

TEMPORARY PROTECTED STATUS: AN IMMIGRATION STATUTE THAT REDEFINES TRADITIONAL NOTIONS OF STATUS AND TEMPORARINESS

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INTRODUCTION

In 1990, Congress passed amendments to the Immigration and Nationality Act to give “temporary protected status” (“TPS”) to certain non-citizens in the United States who would face a threat of life or liberty if they were required to return to their home countries.¹ In the seventeen years since the first TPS state designation was passed, the statute has evolved into a valid means of offering shelter for victims of civil war, political uprising, or natural disaster. However, this statute also arbitrarily robs many of a legal means to stay in the country, allows no hope of family reunification for its recipients, and does not grant social benefits regardless of the amount of taxes and Social Security paid by recipients. For these reasons and more, the statute should either be significantly changed textually or its enforcement should be administered more fairly, including an allowance of judicial review.

This Note argues that because of the unfair administration of TPS and the arbitrariness of certain sections of the statute, TPS is currently not a status when compared to other forms of immigration relief termed “status” by U.S. Citizenship and Immigration Services (“USCIS”). Furthermore, this Note also attempts to define “temporary” as it exists under the current TPS statute and its administration when a state’s designation no longer fits traditional notions of “temporary.” Part I examines the statutory construction of TPS, including its legislative history and the complex requirements the statute defines. Part II discusses the problems with TPS as it currently exists, particularly by studying Montserrat, whose designation was recently terminated. Lastly, Part III details what other countries, other forms of United States immigration relief, and former guest worker programs can teach us about allowing nationals of other countries to come into the U.S. “temporarily.” A change in the law will thus be suggested: once TPS is no longer temporary or no longer provides status for its recipients, adjustment of status for lawful permanent residency should be avail-

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¹ Immigration Act of 1990, Pub. L. No. 101-649, § 303, 104 Stat. 4979 (1990).

able for TPS recipients. Such a change will allow fairness, stability, and shelter for many uprooted immigrants while favoring the original policies of immigration law in the U.S., including family reunification, as suggested by the initial enactment of the Immigration and Nationality Act.

I. WHAT IS TPS?: THE ORIGINS AND STATUTORY CONSTRUCTION OF SECTION 244 OF THE IMMIGRATION AND NATIONALITY ACT [8 U.S.C. § 1254A]²

TPS was originally passed as part of the Immigration Act of 1990 to give “temporary protected status” to certain non-citizens in the U.S. who would face a threat to life or liberty if they were required to return to their home countries.³ In addition to establishing a generic TPS procedure, the new law also designated El Salvador as the first country whose nationals were able to seek TPS to stay in the United States while their country was re-built.⁴ At the time, over 500,000 undocumented El Salvadorans in the U.S. were potentially eligible for this new “status.”⁵ These El Salvadorans fled their home country from civil war and political uprising for the sanctity and protection of the United States.⁶ Speaking for the Congressional Record, Senator DeConcini said “[o]ne of [our] responsibilities [in offering TPS] is humanitarian concern toward the Salvadorans whose lives have been violently disrupted and endangered by war.”⁷ In enacting TPS, Congress wanted to ensure that the scared, desperate nationals of El Salvador who fled to the United States in hopes of protection were indeed protected from their fear of returning to El Salvador where those nationals would not be safe in their own country.

There were also political considerations in offering TPS. That is, because the United States was offering military aid to El Salvador, the United States should not return Salvadorans to their home country, which was immersed in a civil war in which the United States actively involved.⁸ Not wanting to seem hypocritical by disrupting a country for humanitarian reasons while displacing nationals with nowhere to go, Congress made specific mention that “[a]long with our involvement in El Salvador, there come certain responsibilities.”⁹ Senator DeConcini also stressed that TPS was a long time coming: since 1979, violence and civil war plagued El Salvador, and yet it was not designated for TPS until 1990.¹⁰ At the time, likely no one imagined how many countries and

² Temporary Protected Status for Nationals of Designated States, 8 C.F.R. § 244 (2006).

