asylum example—this does not answer the question of whether lawful status *as a nonimmigrant* means having been inspected and admitted. We conclude that it does.

This argument misses the mark. Although not all TPS beneficiaries have been admitted at a port of entry, Congress used the term "considered" to create a legal fiction for adjustment purposes. A TPS beneficiary must be treated as a nonimmigrant under § 1255 even if she has not in fact met all requirements for nonimmigrant status. Inspection and admission are two of those requirements. See id. § 1184 ("Admission of nonimmigrants"). Other parts of the INA similarly use the term "consider" to create a legal fiction. See, e.g., id. § 1152(b)(3) (providing that, under certain circumstances, a noncitizen born in the United States "shall be considered as having been born in the country of which he is a citizen or subject"); id. § 1101(g) (a noncitizen under final order of removal who has already left the United States "shall be considered to have been . . . removed in pursuance of law"). Because TPS beneficiaries are "considered" nonimmigrants for § 1255 purposes, they are considered "inspected and admitted" under § 1255(a), regardless of how they entered the country. See, e.g., Gomez, 831 F.3d at 659 n.9 (recognizing categories of "legally fictional admissions").

The government's position that TPS beneficiaries must be "admitted" within the INA's strict port-of-entry definition falters even on its own terms. We have explained that the INA "inconsistently" uses the words "admitted" and "admission." Roberts v. Holder, 745 F.3d 928, 932 (8th Cir. 2014). Indeed, the adjustment statute itself uses "admission" inconsistently with the port-of-entry definition when it states that "the Attorney General shall record the [noncitizen]'s lawful *admission* for permanent residence" as the date the adjustment application is approved, rather than as the date of "lawful entry . . . into the United States," as

§ 1101(a)(13)(A) would require. See 8 U.S.C. § 1255(b) (emphasis added). The government gives no reason for why the meaning of "admitted" in § 1255(a) cannot also depart from the formal port-of-entry definition. And Roberts—which ruled that "admitted" and "admission" in the INA need not be read strictly to mean a port-of-entry admission—is an important precedent for this court. 745 F.3d at 932.

Finally, the government urges us to adopt the Eleventh Circuit's reasoning in Serrano, which held that, although a TPS beneficiary "has 'lawful status as a nonimmigrant' for purposes of adjusting his status," this "does not change § 1255(a)'s threshold requirement that he is eligible for adjustment of status only if he was initially inspected and admitted." See Serrano, 655 F.3d at 1265. We are not persuaded. Rather than "change" the prerequisites for adjustment under § 1255(a), § 1254a(f)(4) deems the TPS recipient to have met them. The Eleventh Circuit's decision did not acknowledge the meaning of "nonimmigrant" under 8 U.S.C. § 1184 or discuss the implication of obtaining lawful status as a nonimmigrant. We believe this analysis is incomplete. See Yates v. United States, 574 U.S. 528, 537, 135 S. Ct. 1074, 191 L. Ed. 2d 64 (2015) (instructing that courts must consider the "specific context in which the [statutory] language is used," in addition to the "language [of the statute] itself"); Lovilia Coal Co., 109 F.3d at 449. We instead agree with the reasoning of the Sixth and Ninth Circuits, which have since examined the meaning of nonimmigrant status and held that the INA's plain language requires TPS beneficiaries to be considered

"inspected and admitted" under § 1255(a). See Ramirez, 852 F.3d at 959; Flores, 718 F.3d at 552-53.[5]

In sum, § 1254a(f)(4) provides that TPS recipients "shall be considered as being in, and maintaining, lawful status as a nonimmigrant" for purposes of adjusting their status under § 1255. 8 U.S.C. § 1254a(f)(4). Those in nonimmigrant status are necessarily inspected and admitted. By operation of § 1254a(f)(4), then, TPS recipients are considered "inspected and admitted" under § 1255(a), regardless of whether they entered the United States without inspection. USCIS's contrary interpretation conflicts with the plain meaning of the INA and is therefore unlawful. See 5 U.S.C. § 706(2)(A). We affirm the district courts' judgments.

LOKEN, Circuit Judge, dissenting.

I respectfully dissent. This case raises an important issue—whether 8 U.S.C. § 1254a(f)(4) allows a noncitizen who entered this country without inspection or admission but was later granted Temporary Pro-

---

[5] We note that the Third Circuit recently agreed with the Eleventh Circuit and decided that TPS recipients must satisfy the strict port-of-entry definition of "admission" to meet § 1255(a)'s threshold requirement. Sanchez, 967 F.3d at 251 & n.6. Respectfully, we disagree. The Sanchez court relied on Third Circuit precedent that requires the terms "admission" and "admitted" to strictly mean a port-of-entry admission. Id. at 245-46, 250 (citing Hanif v. Att'y Gen., 694 F.3d 479, 485 (3d Cir. 2012)). This rule conflicts with our decision in Roberts, 745 F.3d at 932. Moreover, the Sanchez court narrowly focused on the "lawful-status" language in § 1254a(f)(4) without fully addressing the meaning of "lawful status *as a nonimmigrant*." 8 U.S.C. § 1254a(f)(4) (emphasis added). This distinction is crucial because nonimmigrant status signifies an inspection and admission.

tected Status (TPS) to adjust her status to Lawful Permanent Resident under 8 U.S.C. § 1255. As the court acknowledges, there is already a conflict in the circuits on this question. Compare Ramirez v. Brown, 852 F.3d 954, 956 (9th Cir. 2017), and Flores v. USCIS, 718 F.3d 548, 553 (6th Cir. 2013), with Sanchez v. Sec'y of Homeland Sec., 967 F.3d 242, 251-52 (3d Cir. 2020), and Serrano v. U.S. Att'y Gen., 655 F.3d 1260, 1265 (11th Cir. 2011); see also Melendez v. McAleenan, 928 F.3d 425, 429 (5th Cir.), cert. denied, — U.S. —, 140 S. Ct. 561, 205 L. Ed. 2d 358 (2019). This makes eventual review by the Supreme Court quite likely. See Sup. Ct. R. 10(a).

I conclude the court has misapplied Chevron, U.S.A., Inc. v. NRDC, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984), and Supreme Court decisions applying Chevron. It also all-but-ignores Matter of H-G-G-, 27 I. & N. Dec. 617, 641 (AAO 2019), a precedential decision in which the Administrative Appeals Office (AAO) of the U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, concluded that 8 U.S.C. § 1254a(f)(4) does not satisfy 8 U.S.C. § 1255(a)'s threshold admission requirement.[6] Although interpretation of these provisions of the Immigration and Nationality Act (INA) is ultimately a question for the courts, I con-

---

[6] The AAO exercises appellate review of the decisions of USCIS officers. USCIS, AAO Practice Manual ch. 1.4(a). The Attorney General has authorized the AAO to issue precedential decisions that bind future adjudications involving the same issue. See 8 C.F.R. § 103.3(c). Though the USCIS stated that H-G-G- was an "adopted" decision, the Executive Office for Immigration Review in the Department of Justice lists H-G-G- as a precedential decision. As the Attorney General's opinion controls, I will treat H-G-G- as precedential. See 8 U.S.C. § 1103(a)(1).

clude the AAO's decision in H-G-G- is "based on a permissible construction of the statute" and therefore should be followed. Chevron, 467 U.S. at 843, 104 S. Ct. 2778. "[I]f the law does not speak clearly to the question at issue, a court must defer to the [AAO's] reasonable interpretation, rather than substitute its own reading." Scialabba v. De Osorio, 573 U.S. 41, 57, 134 S. Ct. 2191, 189 L. Ed. 2d 98 (2014) (plurality opinion); id. at 79, 134 S. Ct. 2191 (Roberts, C.J., concurring) (upholding the agency's reasonable interpretation because "Congress did not speak clearly" to the issue). I would therefore reverse the decisions of the district court.[7]

Congress enacts many complex statutes which the federal courts must interpret if called upon to do so by an actual case or controversy. "When a court reviews an agency's construction of the statute which it administers . . . [i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Chevron, 467 U.S. at 842-43, 104 S. Ct. 2778. However, "if the statute *is silent or ambiguous* with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." Id. at 843, 104 S. Ct. 2778 (emphasis added). The court here, like too many others, ignores the explicit inclusion

---

[7] The applicant in H-G-G- brought an action in the District of Minnesota seeking judicial review of the AAO's decision under the Administrative Procedure Act. On September 28, the court granted summary judgment for the applicant, agreeing with the Ninth Circuit in Ramirez and the Sixth Circuit in Flores that the AAO's decision was arbitrary and capricious. Hernandez de Gutierrez v. Barr, No. 19-CV-02495, — F. Supp. 3d —, —, 2020 WL 5764281 at *6 (D. Minn. Sept. 28, 2020).

of statutory silence in defining whether an agency decision must be afforded deference. The Supreme Court has repeatedly stated that "silent or ambiguous" is the governing standard. See, e.g., Barnhart v. Walton, 535 U.S. 212, 218, 122 S. Ct. 1265, 152 L. Ed. 2d 330 (2002); I.N.S. v. Aguirre-Aguirre, 526 U.S. 415, 424, 119 S. Ct. 1439, 143 L. Ed. 2d 590 (1999). The inclusion is highly significant, for "silence, after all, normally creates ambiguity. It does not resolve it." Barnhart, 535 U.S. at 218, 122 S. Ct. 1265. If a statute "does not speak with the precision necessary to say definitively whether it applies . . . [t]his is the very situation in which we look to an authoritative agency for a decision about the statute's scope . . . [and] ask only whether the department's application was reasonable." United States v. Eurodif S.A., 555 U.S. 305, 319, 129 S. Ct. 878, 172 L. Ed. 2d 679 (2009). A unanimous Court adhered to this principle in Mayo Found. for Med. Educ. & Research v. United States, 562 U.S. 44, 53, 131 S. Ct. 704, 178 L. Ed. 2d 588 (2011), where the Court noted that "[t]he principles underlying our decision in Chevron apply with full force in the tax context." Id. at 55, 131 S. Ct. 704.

These principles apply with equal if not greater force to questions of statutory interpretation arising under the INA. See, e.g., Aguirre-Aguirre, 526 U.S. at 424, 119 S. Ct. 1439; Ortega-Marroquin v. Holder, 640 F.3d 814, 818 (8th Cir. 2011). Indeed, the INA expressly provides that "determination and ruling by the Attorney General with respect to all questions of law shall be controlling." 8 U.S.C. § 1103(a)(1); see Nielsen v. Preap, — U.S. —, 139 S. Ct. 954, 959 n.2, 203 L. Ed. 2d 333 (2019); Bobadilla v. Holder, 679 F.3d 1052, 1054 (8th Cir.

2012).[8] "[J]udicial deference to the Executive Branch is especially appropriate in the immigration context because of its impact on foreign relations." Birdsong v. Holder, 641 F.3d 957, 959 (8th Cir. 2011), quoting Aguirre-Aguirre, 526 U.S. at 425, 119 S. Ct. 1439.

I agree with the "Background" discussion of the statute at issue and the procedural history of these appeals in Part I. of the court's opinion. Plaintiffs were denied adjustment of status under 8 U.S.C. § 1255 because they failed to satisfy the initial eligibility requirement in § 1255(a):

> The status of an alien *who was inspected and admitted or paroled into the United States* . . . may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence. . . .

(Emphasis added.) As I understand its essential reasoning, the court's decision that plaintiffs satisfied this statutory element is based on the following propositions. (i) Because 8 U.S.C. § 1254a(f)(4) provides that "TPS beneficiaries are 'considered' nonimmigrants for § 1255 purposes, they are considered 'inspected and admitted' under § 1255(a), regardless of how they entered the country. . . . Rather than 'change' the prerequisites for adjustment under § 1255(a), § 1254a(f)(4) deems the TPS recipient to have met them." *Supra* p. 580.

---

[8] Congress further provided in 6 U.S.C. § 522 that nothing in 8 U.S.C. § 1103 "shall be construed to limit judicial deference to regulations, adjudications, interpretations, orders, decisions, judgments, or any other actions of the Secretary of Homeland Security or the Attorney General."

(ii) "[T]here is no reason for Congress to expressly exempt TPS beneficiaries from § 1255(a)'s requirements, given the plain language in § 1254a(f)(4)." *Supra* p. 579. (iii) "[W]e need not resolve [a] dispute over purpose because the statutory language is unambiguous." *Supra* p. 580. (iv) "Because the statute unambiguously treats TPS recipients as 'inspected and admitted' for purposes of § 1255(a)'s threshold requirement, Matter of H-G-G- is contrary to law." *Supra* p. 579 n.4.

In H-G-G-, the AAO explained that Congress enacted TPS in November 1990[9] to protect two groups of aliens who entered the United States under different circumstances—Chinese nationals who were admitted under temporary student visas but faced threats if they returned after the Chinese government suppressed protests in Tiananmen Square, and refugees who entered the country illegally from countries experiencing internal strife such as El Salvador and Liberia. H-G-G-, 27 I. & N. Dec. at 624-25. In March 1991, the General Counsel of the Immigration and Naturalization Service (USCIS's predecessor) issued an opinion declaring that an individual in the latter group was barred from adjustment of status by § 1255(a) because "an alien who entered without inspection, by definition, cannot satisfy this requirement." Id. at 621. Later that year, the INS published TPS regulations, declining to adopt a public comment asserting that aliens granted TPS should be allowed to adjust status "regardless of how they entered the United States." Id., citing Temporary Protected Status, 56 Fed. Reg. 23491, 23495 (May 22, 1991); see I.N.S. Genco, Op. 91-27, 1991 WL 1185138,

---

[9] Immigration Act of 1990, Pub. L. No. 101-649 § 244A, 104 Stat. 4978, 5035 (enacted on November 29, 1990).

at *2 (I.N.S. Mar. 4, 1991). The agency has maintained this position ever since, and Congress has not addressed the issue, despite amending § 1255(a) several times in the interim. H-G-G-, 27 I. & N. Dec. at 629.

Expressly disagreeing with contrary decisions of the Sixth and Ninth Circuits, the AAO concluded that the TPS statutory provision at issue, § 1254a(f)(4), "does not provide for the inspection, admission, or parole of an alien," id. at 626, whether the statute is unambiguous, as the AAO and every circuit to consider the issue has concluded, or is construed as containing "some ambiguity," in which case Chevron requires deference if the agency has adopted a reasonable construction. 467 U.S. at 844, 104 S. Ct. 2778. On its face, the AAO reasoned, § 1254a(f)(4) does not provide for inspection, admission, or parole "as the terms are entirely absent." "[U]se of the phrase 'considered as being in and maintaining' lawful status serves as implicit recognition that the individual is not in fact in such status." H-G-G-, 27 I. & N. Dec. at 626. Properly construed, the statute "does not confer a broad remedy for prior immigration violations, but instead serves a limited and specific purpose: it maintains the status quo, ensuring that individuals who maintained a lawful immigration status prior to TPS [such as those admitted under short-term student or visitor visas] are not penalized if that status expires during the time in which they are in TPS." Id. at 627. The AAO concluded that congressional silence, while "not always determinative," makes clear "that Congress had an intention on the precise question at issue," quoting Negusie v. Holder, 555 U.S. 511, 518, 129 S. Ct. 1159, 173 L. Ed. 2d 20 (2009). "If Congress intended to deem a grant of TPS to constitute an admission or parole for ad-

justment or change of status purposes, it could have included language akin to that of [§ 1255(h)(1)], clarifying that a special immigrant juvenile . . . 'shall be deemed, for purposes of [§ 1255(a)] to have been paroled into the United States.'" H-G-G-, 27 I. & N. Dec. at 628.

The AAO also directly addressed the court's assertion, essential to its decision, that "every person with lawful status as a nonimmigrant has been 'admitted' into the United States." *Infra* p. 577. "While it is true that inspection and admission generally lead to lawful immigration status," the AAO explained, "it does not follow that having a lawful status results in one's inspection and admission. . . . For example, a grant of asylum places the individual in valid immigration status but is not an 'admission.'" H-G-G-, 27 I. & N. Dec. at 634-35. "[N]either the language of [§ 1254a(f)(4)] nor the legislative history of TPS suggests that Congress had any intent to waive the requirements of lawful admission and maintenance of lawful status for those who did not meet them in the first instance." Id. at 636-37.

For the same reasons, the AAO concluded that "even if the statute is ambiguous, the most reasonable reading of [§ 1254a(f)(4)] is that it does not render a beneficiary 'inspected and admitted or paroled' for purposes of adjusting to permanent resident status." Id. at 640. The AAO then concluded:

> Upon consideration of the plain language [of § 1254a(f)(4)], its construction, its operation in the larger statutory scheme, its legislative history, and its application by the agency charged with its administration since its inception, we would follow USCIS's and the former INS's long-standing interpretation.

> Accordingly, under either a plan [sic] language or ambiguity analysis, the end result is the same—TPS is not an admission for purposes of [§ 1255(a)] of the [INA]

Id. at 641.

In my view, we should follow the AAO's decision in H-G-G- because, like the BIA decision upheld by a unanimous Court in Holder v. Martinez Gutierrez, the AAO's lengthy opinion:

> expressed the [agency's] view, based on its experience implementing the INA, that statutory text, administrative practice, and regulatory policy all pointed in one direction: toward disallowing [the requested cancellation of removal under 8 U.S.C. § 1229b(a)]. In making that case, the decision reads like a multitude of agency interpretations . . . to which we and other courts have routinely deferred.

566 U.S. 583, 597-98, 132 S. Ct. 2011, 182 L. Ed. 2d 922 (2012).

Viewing the Chevron deference issue more broadly, this case requires us to determine the proper interplay between adjustment-of-status and TPS provisions in the INA. It is not a case where "[t]he language and punctuation Congress used" can only be read one way. United States v. Ron Pair Enter., Inc., 489 U.S. 235, 242, 109 S. Ct. 1026, 103 L. Ed. 2d 290 (1989). Rather, considering "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole," both sides of the circuit conflict put forth plausible interpretations of the impact of the

language Congress used in § 1254a(f)(4) on other provisions of the INA. Robinson v. Shell Oil Co., 519 U.S. 337, 341, 117 S. Ct. 843, 136 L. Ed. 2d 808 (1997).

In a case where agency deference is *not at issue*, such as Robinson, the Supreme Court routinely concludes that the statute is ambiguous and proceeds to resolve the ambiguity. Id. at 345, 117 S. Ct. 843. Here, agency deference is at issue. In Chevron, the deference issue turned on whether Congress had left a regulatory "gap" for the agency to fill. Here, there is not a regulatory gap. Rather, the issue is how an explicit regulatory "directive" to the agency should be interpreted. In this situation, dividing the deference question into two categorical extremes—unambiguous means no deference; ambiguous means nearly total deference—has produced recurring debate in the lower courts and has stretched use of the term "silent or ambiguous" in the Chevron opinion beyond its customary role in construing a statute. Focusing on the results in analogous cases, rather than on the reasoning in individual opinions, the Supreme Court has consistently deferred to plausible, well-considered agency interpretations, particularly when complex statutes such as the INA or the Internal Revenue Code are being interpreted. But in applying Chevron, the conflicting opinions in cases such as Scialabba and United States v. Mead Corp., 533 U.S. 218, 121 S. Ct. 2164, 150 L. Ed. 2d 292 (2001), persuade me that further clarification of the paradigmatic two-step Chevron analysis in this type of case would be helpful. But that is not the function of a court of appeals. In this case, like the AAO I conclude that, no matter how the question of ambiguity is resolved, the agency's long-standing interpretation of the INA as explained in H-G-G-

is worthy of substantial deference under Chevron and is persuasive.