³ Immigration Act of 1990 § 303.

⁴ Robert Rubin, *Ten Years After: Vindication for Salvadorans and New Promises for Safe Haven and Refugee Protection*, 68 INTERPRETER RELEASES 97, 97 (1991). See also Eli Cofino, Note, *A Long Road to Residency: The Legal History of Salvadoran & Guatemalan Immigration to the United States with a Focus on NACARA*, 14 CARDOZO J. INT’L & COMP. L. 177, 184-91 (2006) (for a detailed history of the struggle of Salvadoran immigrants, including their TPS designation).

⁵ Rubin, *supra* note 4, at 97.

⁶ 136 CONG. REC. S17,106-01 (1990).

⁷ *Id.* at S17,108 (statement of Sen. DeConcini).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

foreign nationals to which the U.S. would offer TPS over the next seventeen years nor the problems which would occur from offering such a status.

A. *Legislative History*

Indeed, TPS was specifically constructed and passed to (a) "maintain accurate records of Salvadorans in this country while at the same time provide them with safe haven;"¹¹ (b) "facilitate the return of Salvadorans when the period of temporary protected status expires;"¹² and (c) establish a statutory framework for the Attorney General to designate other states whose nationals would be eligible for the protection of TPS should their country become unsafe or unable to handle the return of its nationals.¹³ However, aside from the political considerations in designating El Salvador for the protection of TPS, Senator DeConcini also cited the unfavorable odds of asylum being granted to nationals of El Salvador as another reason for enacting TPS.¹⁴ Reasons for subsequent designations were cited as: (1) there is an "ongoing armed conflict which poses substantial threat to personal safety;" (2) there was an "earthquake, drought, or other environmental disasters resulting in substantial, but temporary, disruption in living conditions;" (3) the foreign state is "unable to handle, temporarily, the return of aliens who are nationals of that state and the foreign state officially requests TPS;" and (4) there exist "extraordinary and temporary conditions in a foreign state that prevent nationals from returning safely, unless permitting the aliens to remain in the United States is contrary to the national interest of the United States."¹⁵ Consequently, the statute was passed and El Salvadorans were "temporarily" protected from being forced to return to their unsafe home country. What Congress did not realize at the time was that TPS would be extended for El Salvadorans and that TPS would subsequently be designated, re-designated, and extended for nationals of seventeen different countries.¹⁶ As such, El Salvador was the first and last state that was designated by Congress; all subsequent designations are done by the Attorney General for whatever reasons the Attorney General deems fit under the statute.

Another important element of TPS was subsequently enacted in the Miscellaneous and Technical Immigration Amendments of 1991.¹⁷ These amendments authorized and extended the benefits of TPS for non-citizens of the United States that have no nationality, and who last permanently resided in the designated state, rather than only nationals of the designated state, as the 1990 act solely provided.¹⁸ This amendment came mere months after the original

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ See generally <http://www.uscis.gov> (follow "Services & Benefits" hyperlink; then select "Humanitarian Benefits;" then click "Temporary Protected Status;" and click "Temporary Protected Status (TPS) Archives") for a current list of TPS designated states and an archive of past designations. Section II of this Note will discuss particular designated states.

¹⁷ Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, § 304(b), 105 Stat. 1733, 1749 (1991).

¹⁸ *Id.*

passage of TPS.¹⁹ The statute today, however, remains largely unchanged in text, if not in administration, from its origins in 1990 and 1991. Nationals of designated states, and non-citizens having no nationality but who last resided in the designated state, may thus be protected by TPS if they meet other requirements of the statute and are not ineligible for entry into the United States as provided by other immigration requirements.