Accordingly, I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

Case No. 18-cv-00733 (JNE/SER)

LEYMIS V. AND SANDRA O., PLAINTIFFS

v.

MATTHEW G. WHITAKER,[1] KIRSTJEN NIELSEN, ROBERT COWAN, LESLIE TRITTEN, LEE CISSNA, DONALD NEUFELD, U.S. DEPARTMENT OF HOMELAND SECURITY, AND U.S. CITIZENSHIP AND IMMIGRATION SERVICES, DEFENDANTS

Filed: Nov. 21, 2018

ORDER

This case involves the interplay between two subsections of the Immigration and Nationality Act ("INA"): the designation of Temporary Protected Status ("TPS") under § 1254a and the adjustment of status to Lawful Permanent Resident ("LPR") under § 1255. The sole issue before the Court is whether TPS beneficiaries are

---

[1] The Court has substituted Matthew G. Whitaker, the Acting Attorney General, for Jefferson B. Sessions, III. A public officer's "successor is automatically substituted as a party" and "[l]ater proceedings should be in the substituted party's name." Fed. R. Civ. P 25(d).

deemed "inspected and admitted" to satisfy the threshold requirement for adjustment of status. The Court holds that they are.

BACKGROUND

Two statutory provisions are at the heart of this case. The first provision, § 1254a, authorizes the Attorney General to grant TPS to immigrants from countries experiencing armed conflict, natural disaster, or other extraordinary circumstances. 8 U.S.C. § 1254a(b)(1)(A)-(B). The TPS statute provides two primary benefits to TPS beneficiaries: temporary protection from removal and work authorization. *Id.* § 1254a(a)(1)-(2). Additionally, "for purposes of adjustment of status under section 1255," the statute requires the TPS beneficiary "to be considered as being in, and maintaining, lawful status as a nonimmigrant." *Id.* § 1254a(f)(4).

The second provision, § 1255, governs the adjustment of immigration status from nonimmigrant to LPR. As a threshold matter, § 1255(a) requires a person to have been "inspected and admitted" into the United States before the Attorney General may adjust her status. *Id.* § 1255(a).

The parties disagree as to whether a grant of TPS satisfies § 1255(a)'s threshold requirement. Plaintiffs argue that the plain language of § 1254a(f)(4) establishes that TPS beneficiaries should be considered inspected and admitted for purposes of adjustment of status under § 1255(a). Defendants disagree. Defendants assert that because § 1254a(f)(4) does not specifically address § 1255(a)'s threshold requirement, a TPS beneficiary must have been separately inspected and admitted into the United States.

The facts asserted in Plaintiffs' Amended Complaint are not in dispute. Plaintiffs are two TPS beneficiaries whose LPR applications were denied by U.S. Citizenship & Immigration Services ("USCIS"). Plaintiffs, Leymis V. and Sandra O., are both citizens of El Salvador who entered the United States unlawfully—without inspection and admission—in October 2000 and May 1993 respectively. In 2001, after the Attorney General designated El Salvador as a TPS country, both Plaintiffs applied for TPS status. Plaintiffs disclosed their unlawful entries in their applications. The former Immigration & Naturalization Service ("INS") approved both Plaintiffs' applications for TPS and subsequent renewals thereafter. On January 8, 2018, however, the Secretary of Homeland Security terminated El Salvador's TPS designation, effective September 9, 2019.

In 2017, Leymis V.'s U.S. citizen husband and Sandra O.'s U.S. citizen child petitioned for immigrant visas for Plaintiffs as immediate relatives. Simultaneous to their relatives' applications, Plaintiffs also sought a family-based adjustment of their status to LPR. In response, USCIS issued a request for evidence of lawful admission into the United States. Leymis V. provided documentation of her TPS grant and a copy of *Bonilla v. Johnson*, 149 F. Supp. 3d 1135 (D. Minn. 2016). In *Bonilla*, the district court held that a grant of TPS satisfies the "inspection and admission" requirement to adjust to LPR status under § 1255(a). *Id.* at 1142. Sandra O. submitted copies of her employment authorization documents to confirm continuous TPS and a legal argument highlighting *Bonilla* and other similar decisions. USCIS nevertheless denied both Plaintiffs' applications asserting that a grant of TPS is not an admission.

USCIS stated in both instances that there is no right of administrative appeal. Plaintiffs commenced this action for review under the Administrative Procedures Act ("APA") before this Court.

LEGAL STANDARD

Summary judgment is proper "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *Arena Holdings Charitable, LLC v. Harman Prof'l, Inc.*, 785 F.3d 292, 293 (8th Cir. 2015). In this case, the parties have agreed that there are no material issues of fact. Therefore, resolution of the legal question and entry of judgment is appropriate at this stage of the proceeding.

The APA governs the Court's review of agency actions. Under the APA, the Court must set aside an agency action, finding, or conclusion that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A). In reviewing an agency action, the Court applies the two-step analysis set forth in *Chevron*. *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837 (1984); *Ortega-Marroquin v. Holder*, 640 F.3d 814, 818 (8th Cir. 2011) (applying *Chevron*). First, the Court determines "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. Courts use "traditional tools of statutory construction" to determine whether Congress has unambiguously expressed its intent. *Id.* at 843 n.9. If the meaning of the statute is unambiguous, then both the courts and agencies "must give effect to the unambiguously expressed intent of

Congress." *Id.* at 842-43. When "Congress has supplied a clear and unambiguous answer to the interpretive question at hand," the Court need not defer to the agency's interpretation. *Pereira v. Sessions*, 138 S. Ct. 2105, 2113 (2018).

If, however, the Court determines that the statute is ambiguous, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. Courts may defer to an agency interpretation even when the agency is not exercising its formal rule-making authority. *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 (1944). The weight of deference, if so given, depends on "the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Id.* at 140.

DISCUSSION

This is a case of statutory interpretation. The essential question for this Court is whether the inclusion of the term "nonimmigrant" in § 1254a(f)(4) plainly means that the TPS beneficiary has been "inspected and admitted" to satisfy the threshold requirement of § 1255(a). Given the meaning of "nonimmigrant" in the statutory scheme, the Court holds that it does.

A grant of TPS satisfies § 1255(a)'s threshold requirement because an alien who has obtained lawful status as a nonimmigrant has necessarily been inspected and admitted. "A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is

used elsewhere in a context that makes its meaning clear." *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988). A review of the statutory scheme reveals that the immigration laws repeatedly associate obtaining nonimmigrant status with inspection and admission to the United States. *See, e.g.,* 8 U.S.C. § 1182(d)(1) ("Nothing in this section shall be regarded as prohibiting the Immigration and Naturalization Service from instituting removal proceedings against an alien admitted as a nonimmigrant . . . for conduct or a condition that was not disclosed to the Attorney General prior to the alien's admission as a nonimmigrant under section 1101(a)(15)(S) of this title."); § 1184(b) (every alien "shall be presumed to be an immigrant until he establishes to the satisfaction of . . . the immigration officers, at the time of application for admission, that he is entitled to a nonimmigrant status"). By consistently linking nonimmigrant status with inspection and admission, Congress attached significance to the term nonimmigrant. *See Ramirez v. Brown*, 852 F.3d 954, 960 (9th Cir. 2017) (analyzing the use of the term "nonimmigrant" under the immigration laws). Accordingly, the Court agrees with the Ninth Circuit's conclusion that "by the very nature of obtaining lawful nonimmigrant status [under § 1254a(f)(4)], the alien goes through inspection and is deemed 'admitted.'" *Ramirez*, 852 F.3d at 960.

This interpretation is further supported by the fact that the application and approval process for TPS shares many of the same attributes as the inspection and admission process for nonimmigrants. The Ninth Circuit in *Ramirez* outlined these similarities in detail:

> Like an alien seeking nonimmigrant status, an alien seeking TPS must establish that he meets the identity and citizenship requirements for that status, usually by submitting supporting documentation like a passport. Similarly, an alien on either track must adequately demonstrate that he is eligible to be admitted to the United States, with the possibility that some grounds of inadmissibility may be waived in individual cases at the Attorney General's discretion.
>
> Once the request for nonimmigrant status or TPS has been submitted, the application is scrutinized for compliance—sometimes supplemented with an interview of the applicant—then approved or denied by USCIS.

Id. (citations omitted). Because both procedures are similarly rigorous, the Court finds that Congress intended that a TPS grant would have the same legal effect as obtaining nonimmigrant status.

The Court's reading of both statues is in line with other courts that have considered the issue. In fact, most other courts presented with this question have similarly concluded that a full and plain reading of the immigration laws requires courts to view a grant of TPS as satisfying inspection and admission. *See e.g.*, *Ramirez*, 852 F.3d at 960; *Flores v. U.S. Citizenship and Immigration Services*, 718 F.3d 548, 553-54 (2013); *Figueroa v. Rodriguez*, CV 16-8218 PA, 2017 WL 3575284, at *4 (C.D. Cal. Aug. 10, 2017); *Bonilla v. Johnson*, 149 F. Supp. 3d 1135, 1138-39 (D. Minn. 2016); *Medina v. Beers*, 65 F. Supp. 3d 419, 428-29 (E.D. Penn. 2014). Because the Court finds that the statute's language is clear, the Court need not afford deference to the agency's interpretation. *See Pereira*, 138 S. Ct. at 2113.

The Court finds Defendants' arguments to the contrary unconvincing. First, Defendants contend that the Eighth Circuit's decision in *Roberts v. Holder*, 745 F.3d 928 (8th Cir. 2014) supports their position. Defendants read *Roberts* as limiting "admissions" under the immigration laws to two contexts: (1) port-of-entry inspection and (2) post-entry adjustment of status to LPR. Defendants, however, read too much into *Roberts*. The Eighth Circuit did not explicitly limit an "admission" to these two contexts. Nor did it address whether other forms of post-entry adjustment of status, like a TPS grant, constitutes an admission. Moreover, by acknowledging that § 1255(b) "treats *adjustment itself* as an 'admission,'" the Eighth Circuit concluded that "[t]he immigration statutes may be fairly read as treating post-entry adjustment as a substitute for port-of entry inspection." *Id.* at 933 (emphasis in original). This reasoning supports Plaintiffs' argument that the immigration laws allow for inspection and admission to occur subsequent to actual physical entry in the United States—like when TPS status is later granted to a beneficiary who entered unlawfully.

Defendants further assert that the requirements of being "inspected and admitted" under § 1255(a) and "being in, and maintaining, lawful status" under § 1254a(f)(4) are separate and distinct. Defendants cite to the Eleventh Circuit's decision in *Serrano v. U.S. Attorney General*, 655 F.3d 1260, 1265 (11th Cir. 2011), which held that the fact that "an alien with Temporary Protected Status has 'lawful status as a nonimmigrant' for purposes of adjusting his status does not change § 1255(a)'s threshold requirement that he is eligible for adjustment of status only if he was initially inspected and admitted

or paroled." For support, Defendants parse the language of § 1255, which separates the requirement of inspection and admission, § 1255(a), from the requirement "to maintain continuously a lawful status," § 1255(c)(2). But Defendants' interpretation is misguided. Without support, Defendants assume that the meaning of § 1254a(f)(4) is identical to § 1255(c)(2).[2]

The Court rejects Defendants' interpretation for two reasons. First, there are meaningful differences between the language used in §§ 1254a(f)(4) and 1255(c)(2). *Compare* § 1254a(f)(4) ("being in, and maintaining, lawful status as a nonimmigrant") *with* § 1255(c)(2) ("maintain continuously a lawful status since entry into the United States"). "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Johnson v. United States*, 559 U.S. 133, 147 (2010). By including the word "nonimmigrant" in § 1254a(f)(4), Congress intended to give this word meaning. As discussed above, the Court holds that a plain reading of "nonimmigrant" signifies inspection and admission since nonimmigrant

---

[2] The cases Defendants cite for support do not address the meaning of § 1254a(f)(4) nor its relation to § 1255(c). *See, e.g., Gomez v. Lynch*, 831 F.3d 652 (5th Cir. 2016) (examining whether a person who was physically inspected and admitted at the border while in temporary status, and subsequently loses that temporary status, also loses their admission under § 1255); *Dhuka v. Holder*, 716 F.3d 149 (5th Cir. 2013) (examining whether plaintiff failed to maintain continuous lawful status under § 1255(c)); *Young Dong Kim v. Holder*, 737 F.3d 1181 (7th Cir. 2013) (same).

status "is a very specific type of status entailing admission by a customs officer under such designation." *Medina v. Beers*, 65 F. Supp. 3d 419, 431 (E.D. Penn. 2014).

Second, Defendants' proposed reading "would limit § 1254a(f)(4)'s effect to one subsection in § 1255—specifically, § 1255(c)(2)—because those two provisions both refer to being in 'lawful status' rather than being 'admitted.'" *Ramirez*, 842 F.3d at 962; *see also Flores*, 718 F.3d at 553. This reading would require the Court to ignore the plain language of § 1254a(f)(4), which refers to § 1255 in its entirety. 8 U.S.C. § 1254a(f)(4) ("for purposes of adjustment of status under *section 1255* of this title") (emphasis added).

Finally, both parties assert that the legislative history provides additional support for their position. The Court need not wade through this thicket, however, because the Supreme Court has instructed that where "[t]he text is clear" courts "need not consider this extratextual evidence." *N.L.R.B. v. SW Gen., Inc.*, 137 S. Ct. 929, 942 (2017).

CONCLUSION

In short, § 1254a(f)(4) allows a TPS recipient to be considered "inspected and admitted" under § 1255(a). Accordingly, under §§ 1254a(f)(4) and 1255(a), Plaintiffs, who have been granted TPS, meet the threshold requirement for the adjustment of status. Because the Government's interpretation is contrary to the plain language of these statutes, the Court concludes that the agency's decision in this case was arbitrary and capricious. Accordingly, the Court reverses the agency's decision and remands to USCIS for further review consistent with this opinion.

ORDER

Based on the foregoing, and on all of the files, records, and proceedings herein, IT IS HEREBY ORDERED that:

1. Plaintiffs' Motion for Summary Judgment [ECF. No. 24] is GRANTED.
2. Defendants' Motion to Dismiss [ECF. No. 13] is DENIED.
3. This matter is REMANDED to the United States Citizenship and Immigration Service for further proceedings consistent with this Memorandum Opinion and Order.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: Nov. 21, 2018

/s/ JOAN N. ERICKSEN
JOAN N. ERICKSEN
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

Case No. 18-1956 (DWF/BRT)

GILMA GEANETTE MELGAR AND AURELIA CONCEPCION MARTINEZ, PLAINTIFFS

v.

WILLIAM P. BARR,[1] KIRSTJEN NIELSEN, LEE CISSNA, DONALD NEUFELD, ROBERT COWAN, LESLIE TRITTEN, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, AND U.S. DEPARTMENT OF HOMELAND SECURITY, DEFENDANTS

Filed: Apr. 2, 2019

MEMORANDUM OPINION AND ORDER

INTRODUCTION

This case presents a question of statutory interpretation between the interplay of two provisions under the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101, *et seq.*: (1) the designation of Temporary Protected Status ("TPS") under § 1254a, and (2) the adjustment of status to Lawful Permanent Resident ("LPR") under § 1255(a). The Court now considers Plaintiffs

---

[1] The Court has substituted William P. Barr, Attorney General, for Jefferson B. Sessions, III. A public officer's "successor is automatically substituted as a party" and "[l]ater proceedings should be in the substituted party's name." Fed. R. Civ. P. 25(D).

Gilma Geanette Melgar and Aurelia Concepcion Martinez's (collectively, "Plaintiffs") First Motion for Summary Judgment (Doc. No. 23) and Defendants William P. Barr, III, Kirstjen Nielsen, Lee Cissna, Donald Neufeld, Robert Cowan, Leslie Tritten, U.S. Citizenship and Immigrant Services, and U.S. Department of Homeland Security's (collectively, "Defendants") Motion to Dismiss.[2] (Doc. No. 16.)

The sole issue before the Court is whether TPS beneficiaries are deemed "inspected and admitted" to satisfy the threshold requirement for adjustment of status to LPR. For the reasons discussed below, the Court holds that they are. Consequently, the Court grants Plaintiffs' First Motion for Summary Judgment and denies Defendants' Motion to Dismiss or, in the alternative, Cross-Motion for Summary Judgment. The Court remands the matter to United States Citizenship and Immigration Services ("USCIS") for adjudication consistent with this Memorandum Opinion.

BACKGROUND

There is no dispute as to the facts asserted in Plaintiffs' Complaint. (Doc. No. 1.) Plaintiffs are each TPS beneficiaries whose applications for status adjustment to LPR were denied by USCIS. (Compl. ¶¶ 55, 69.) Plaintiff Gilma Geanette Melgar. ("Melgar") is a citizen of El Salvador who entered the United States unlawfully without inspection in February 1992. (*Id.*

---

[2] Defendants filed a reply memorandum in support of their motion to dismiss, or alternatively, in support of cross-motion for summary judgment. (Doc. No. 31.) Because the parties appear to agree that no additional discovery is required, the Court will apply the legal standard for summary judgment.

¶¶ 1, 46.) Plaintiff Aurelia Concepcion Martinez ("Martinez") is a citizen of Honduras who entered the United States unlawfully without inspection in November 1996. (*Id.* ¶¶ 4, 60.) The Attorney General designated both El Salvador (March 9, 2001) and Honduras (January 5, 1999) as TPS countries. (*Id.* ¶¶ 38, 41.) Following the corresponding designations, Plaintiffs each timely applied to USCIS for TPS. (*Id.* ¶¶ 48, 62.) Plaintiffs both disclosed to USCIS that they entered the United States without inspection. (Doc. Nos. 26 ¶ 3, 27 ¶ 2.) Plaintiffs were each approved for TPS and subsequent extensions by USCIS. (Compl. ¶¶ 49-50, 63-64.) In early 2018, the Secretary of the Department of Homeland Security, terminated TPS for El Salvador and Honduras effective September 9, 2019 and January 5, 2020, respectively. (*Id.* ¶¶ 39, 42.)

In December 2016, Melgar's adult daughter, who is a United States citizen, petitioned for an immigrant visa for Melgar as an immediate relative. (*Id.* ¶ 51.) Likewise, on August 27, 2017, Martinez's adult daughter, who is a United States citizen, petitioned for an immigrant visa for Martinez as an immediate relative. (*Id.* ¶ 65.) Plaintiffs also applied for family-based status adjustment to LPR in conjunction with their daughters' petitions. (*Id.* ¶¶ 51, 65.)

In response, USCIS issued a request for evidence of lawful admission or parole into the United States. (*Id.* ¶¶ 52, 66.) Plaintiffs each timely responded to the request with documentation of their TPS and a copy of *Bonilla v. Johnson*, 149 F. Supp. 3d 1135 (D. Minn. 2016), holding that TPS approval satisfied the admission requirement under INA § 245(a). (*Id.* ¶¶ 53, 67.) USCIS

nonetheless denied Plaintiffs' applications for adjustment of status, asserting that a grant of TPS is not an admission.[3] (*Id.* ¶¶ 55-56, 69-70.) Plaintiffs commenced this action for review of USCIS' denials under the Administrative Procedures Act.

DISCUSSION

I. Summary Judgment Standard

Summary judgment is appropriate if the "movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Courts must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party. *Weitz Co., LLC v. Lloyd's of London*, 574 F.3d 885, 892 (8th Cir. 2009). However, "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy, and inexpensive determination of every action.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (quoting Fed. R. Civ. P. 1).