B. Designating a State

Today, the Department of Homeland Security (“DHS”) is in charge of the administration of TPS, but countries are designated, extended, and terminated for the protection of TPS solely by the discretion of the Attorney General.²⁰ That is, the power to designate and revoke a state’s nationals²¹ as eligible for TPS is solely within the control of the Attorney General. To be eligible for the protection of TPS under the statute, one must: (a) be a national²² of a state designated for TPS;²³ (b) be able to prove continuous, physical presence in the United States since the effective date of the most recent designation of the state;²⁴ (c) be able to prove that one has continuously resided in the United States since such date as the Attorney General may designate and has designated;²⁵ (d) be otherwise admissible as an immigrant, and not ineligible for temporary protected status as defined by paragraph (2)(B) of the same statute;²⁶ and (e) to the extent, and in the manner which the Attorney General establishes, register for TPS under this section during a registration period of not less than 180 days.²⁷ These are the basic requirements for eligibility and protection under TPS, but, as will soon be shown, meeting these requirements and keeping one’s TPS status is not as easy as complying with the statute. Notice is particularly an inherent problem with the statute. However, a bigger problem is arbitrariness in the decision of designation, extension, and termination of state under the TPS statutory scheme. Lastly, TPS is largely only available for nationals of a designated state who are already in the United States once the state is designated. Thus, in the case of ongoing armed conflict for several years or severe natural disasters that prevent movement within a state, nationals of such state are unable to apply for TPS because they are not in the United States at the time of the state’s designation. Nationals that may be eligible for TPS cannot foresee a state’s designation and rely upon such a designation to enter the United States: TPS thus only protects those nationals in the United States when disaster occurs.

¹⁹ *Id.*

²⁰ 8 U.S.C. § 1254a(a)(1) (2000).

²¹ “Nationals” designated for TPS refers to nationals of the designated state and also non-citizens having no nationality who last resided in the designated state, as made eligible by Miscellaneous and Technical Immigration and Naturalization Amendments of 1991.

²² *Id.*

²³ 8 U.S.C. § 1254a(c)(1)(A).

²⁴ *Id.* § 1254a(c)(1)(i).

²⁵ *Id.* § 1254a(c)(1)(ii).

²⁶ *Id.* § 1254a(c)(1)(iii).

²⁷ *Id.* § 1254a(c)(1)(iv).

Moreover, to designate a state as eligible for temporary protected status, the Attorney General must find that “there is an ongoing armed conflict within the state and, due to such conflict, requiring the return of aliens who are nationals of that state to that state (or to a certain part of the state) would pose a serious threat to [the national’s] personal safety.”²⁸ Alternatively, a state may be eligible for TPS if the Attorney General finds (a) “that there has been an earthquake, flood, drought, epidemic, or other environmental disaster in the state resulting in a substantial, but temporary, disruption of living conditions in the area affected;”²⁹ (b) “the foreign state is unable, temporarily, to handle adequately the return to the state of aliens who are nationals of the state;”³⁰ and (c) “the foreign state officially has requested designation under the statute.”³¹ Finally, unless the Attorney General finds that permitting aliens from a designated state to remain in the county is contrary to the national interest of the United States, a state may be eligible for TPS designation if the Attorney General finds that there exist extraordinary and temporary conditions in the foreign state that prevent aliens who are nationals of the state from returning to the state in safety.³² Thus, there are three sets of factors under the statute for the Attorney General to find reason to designate a state and its nationals for the protection TPS. It is important to note that a state’s designation by the Attorney General is not reviewable by the judiciary.³³ Because a state’s designation by the Attorney General is not reviewable by the judiciary, designations that are arbitrary or in any other way unfair are not subject to question. Thus, political considerations may heavily influence the Attorney General’s choices of designated states rather than being motivated by the true need for protection.

C. Notice

To make possible recipients of TPS aware of potential benefits, it is imperative to provide notice of newly-designated states, as well as the notice of extension and termination of a state’s designation, because nationals who already are protected or may be protected by TPS are thus able to register or prepare for return to their home country. Whenever a state is designated under the TPS statutory scheme, the Attorney General must provide notice in the Federal Register;³⁴ and in a language the alien can understand.³⁵ Moreover, if an alien is a national of a designated foreign state and is undergoing removal proceedings, the Attorney General must provide him or her with the information that TPS may be available.³⁶ Once a state is designated, the Attorney General specifies the time period for which the state is designated, not less than six months and no longer than eighteen months.³⁷ Those who meet the qualifi-

²⁸ *Id.* § 1254a(b)(1)(A).

²⁹ *Id.* § 1254a(b)(1)(B)(i).

³⁰ *Id.* § 1254a(b)(1)(B)(ii).

³¹ *Id.* § 1254a(b)(1)(B)(iii).

³² *Id.* § 1254a(b)(1)(c).

³³ *Id.* § 1254a(b)(5).

³⁴ *Id.* § 1254a(b)(3)(A).

³⁵ *Id.* § 1254a(a)(3)(D).

³⁶ *Id.* § 1254a(a)(3)(C).

³⁷ *Id.* § 1254a(b)(2)(B).

cations for TPS protection, and register according to the statute, are subsequently granted work authorization for the entire period for which the state is designated.³⁸ Work authorization is renewed yearly, subject to re-registration and payment of a fee, as long as the state is designated.³⁹ If a TPS recipient becomes inadmissible to the United States between the time he is granted TPS and the time he must re-register for TPS if his state's designation is extended, he will be denied further benefits, namely work authorization, stemming from TPS, and may be placed in removal proceedings.⁴⁰ Consequently, TPS will not always protect its recipients from removal, despite current conditions in the alien's home country to which he may be removed.⁴¹

D. Extension, Termination, or Re-Designation of a State

Within sixty days of the date on which a state's designation will expire, the Attorney General may either extend⁴² or terminate⁴³ the state's designation. Extension may apply if the Attorney General determines that the foreign state still meets the conditions of its original designation.⁴⁴ That is, if that state is still unable to accommodate the return of its nationals safely and/or still provides unsafe conditions for the life and liberty of its nationals, the Attorney General may extend a state's designation.⁴⁵ The Attorney General may also terminate a state's designation if the state no longer meets the conditions under which it was designated.⁴⁶ However, there is no judicial review of any determination of the Attorney General with respect to the designation, termination, or extension of designation of a foreign state.⁴⁷ Rather, a vote by the supermajority⁴⁸ of Senate members is required to "provide for adjustment to lawful temporary or permanent resident alien status for any alien receiving temporary protected status."⁴⁹ That is, if a state's designation is terminated, only Congress has the power and authority to keep such nationals in the United States legally.⁵⁰ Otherwise, nationals of a state whose designation has been terminated are subject to immediate removal.⁵¹ Again, because there is no judicial review of the Attorney General's designation of a state, or more importantly the subsequent termination of the state's designation, TPS recipients are truly subject to the arbitrary decisions of the executive branch. Congress also cannot question a state's designation or termination. Instead, Congress merely has the option to provide lawful permanent or temporary residence by a

³⁸ *Id.* § 1254a(a)(2).

³⁹ 8 C.F.R. § 244.10(e)(1).

⁴⁰ 8 U.S.C. § 1254a(a)(4).

⁴¹ *See infra* Part II-B.

⁴² 8 U.S.C. § 1254a(b)(3)(C).

⁴³ *Id.* § 1254a(b)(3)(B).

⁴⁴ *Id.* § 1254a(b)(3)(C).

⁴⁵ *Id.* § 1254a(b)(3)(C).

⁴⁶ *Id.* § 1254a(b)(3)(B).

⁴⁷ *Id.* § 1254a(b)(5)(A).

⁴⁸ Three-fifths of the members of the Senate. *Id.* at § 1254a(h)(2).

⁴⁹ *Id.* § 1254a(h)(1)(A).