The moving party bears the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Enter. Bank*

---

[3] The denials included the following explanation: "Only where an applicant is already in lawful status at the moment they are granted TPS will their status be considered to be maintained for the purposes of adjustment pursuant to INA § 244(f)(4). This benefit does not apply in your case because you were not in lawful status when your TPS was granted. . . . Section § 244(f)(4) neither addresses nor confers lawful admission to the United States. Lawful admission to the United States is a separate eligibility factor from maintenance of lawful status." (Compl. ¶¶ 56, 50.)

v. Magna Bank of Mo., 92 F.3d 743, 747 (8th Cir. 1996). The nonmoving party must demonstrate the existence of specific facts in the record that create a genuine issue for trial. *Krenik v. Cty. of Le Sueur*, 47 F.3d 953, 957 (8th Cir. 1995). A party opposing a properly supported motion for summary judgment "may not rest upon mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986).

II. Scope of Review

Plaintiffs' claims are brought under the judicial review provisions of the Administrative Procedures Act ("APA"). Under the APA, the reviewing court must affirm an agency decision unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). In reviewing an agency action, the court applies a two-step analysis set forth in *Chevron*. *Chevron, U.S.A. Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984); *see also Ortega-Marroquin v. Holder*, 640 F.3d 814, 818 (8th Cir. 2011) (adopting *Chevron* analysis).

First, the court must determine "whether Congress has directly spoken to the precise question at issue," and "unambiguously expressed its intent." *Chevron*, 467 U.S. at 842-43. Courts use "traditional tools of statutory construction" to determine whether Congress has unambiguously expressed its intent. *Chevron*, 467 U.S. at 843 n.9. "[W]hen deciding whether the language is plain, [courts] must read the words 'in their context and with a view to their place in the overall statutory scheme.'" *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (quoting *F.D.A. v. Brown Williamson Tobacco Corp.*,

529 U.S. 120, 133 (2000)). If the meaning of the statute is unambiguous, then both the court and the agency "must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43; *see* also *Friends of the Boundary Waters Wilderness v. Dombeck*, 164 F.3d 1115, 1121 (8th Cir. 1999) ("When reviewing an agency's construction of a statute, the court first considers whether the intent of Congress is clear; if so, the court's inquiry is over[.]"). When "Congress has supplied a clear and unambiguous answer to the interpretive question at hand," the court need not defer to the agency's interpretations. *Pereira v. Sessions*, 138 S. Ct. 2105, 2113 (2018).

If, however, the court finds that the statute "is silent or ambiguous with respect to the specific issue," the court proceeds to step two of the analysis to determine "whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. Courts may defer to an agency interpretation even when the agency is not exercising its formal rule-making authority. *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 (1944). The weight of deference, if so given, depends on "the thoroughness evident in [the agency's] consideration, the validity of reasoning, its consistency with earlier and later pronouncements, and all of those factors which give it power to persuade, if lacking power to control." *Id.* at 140.

III. Analysis

The sole issue before the Court is one of statutory interpretation. The threshold question under *Chevron* is whether the plain language of 8 U.S.C. § 1254a(f)(4), read in context, makes clear that when a person is granted TPS under 8 U.S.C. § 1254a, it satisfies the

threshold requirement of inspection and admission to the United States under 8 U.S.C. § 1255(a) for the purposes of becoming eligible for adjustment to LPR status.

Section 1254a(f)(4) states, "[d]uring a period in which an alien is granted temporary protected status under this section . . . for the purposes of adjustment of status under section 1255 of this title and change of status under section 1258 of this title, the alien shall be considered being in, and maintaining, lawful status as a nonimmigrant." 8 U.S.C. § 1254a(f)(4).

Section 1255(a) states, "[t]he status of an alien who was inspected and admitted or paroled into the Unites States" may be adjusted. 8 U.S.C. § 1255(a). Plaintiffs contend that the grant of TPS is an "admission" or "inspection" that satisfies the threshold requirement of § 1255(a). (Doc. No. 24 ("Plaintiffs' Memo.") at 3.)

Defendants argue that when § 1255 is read as a whole, it is clear that there are two independent requirements that must be satisfied for the purposes of adjustment: (1) admission, pursuant to § 1255(a); and (2) lawful status, pursuant to § 1255(c)(2).[4] (Doc. No. 18 ("Defs.' Memo.") at 13.) Accordingly, they suggest that the

---

[4] Section 1255(c)(2) states that subsection (a) is inapplicable to "an alien (other than an immediate relative [of a citizen of the United States]) . . . who hereafter continues in or accepts unauthorized employment prior to filing an application for adjustment of status or who is in unlawful immigration status on the date of filing the application for adjustment of status or who has failed (other than through no fault of his own or for technical reasons) to maintain continuously a lawful status since entry into the United States. 8 U.S.C. § 1255(c)(2).

terms "admission" and "admitted" mean a lawful physical entry into the United States, whereas "status" describes the type of permission to be present in the United States.[5] (*Id.* at 14-15.) Defendants contend that while the TPS bestows "lawful status" to recipients, it does not provide "admission" as defined by the INA and as required for adjustment of status under § 1255(a). (*Id.* at 18-21.) Defendants argue that USCIS properly denied Plaintiffs' applications because they entered the United States illegally. (*Id.* at 18.)

Plaintiffs argue that the plain language of § 1254a(f)(4) clearly indicates that it applies to the entirety § 1255, and that Congress intended for individuals in Plaintiffs' position to be eligible to adjust status despite an unlawful entry. (Plaintiffs' Memo. at 33.) Specifically, Plaintiffs contend that exclusion of a reference to subsection 1255(c)(2) and inclusion of the word "nonimmigrant" in § 1254a(f)(4) clearly indicate that TPS beneficiaries are nonimmigrants who are deemed inspected and admitted or paroled for the purposes of adjustment under § 1255. (Doc. No. 32 ("Plaintiffs' Reply") at 2.) The Court agrees.

The Court interprets § 1254a(f)(4) exactly as written and finds that it clearly and unambiguously allows Plaintiffs to be considered as being in lawful status as nonimmigrants for purposes of adjustment of status under § 1255. Because the statute is clear and unambiguous,

---

[5] Defendants cite the definitions of "admission" and "admitted" in the INA. *See* § 1101(a)(13)(A) ("The terms 'admission' and 'admitted' mean, with respect to an alien, the lawful entry of the alien to the United States after inspection and authorization by an immigration officer.").

the Court need not consider the agency's interpretation under step two of the *Chevron* deference analysis.

Several other courts presented with this question have similarly concluded that a full and plain reading of the immigration laws requires courts to view a grant of TPS as satisfying inspection and admission. *See, e.g.*, *Ramirez v. Brown*, 852 F.3d 954, 960 (9th Cir. 2017) ("Under the immigration laws, an alien who has obtained lawful status as a nonimmigrant has necessarily been "admitted."); *Flores v. U.S. Citizenship and Immigration Servs.*, 718 F.3d 548, 553-54 (6th Cir. 2013) ("We interpret the statute exactly as written—as allowing [the applicant] to be considered as being in lawful status as a nonimmigrant for purposes of adjustment under § 1255."); *Leymis V. v. Whitaker*, 355 F. Supp. 3d 779, 787 (D. Minn. 2018.) ([Section] 1254a(f)(4) allows a TPS recipient to be considered as "inspected and admitted" under § 1255(a).); *Figueroa v. Rodriguez*, CV 16-8218 PA, 2017 WL 3575284, at *4 (C.D. Cal. Aug. 10, 2017); *Bonilla v. Johnson*, 149 F. Supp. 3d 1135, 1138-39 (D. Minn. 2016) ("Section 1254a(f)(4) applies to the entirety of § 1255, allows Plaintiff to be considered as being in lawful status as a nonimmigrant for purposes of adjustment under § 1255, and therefore satisfies the 'inspected and admitted or paroled' prerequisite of § 1255(a)."); *Medina v. Beers*, 65 F. Supp. 3d 419, 428-29 (E.D. Pa. 2014) ("By its clear terms, § 1254a(f)(4) applies to the entirety of § 1255 and thereby satisfies the 'inspected and admitted or paroled' prerequisite of § 1255(a).").

Defendants argue that the Court should ignore this persuasive weight of authority and adopt the Eleventh

Circuit's more narrow interpretation.[6] *See Serrano v. U.S. Att'y Gen.*, 655 F.3d 1260 (11th Cir. 2011). In *Serrano*, the Eleventh Circuit concluded that the plain language of § 1255(a) limits eligibility for status adjustment to an alien who has been inspected and admitted or paroled. *Id.* at 1265. The court observed, "an alien with Temporary Protected Status [who] has 'lawful status as a nonimmigrant' for purposes of adjusting his status does not change § 1255(a)'s threshold requirement that he is eligible for adjustment of status only if he was initially inspected and admitted or paroled." *Id.* While these Plaintiffs attempt to distinguish *Serrano* on the basis that the petitioner did not disclose his illegal entry into the country on his TPS application, the Ninth Circuit correctly observed that the factual difference "has no bearing on the Eleventh Circuit's conclusion that § 1254a(f)(4) does not override § 1255(a)'s threshold 'inspected and admitted' requirement." *Ramirez*, 852 F.3d at 959.