⁵⁰ *See infra* Part II-A.

⁵¹ *Id.*

supermajority vote, which has never occurred since the statute was passed in 1990.

Since its inception, seventeen states have received the designation required to offer its nationals temporary protected status.⁵² Currently, six states have TPS designations.⁵³ Burundi was originally designated for TPS on November 4, 1997 because “[t]here exist[ed] an ongoing armed conflict in Burundi and a return of aliens who are nationals of Burundi (and aliens having no nationality who last habitually resided in Burundi) would pose a serious threat to their personal safety as a result of the armed conflict in that nation.”⁵⁴ El Salvador was re-designated on March 9, 2001 because it suffered a devastating earthquake on January 13, 2001 and experienced two more earthquakes on February 13 and 17, 2001.⁵⁵ Thus, the Attorney General determined that due to the environmental disaster and substantial disruption of living conditions caused by the earthquakes, El Salvador is “unable, temporarily, to handle adequately the return” of its nationals.⁵⁶ Honduras was similarly designated on January 5, 1999 because “Hurricane Mitch swept through Central America causing severe flooding and associated damage in Honduras,” and Honduras was unable to handle the return of its nationals temporarily.⁵⁷ Nicaragua, like Honduras, was also designated on January 5, 1999 because of the effects of Hurricane Mitch.⁵⁸ Somalia was designated on September 6, 1991 because “there exist extraordinary and temporary conditions in Somalia that prevent aliens who are nationals of Somalia from returning to Somalia in safety.”⁵⁹ Lastly, Sudan was designated on November 4, 1997 because: (1) there exists an ongoing armed conflict in Sudan and a return of aliens who are nationals of Sudan (and aliens having no nationality who last habitually resided in Sudan) would pose a serious threat to their personal safety as a result of the armed conflict in that nation; (2) there exist extraordinary and temporary conditions in Sudan that prevent aliens who are nationals of Sudan (and aliens having no nationality who last habitually resided in Sudan) from returning to the Sudan in Safety; and (3) permit-

⁵² See generally <http://www.uscis.gov> (follow “Services & Benefits” hyperlink; then select “Humanitarian Benefits”; then click “Temporary Protected Status”; and click “Temporary Protected Status (TPS) Archives”) for USCIS’s website regarding TPS and its past designated states.

⁵³ These include Burundi, El Salvador, Honduras, Nicaragua, Somalia, and Sudan. See generally <http://www.uscis.gov> (follow “Services & Benefits” hyperlink; then select “Humanitarian Benefits”; then click “Temporary Protected Status”; and click “Temporary Protected Status (TPS) Archives”). Quite recently, Liberia’s designation was terminated. See Termination of the Designation of Liberia for Temporary Protected Status, 71 Fed. Reg. 55,000 (Sept. 20, 2007).

⁵⁴ Notice of Designation of Burundi Under Temporary Protected Status, 62 Fed. Reg. 59,735 (Nov. 4, 1997).

⁵⁵ Designation of El Salvador Under Temporary Protected Status Program, 66 Fed. Reg. 14,214 (Mar. 9, 2001).

⁵⁶ *Id.*

⁵⁷ Designation of Honduras Under Temporary Protected Status, 64 Fed. Reg. 524 (Jan. 5, 1999).

⁵⁸ Designation of Nicaragua Under Temporary Protected Status Program, 64 Fed. Reg. 526 (Jan. 5, 1999).