Nonetheless, the Ninth Circuit rejected *Serrano* because it found that "[section] 1254a(f)(4) unambiguously treats aliens with TPS as being 'admitted' for purposes of adjusting status." *Id.* at 958. The Court agrees. The Ninth Circuit relied on the admission process and procedures for nonimmigrants defined in 8 U.S.C. § 1184 and found that "by the very nature of obtaining

---

[6] Defendants contend that other courts have erred, in part, by relying on the TPS statute at 8 U.S.C. § 1254a(f)(4) instead of the controlling language in § 1255 which requires both an admission, § 1255(a), and lawful status, § 1255(c)(2). The Court finds that even if § 1255 controls, § 1254a(f)(4) satisfies the threshold requirements of both admission and lawful status. *See infra.* The Court disagrees that such a finding conflates the requirements.

lawful nonimmigrant status, the alien goes through inspection and is deemed 'admitted.'" *Id.* at 960. Because section 1254a(f)(4) confers the status of lawful nonimmigrant on TPS recipients, the Ninth Circuit found that TPS recipients were deemed admitted for the purposes of adjusting status. *Id.* at 958.[7] "This interpretation is further supported by the fact that the application and approval process for TPS shares many of the attributes as the inspection and admission process for nonimmigrants." *Leymis V.*, 355 F. Supp. 3d at 783. The Court finds that even if § 1255 sets forth two separate requirements, § 1254a(f)(4) satisfies each of them: (1) admission by virtue of conferring nonimmigrant status; and (2) lawful status by virtue of its plain language that "the alien shall be considered being in, and maintaining, lawful status."[8] 8 U.S.C. § 1254a(f)(4).

Defendants argue that being admitted as a nonimmigrant as described in 8 U.S.C. § 1184 is a distinct process from "the lawful entry of the alien into the United States after inspection and authorization by an immigrant officer" under § 11(a)(13)(A), and therefore fails to satisfy the threshold requirement of § 1255(a). (Defs.' Memo. at 23.) They argue further that TPS beneficiaries are not actually nonimmigrants, because § 1254a(f)(4) states only that TPS beneficiaries "shall be considered as be-

---

[7] The courts in *Medina* and *Bonilla* rely on the same reference to "nonimmigrant" and reach the same conclusion. *See Medina*, 65 F. Supp. 3d at 430; *Bonilla*, 149 F. Supp. 3d at 1140.

[8] The Court recognizes that the conferral of nonimmigrant status also satisfies the "lawful status" requirement; however, it makes the distinction to illustrate that its finding is not based on conflating "admission" with "lawful status."

ing in, and maintaining, lawful status as a nonimmigrant." (*Id.* at 27.) They also contend that their interpretation is consistent with Congressional intent. (*Id.* at 35.) The Court disagrees.

Defendants' arguments fail to overcome this Court's reading of the clear and unambiguous language of the statutes in question. The Court finds the analysis in *Medina*, which addresses several of Defendants' arguments, particularly instructive. *Medina*, 65 F. Supp. 3d at 429-36 (addressing arguments that (1) Congress intended different meanings for the words "lawful status as nonimmigrant" from "inspected and admitted or paroled"; (2) if plaintiff's interpretation is correct, there would be no need for § 1255 to separately refer to admission or parole as a threshold requirement in subsection (a), and to refer to the failure to maintain lawful status as a bar to eligibility in subsection (c); (3) the plain language of § 1254a(f)(4) addresses only the bar to adjustment of status in § 1255(c)(2); (4) plaintiff's interpretation of the statutory language conflicts with portions of § 1255; (5) the Court should apply *Serrano*; and (6) the government's interpretation is consistent with Congressional intent). *See also* Bonilla, 149 F. Supp. 3d at 1142 (summarizing *Medina*'s analysis of the arguments raised by the government).

The Court is unconvinced by Defendants' attempt to parse words. *See Medina*, 65 F. Supp. 3d at 436 ("Defendants' repeated attempts to twist the basic language into either meaning something extremely specific or applying only to specific portions of § 1255 constitute tortured interpretations that do not comport with a plain language reading."). The plain language of § 1254a(f)(4) clearly states that it applies to all of § 1255: "[f]or the

purposes of adjustment of status under section 1255," the TPS beneficiary "shall be considered being in, and maintaining, lawful status as a nonimmigrant." 8 U.S.C. § 1254a(f)(4). If Congress had intended that § 1254a(f)(4) was limited to only a part of § 1255, it could have easily specified.[9] Congress' choice to include the word "nonimmigrant" is also significant. As discussed above, the Court holds that "a plain reading of "nonimmigrant" signifies inspection and admission since nonimmigrant status 'is a very specific type of status entailing admission by a customs officer under such designation.'" *Leymis V.*, 355 F. Supp. 3d at 784 (citing *Medina*, 65 F. Supp .3d at 431).

The Court is further unpersuaded that the term "admission" is limited to port of entry. This is not based on sympathy, but on a plain reading of the INA. Defendants acknowledge that the Eighth Circuit recognized two types of admission under the immigration laws: (1) port-of-entry inspection and (2) post-entry

---

[9] Defendants contend that if Congress had intended § 1254a(f)(4) to apply to § 1255(a), it could have stated that a TPS applicant is "admitted as a" nonimmigrant, or specified "section 1255(a)(1)," instead of stating than an alien shall be "considered as being in and maintaining lawful status as a nonimmigrant." (Doc. No. 31. ("Defs.' Reply") at 10.) The Court is unpersuaded. First, it is unnecessary to specify when the intent is to apply to the entire section. Here, Congress chose to state that the benefit applies to "section 1255," clearly indicating that it applies to the entire section. Second, use of the word "nonimmigrant" negates the need for any additional clarification that the beneficiary is deemed admitted for the purposes of section 1255. Whether or not there is a proposed bill to change the wording does not impact the clear and unambiguous language of the statute as it currently reads. *N.L.R.B. v. SW Gen., Inc.*, 137 S. Ct. 929, 942 (2017) (finding that where "[t]he text is clear" courts "need not consider this extra-textual evidence").

adjustment of status to LPR. *See Roberts v. Holder*, 745 F.3d 928, 932-33 (8th Cir. 2014). While Defendants contend that this decision was based on precedent subsequently overturned by the Board of Immigration Appeals, the Eighth Circuit also observed, "[t]he immigration statutes as a whole . . . do not treat the words 'admitted' and 'admission' consistently." *Id.* at 933. It then looked to § 1255 itself and found that § 1255(b) "treats *adjustment itself* as an 'admission.'" (*Id.*) While Defendants argue that *Roberts* does not expand the scope of "admission" to TPS, the Court disagrees. The Eighth Circuit concluded that "[t]he immigration laws may be fairly read as treating post-entry adjustment as a substitute for port-of-entry inspection." *Id.* It is reasonable to conclude that "the immigration laws also allow for inspection and admission to occur subsequent to actual physical entry in the United Sates—like when TPS status [sic] is later granted to a beneficiary who entered unlawfully." *Leymis V.*, 355 F. Supp. 3d at 783.

Further, it simply defies logic that Congress would allow TPS beneficiaries to live and work in this country as a form of refuge, but deny them the ability to become lawful permanent resident without physically leaving this country. *See Bonilla*, 149 F. Supp. 3d at 1142-42 (quoting *Medina*, F. Supp. 3d at 435-36); *Flores*, 718 F.3d at 555-56. While Defendants argue that TPS beneficiaries need not return to their home countries to reenter legally, the Court is unpersuaded. The concept that physical entry is required, particularly in light of the rigorous application process necessary to gain TPS, is absurd. *See* 8 C.F.R. § 244.6; 8 U.S.C. §§ 1182(a), 1254a(c)(1)(A)(iii) (application requirements and grounds for inadmissibility). The Court finds that TPS is not,

as Defendants contend, an avenue to "circumvent admission," but a practical, safe, alternative to obtain it. The plain, unambiguous language of § 1254a(f)(4) makes this clear.

CONCLUSION

For the aforementioned reasons, the Court finds that the plain language of 8 U.S.C. § 1254a(f)(4), read in context, makes clear that when a person is granted TPS under 8 U.S.C. § 1254a, it satisfies the threshold requirement of inspection and admission to the United States under 8 U.S.C. § 1255(a) for the purposes of becoming eligible for adjustment to LPR status.

ORDER

Based on the files, records, and proceedings herein, and for the reasons set forth above, **IT IS HEREBY ORDERED** that:

1. Plaintiffs' First Motion for Summary Judgment (Doc. No. [23]) is **GRANTED**.

2. Defendants' Motion to Dismiss (Doc. No. [16]) is **DENIED**.

3. This matter is **REMANDED** to the United States Citizenship and Immigration Service for adjudication consistent with this Memorandum Opinion and Order.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: Apr. 2, 2019

/s/ DONOVAN W. FRANK
DONOVAN W. FRANK
United States District Judge

APPENDIX D

[FEB 13, 2018]

U.S. Department of Homeland Security
P.O. Box 648004
Lee's Summit, MO 64002

U.S. Citizenship and Immigration Services

CASSONDRE BUTEYN
WILSON LAW GROUP
3019 MINNEHAHA AVE
MINNEAPOLIS, MN 55406

File #: MSC1790777903
A #: [**REDACTED**]
Form: I-485

DECISION

In RE: LEYMIS VELASQUEZ

On February 22, 2017, you submitted an Application to Register for Permanent Residence or Adjust Status (Form I-485), to U.S. Citizenship and Immigration Services (USCIS) pursuant to section 245 of the Immigration and Nationality Act (INA), based on being the beneficiary of an immigrant visa petition filed on your behalf by your spouse who is a United States Citizen (USC).

After a thorough review of your application and supporting documents and DHS records, USCIS must inform

you that we are denying your application for the following reason(s):

USCIS must deny your application because you have not satisfied the core requirement of INA § 245(a) that you were "inspected and admitted or paroled into the United States."

I. DISCUSSION OF INA § 245(a)

Generally, to qualify for adjustment under INA § 245(a), an applicant must satisfy the following criteria:

- Be inspected and admitted or paroled into the United States;
- Be eligible to receive an immigrant visa;
- Be admissible to the United States for permanent residence;
- Have an immigrant visa immediately available at the time the application is filed; and
- Warrant a favorable exercise of discretion.

In addressing the first criteria, you assert in your application that the Temporary Protected Status (TPS) granted to you on July 11, 2001 constitutes an inspection and admission. However, INA § 245(a) limits eligibility to adjust status to an alien who has, *inter alia*, been "admitted or paroled into the United States." An "admission" is defined by INA § 101(a)(13)(A) as "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer."

> INA § 245(a)—The status of an alien who was inspected and admitted or paroled into the United States,,, may be adjusted by the Attorney General, in

> his discretion . . . to that of an alien lawfully admitted for permanent residence if" (various conditions are satisfied)."
>
> INA § 101(a)(13)(A)—The terms "admission" and "admitted" mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.

By contrast, INA § 244(f)(4) provides that for purposes of INA §§ 245 and 248, a TPS recipient "shall be considered as being in, and maintaining, lawful status as a nonimmigrant." Maintaining lawful status as a nonimmigrant, however, is different than being admitted. An admitted nonimmigrant may fail to maintain status, see, e.g., 8 C.F.R. §§ 214.1(e)-(g), while some nonimmigrants are never "admitted" at a port-of- entry, see, e.g., 8 C.F.R. § 214.14(c)(5) (regulating grants of nonimmigrant U-visas).

> INA § 244(f)—Benefits and Status During Period of Temporary Protected Status. During a period in which an alien is granted temporary protected status under this section—(4) for the purposes of adjustment of status under section 245 and change of status under section 248, the alien shall be considered as being in, and maintaining, lawful status as a nonimmigrant.

Only where an applicant is already in a lawful status at the moment they are granted TPS will their status be considered to be maintained for the purposes of adjustment pursuant to INA § 244(f)(4). This benefit does not apply in your case because you were not in a lawful status when your TPS was granted. USCIS records indicate that your last and only entry into the United

States was without inspection and admission or parole on October 15, 2000. Section 244(f)(4) neither addresses nor confers lawful admission to the United States. Lawful admission to the United States is a separate eligibility factor from maintenance of lawful status.

CONCLUSION

In light of the foregoing, USCIS has denied your application for adjustment of status. Although you may not appeal this decision, if you are referred to removal proceedings, you may renew this application before the Immigration Judge in accordance with 8 C.F.R. § 245.2(a)(5)(ii).

Nothing in this decision should be construed as affecting your grant of TPS. You remain subject to the terms, conditions, and period of validity for your existing TPS.

Sincerely,

/s/ ROBERT M. COWAN
ROBERT M. COWAN
Director
RMC/LA-0383

cc: copy sent to Attorney

APPENDIX E

[FEB 27, 2018]

U.S. Department of Homeland Security
P.O. Box 648004
Lee's Summit, MO 64002

U.S. Citizenship and Immigration Services

DAVID WILSON
WILSON LAW GROUP
3019 MINNEHAHA AVE
MINNEAPOLIS, MN 55406

File #: MSC1791323730
A #: [**REDACTED**]
Form: I-485

DECISION

In RE: SANDRA ORTIZ

On June 1, 2017 you submitted an Application to Register for Permanent Residence or Adjust Status (form I-485), to U.S. Citizenship and Immigration Services (USCIS) pursuant to section 245 of the Immigration and Nationality Act (INA), based on being the beneficiary of an immigrant visa petition filed on your behalf by your child who is a United States Citizen (USC).

After a thorough review of your application and supporting documents and DHS records, USCIS must inform

you that we are denying your application for the following reason(s):

USCIS must deny your application because you have not satisfied the core requirement of INA § 245(a) that you were "inspected and admitted or paroled into the United States."

I. DISCUSSION OF INA § 245(a)

Generally, to qualify for adjustment under INA § 245(a), an applicant must satisfy the following criteria:

- Be inspected and admitted or paroled into the United States;
- Be eligible to receive an immigrant visa;
- Be admissible to the United States for permanent residence;
- Have an immigrant visa immediately available at the time the application is filed; and
- Warrant a favorable exercise of discretion.

In addressing the first criteria, you assert in your application that the Temporary Protected Status (TPS) granted to you on August 16, 2001 constitutes an inspection and admission. However, INA § 245(a) limits eligibility to adjust status to an alien who has *inter alia*, been "admitted or paroled into the United States." An "admission" is defined by INA § 10l(a)(13)(A) as "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer."

> INA § 245(a)—The status of an alien who was inspected and admitted or paroled into the United States,,, may be adjusted by the Attorney General, in

> his discretion . . . to that of an alien lawfully admitted for permanent residence if" (various conditions are satisfied)."
>
> INA § 101(a)(13)(A)—The terms "admission" and "admitted" mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.

By contrast, INA § 244(f)(4) provides that for purposes of INA §§ 245 and 248, a TPS recipient "shall be considered as being in, and maintaining, lawful status as a nonimmigrant." Maintaining lawful status as a nonimmigrant, however, is different than being admitted. An admitted nonimmigrant may fail to maintain status, see, e.g., 8 C.F.R. §§ 214.1(e)-(g), while some nonimmigrants are never "admitted" at a port-of-entry, see, e.g., 8 C.F.R. § 214.14(c)(5) (regulating grants of nonimmigrant U-visas).

> INA § 244(f)—Benefits and Status During Period of Temporary Protected Status. During a period in which an alien is granted temporary protected status under this section—(4) for the purposes of adjustment of status under section 245 and change of status under section 248, the alien shall be considered as being in, and maintaining, lawful status as a nonimmigrant.

Only where an applicant is already in a lawful status at the moment they are granted TPS will their status be considered to be maintained for the purposes of adjustment pursuant to INA § 244(f)(4). This benefit does not apply in your case because you were not in a lawful status when your TPS was granted. USCIS records indicate that your last and only entry into the United

States was without inspection and admission or parole on May 12, 1993. Section 244(f)(4) neither addresses nor confers lawful admission to the United States. Lawful admission to the United States is a separate eligibility factor from maintenance of lawful status.

CONCLUSION

In light of the foregoing, USCIS has denied your application for adjustment of status. Although you may not appeal this decision, if you are referred to removal proceedings, you may renew this application before the Immigration Judge in accordance with 8 C.F.R. § 245.2(a)(5)(ii).

Nothing in this decision should be construed as affecting your grant of TPS. You remain subject to the terms, conditions, and period of validity for your existing TPS.

Sincerely,

/s/ ROBERT M. COWAN
ROBERT M. COWAN
Director
RMC/LA-0383

cc: copy sent to Attorney

APPENDIX F

[MAY 8, 2018]

U.S. Department of Homeland Security
P.O. Box 648004
Lee's Summit, MO 64002

U.S. Citizenship and Immigration Services

DAVID WILSON
WILSON LAW GROUP
3019 MINNEHAHA AVE
MINNEAPOLIS, MN 55406

File #: MSC1790495355
A #: A094328876
Form: I-485

DECISION

In RE: GILMA MELGAR

On December 23, 2016, you submitted an Application to Register for Permanent Residence or Adjust Status (Form I-485), to U.S. Citizenship and Immigration Services (USCIS) pursuant to section 245 of the Immigration and Nationality Act (INA), based on being the beneficiary of an immigrant visa petition filed on your behalf by your child who is a United States Citizen (USC).

After a thorough review of your application and supporting documents and DHS records, USCIS must inform you that we are denying your application for the following reason(s):

USCIS must deny your application because you have not satisfied the core requirement of INA § 245(a) that you were "inspected and admitted or paroled into the United States."

I. DISCUSSION OF INA § 245(a)

Generally, to qualify for adjustment under INA § 245(a), an applicant must satisfy the following criteria:

- Be inspected and admitted or paroled into the United States;
- Be eligible to receive an immigrant visa;
- Be admissible to the United States for permanent residence;
- Have an immigrant visa immediately available at the time the application is filed; and
- Warrant a favorable exercise of discretion.

In addressing the first criteria, you assert in your application that the Temporary Protected Status (TPS) granted to you on May 9, 2002 constitutes an inspection and admission. However, INA § 245(a) limits eligibility to adjust status to an alien who has, *inter alia,* been "admitted or paroled into the United States." An "admission" is defined by INA § 101(a)(13)(A) as "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer."

> INA § 245(a)—The status of an alien who was inspected and admitted or paroled into the United States,,, may be adjusted by the Attorney General, in his discretion . . . to that of an alien lawfully admitted for permanent residence if" (various conditions are satisfied)."

> INA § 101(a)(13)(A)—The terms "admission" and "admitted" mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.

By contrast, INA § 244(f)(4) provides that for purposes of INA §§ 245 and 248, a TPS recipient "shall be considered as being in, and maintaining, lawful status as a nonimmigrant." Maintaining lawful status as a nonimmigrant, however, is different than being admitted. An admitted nonimmigrant may fail to maintain status, see, e.g., 8 C.F.R. §§ 214.l(e)-(g), while some nonimmigrants are never "admitted" at a port-of-entry, see, e.g., 8 C.F.R. § 214.14(c)(5) (regulating grants of nonimmigrant U-visas).

> INA§ 244(f)—Benefits and Status During Period of Temporary Protected Status. During a period in which an alien is granted temporary protected status under this section—(4) for the purposes of adjustment of status under section 245 and change of status under section 248, the alien shall be considered as being in, and maintaining, lawful status as a nonimmigrant.

Only where an applicant is already in a lawful status at the moment they are granted TPS will their status be considered to be maintained for the purposes of adjustment pursuant to INA § 244(f)(4). This benefit does not apply in your case because you were not in a lawful status when your TPS was granted. USCIS records indicate that your last and only entry into the United States was without inspection and admission or parole on February 14, 1992. Section 244(f)(4) neither addresses nor confers lawful admission to the United

States. Lawful admission to the United States is a separate eligibility factor from maintenance of lawful status.

CONCLUSION

In light of the foregoing, USCIS has denied your application for adjustment of status. Although you may not appeal this decision, if you are referred to removal proceedings, you may renew this application before the Immigration Judge in accordance with 8 C.F.R. § 245.2(a)(5)(ii).

Nothing in this decision should be construed as affecting your grant of TPS. You remain subject to the terms, conditions, and period of validity for your existing TPS.

Sincerely,

/s/ ROBERT M. COWAN
ROBERT M. COWAN
Director
RMC/LA-0383

cc: copy sent to Attorney

APPENDIX G

[MAY 09, 2018]

U.S. Department of Homeland Security
P.O. Box 648004
Lee's Summit, MO 64002

U.S. Citizenship and Immigration Services

CASSONDRE BUTEYN
WILSON LAW GROUP
3019 MINNEHAHA AVE
MINNEAPOLIS, MN 55406

File #: MSC1791785393
A #: A094326576
Form: I-485

DECISION

In RE: AURELIA MARTINEZ

On August 28, 2017, you submitted an Application to Register for Permanent Residence or Adjust Status (Form I-485), to U.S. Citizenship and Immigration Services (USCIS) pursuant to section 245 of the Immigration and Nationality Act (INA), based on being the beneficiary of an immigrant visa petition filed on your behalf by your child who is a United States Citizen (USC).

After a thorough review of your application and supporting documents and DHS records, USCIS must inform you that we are denying your application for the following reason(s):

USCIS must deny your application because you have not satisfied the core requirement of INA § 245(a) that you were "inspected and admitted or paroled into the United States."

I. DISCUSSION OF INA § 245(a)

Generally, to qualify for adjustment under INA § 245(a), an applicant must satisfy the following criteria:

- Be inspected and admitted or paroled into the United States;
- Be eligible to receive an immigrant visa;
- Be admissible to the United States for permanent residence;
- Have an immigrant visa immediately available at the time the application is filed; and
- Warrant a favorable exercise of discretion

In addressing the first criteria, you assert in your application that the Temporary Protected Status (TPS) granted to you on January 21, 2000 constitutes an inspection and admission. However, INA § 245(a) limits eligibility to adjust status to an alien who has, *inter alia*, been "admitted or paroled into the United States." An "admission" is defined by INA § 101(a)(13)(A) as "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer."

> INA § 245(a)—The status of an alien who was inspected and admitted or paroled into the United States,,, may be adjusted by the Attorney General, in his discretion . . . to that of an alien lawfully admitted for permanent residence if" (various conditions are satisfied)."

> INA § 101(a)(13)(A)—The terms "admission" and "admitted" mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.

By contrast, INA § 244(f)(4) provides that for purposes of INA §§ 245 and 248, a TPS recipient "shall be considered as being in, and maintaining, lawful status as a nonimmigrant." Maintaining lawful status as a nonimmigrant, however, is different than being admitted. An admitted nonimmigrant may fail to maintain status, see, e.g., 8 C.F.R. §§ 214.1(e)-(g), while some nonimmigrants are never "admitted" at a port-of-entry, see, e.g., 8 C.F.R. § 214.14(c)(5) (regulating grants of nonimmigrant U-visas).

> INA § 244(f)—Benefits and Status During Period of Temporary Protected Status. During a period in which an alien is granted temporary protected status under this section—(4) for the purposes of adjustment of status under section 245 and change of status under section 248, the alien shall be considered as being in, and maintaining, lawful status as a nonimmigrant.

Only where an applicant is already in a lawful status at the moment they are granted TPS will their status be considered to be maintained for the purposes of adjustment pursuant to INA § 244(f)(4). This benefit does not apply in your case because you were not in a lawful status when your TPS was granted. USCIS records indicate that your last and only entry into the United States was without inspection and admission or parole on December 5, 1993. Section 244(f)(4) neither addresses

nor confers lawful admission to the United States. Lawful admission to the United States is a separate eligibility factor from maintenance of lawful status.

CONCLUSION

In light of the foregoing, USCIS has denied your application for adjustment of status. Although you may not appeal this decision, if you are referred to removal proceedings, you may renew this application before the Immigration Judge in accordance with 8 C.F.R. § 245.2(a)(5)(ii).

Nothing in this decision should be construed as affecting your grant of TPS. You remain subject to the terms, conditions, and period of validity for your existing TPS.

Sincerely,

/s/ ROBERT M. COWAN
ROBERT M. COWAN
Director
RMC/LA-0383

cc: copy sent to Attorney

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 19-1148

LEYMIS CAROLINA VELASQUEZ AND SANDRA ORTIZ,
APPELLEES

v.

WILLIAM P. BARR, ATTORNEY GENERAL OF THE
UNITED STATES, ET AL., APPELLANTS

AMERICAN IMMIGRATION COUNCIL, ET AL.,
AMICI ON BEHALF OF APPELLEE(S)

No. 19-2130

GILMA GEANETTE MELGAR AND AURELIA
CONCEPCION MARTINEZ, APPELLEES

v.

WILLIAM P. BARR, ATTORNEY GENERAL OF THE
UNITED STATES, ET AL., APPELLANTS

AMERICAN IMMIGRATION LAWYERS ASSOCIATION,
ET AL., AMICI ON BEHALF OF APPELLEE(S)

Appeal from U.S. District Court
for the District of Minnesota
(0:18-cv-00733-JNE)
(0:18-cv-01956-DWF)

ORDER

The petition for panel rehearing is denied. Judge Loken dissents from the denial of the petition for panel rehearing.

The request to hold the petition in abeyance is denied.

Feb. 03, 2021

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ MICHAEL E. GANS
MICHAEL E. GANS

APPENDIX I

1. 8 U.S.C. 1101 provides in pertinent part:

Definitions

(a) As used in this chapter—

* * * * *

(13)(A) The terms "admission" and "admitted" mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.

* * * * *

2. 8 U.S.C. 1184 provides in pertinent part:

Admission of nonimmigrants

(a) Regulations

(1) The admission to the United States of any alien as a nonimmigrant shall be for such time and under such conditions as the Attorney General may by regulations prescribe, including when he deems necessary the giving of a bond with sufficient surety in such sum and containing such conditions as the Attorney General shall prescribe, to insure that at the expiration of such time or upon failure to maintain the status under which he was admitted, or to maintain any status subsequently acquired under section 1258 of this title, such alien will depart from the United States. No alien admitted to Guam or the Commonwealth of the Northern Mariana Islands without a visa pursuant to section 1182(*l*) of this title may be authorized to enter or stay in the United

States other than in Guam or the Commonwealth of the Northern Mariana Islands or to remain in Guam or the Commonwealth of the Northern Mariana Islands for a period exceeding 45 days from date of admission to Guam or the Commonwealth of the Northern Mariana Islands. No alien admitted to the United States without a visa pursuant to section 1187 of this title may be authorized to remain in the United States as a nonimmigrant visitor for a period exceeding 90 days from the date of admission.

* * * * *

(b) Presumption of status; written waiver

Every alien (other than a nonimmigrant described in subparagraph (L) or (V) of section 1101(a)(15) of this title, and other than a nonimmigrant described in any provision of section 1101(a)(15)(H)(i) of this title except subclause (b1) of such section) shall be presumed to be an immigrant until he establishes to the satisfaction of the consular officer, at the time of application for a visa, and the immigration officers, at the time of application for admission, that he is entitled to a nonimmigrant status under section 1101(a)(15) of this title. An alien who is an officer or employee of any foreign government or of any international organization entitled to enjoy privileges, exemptions, and immunities under the International Organizations Immunities Act [22 U.S.C. 288 et seq.], or an alien who is the attendant, servant, employee, or member of the immediate family of any such alien shall not be entitled to apply for or receive an immigrant visa, or to enter the United States as an immigrant unless he executes a written waiver in the same

form and substance as is prescribed by section 1257(b) of this title.

* * * * *

3. 8 U.S.C. 1254a provides in pertinent part:

Temporary protected status

* * * * *

(f) Benefits and status during period of temporary protected status

During a period in which an alien is granted temporary protected status under this section—

(1) the alien shall not be considered to be permanently residing in the United States under color of law;

(2) the alien may be deemed ineligible for public assistance by a State (as defined in section 1101(a)(36) of this title) or any political subdivision thereof which furnishes such assistance;

(3) the alien may travel abroad with the prior consent of the Attorney General; and

(4) for purposes of adjustment of status under section 1255 of this title and change of status under section 1258 of this title, the alien shall be considered as being in, and maintaining, lawful status as a nonimmigrant.

* * * * *

4. 8 U.S.C. 1255 provides in pertinent part:

Adjustment of status of nonimmigrant to that of person admitted for permanent residence

(a) Status as person admitted for permanent residence on application and eligibility for immigrant visa

The status of an alien who was inspected and admitted or paroled into the United States or the status of any other alien having an approved petition for classification as a VAWA self-petitioner may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed.

* * * * *

(c) Alien crewmen, aliens continuing or accepting unauthorized employment, and aliens admitted in transit without visa

Other than an alien having an approved petition for classification as a VAWA self-petitioner, subsection (a) shall not be applicable to (1) an alien crewman; (2) subject to subsection (k), an alien (other than an immediate relative as defined in section 1151(b) of this title or a special immigrant described in section 1101(a)(27)(H), (I), (J), or (K) of this title) who hereafter continues in or accepts unauthorized employment prior to filing an application for adjustment of status or who is in unlawful immigration status on the date of filing the application

for adjustment of status or who has failed (other than through no fault of his own or for technical reasons) to maintain continuously a lawful status since entry into the United States; (3) any alien admitted in transit without visa under section 1182(d)(4)(C) of this title; (4) an alien (other than an immediate relative as defined in section 1151(b) of this title) who was admitted as a nonimmigrant visitor without a visa under section 1182(*l*) of this title or section 1187 of this title; (5) an alien who was admitted as a nonimmigrant described in section 1101(a)(15)(S) of this title,[1] (6) an alien who is deportable under section 1227(a)(4)(B) of this title; (7) any alien who seeks adjustment of status to that of an immigrant under section 1153(b) of this title and is not in a lawful nonimmigrant status; or (8) any alien who was employed while the alien was an unauthorized alien, as defined in section 1324a(h)(3) of this title, or who has otherwise violated the terms of a nonimmigrant visa.

* * * * *

[1] So in original. The comma probably should be a semicolon.