⁵⁹ Notice of Designation of Somalia Under Temporary Protected Status, 56 Fed. Reg. 46,805 (Sept. 16, 1991).

ting nationals of Sudan (and aliens having no nationality who last habitually resided in Sudan) to remain temporarily in the United States is not contrary to the national interest of the United States.”⁶⁰ Thus, all currently designated states have been periodically extended to the present by the Attorney General since their original designation. Pakistan was recently considered for, but did not receive, TPS designation because of the effects of the 2005 earthquake.⁶¹ Also, nationals of the states that were victims of the 2004 Tsunami never received any TPS designation.⁶²

Consequently, the Attorney General has terminated ten state designations.⁶³ Angola’s designation was terminated on March 29, 2003 because the two factions that were fighting sufficiently to designate Angola’s nationals as needing TPS in the first place signed a peace accord, substantial fighting ceased, and many insurgents were disarmed and decommissioned, “effectively dismantling [the insurgent’s] military capability.”⁶⁴ Moreover, the Attorney General seemed persuaded by “efforts by the United Nations and non-governmental organizations to resettle Angolan citizens [that] signify the improvement of humanitarian and socioeconomic conditions in Angola.”⁶⁵ The designation of Bosnia and Herzegovina, El Salvador, Guinea-Bissau, Kosovo Province, Kuwait, Lebanon, Liberia, Montserrat, Rwanda, and Sierra Leone have also been terminated for various reasons, largely that the Attorney General determined that the states could now safely handle the return of their nationals or that the reasons for the state’s original TPS designation no longer exist.

E. *Problems with Statutory Construction of TPS*

One caveat of being a TPS recipient is being unable to receive most public benefits.⁶⁶ Although TPS recipients are granted work authorization, and as such, must pay federal taxes, state taxes, and Social Security, they are unable to receive any benefits, such as Social Security and Supplemental Security Income (“SSI”) benefits.⁶⁷ Thus, an unfair result occurs in requiring the payment of taxes while denying those same taxpayers benefits. Furthermore, once a state’s designation is terminated, and former TPS recipients are forced to return to their home country, those nationals are not able to claim Social Security after paying into it for years. This is particularly a problem when a state is

⁶⁰ Designation of Sudan Under Temporary Protected Status Program, 62 Fed. Reg. 59,737 (Nov. 4, 1997).

⁶¹ Oscar Avila, *Immigration Relief Sought*, CHICAGO TRIBUNE, Nov. 7, 2005, at 1; *US Congressmen Favour Temporary Protected Status for Pakistan*, BUSINESS RECORDER, Oct. 30, 2005, available at 2005 WL 25119337.

⁶² Avila, *supra* note 61, at 1.

⁶³ These include Angola, Bosnia and Herzegovina, El Salvador (although El Salvador is currently designated for other reasons), Guinea-Bissau, Kosovo Province, Kuwait, Lebanon, Liberia (twice), Montserrat, Rwanda, and Sierra Leone. See generally <http://www.uscis.gov> (follow “Services & Benefits” hyperlink; then select “Humanitarian Benefits;” then click “Temporary Protected Status;” and click “Temporary Protected Status (TPS) Archives”).

⁶⁴ Termination of Designation of Angola Under Temporary Protected Status Program, 68 Fed. Reg. 3,896 (Jan. 27, 2003).

⁶⁵ *Id.* at 3,897.

⁶⁶ 70B AM. JUR. 2D *Social Security and Medicare* § 913 (2005).

⁶⁷ *Id.*

designated for TPS for five, or even ten, years because of the greater amount of taxes and Social Security a TPS recipient pays without receiving benefits. As such, the longer a state is designated, the greater possibility for unfairness in denying benefits to those TPS recipients whose stay is not temporary under traditional definitions of temporary.

There are also many practical problems with TPS. As cases discussed later show, TPS does not protect someone from removal; it may offer a temporary stay of removal only if the person is not being removed for other reasons. Moreover, if someone registers one day too late for TPS, she is ineligible for its benefits and will not be granted TPS, although she may truly need protection from returning to her home country. If someone becomes inadmissible between being granted TPS and renewing her work authorization, etc. under TPS, she is subject to immediate removal. Lastly, TPS does not allow for family reunification, which contravenes the basic premise of the United States' immigration policies.

F. Who is Not Eligible for TPS?

Under the statute, many non-immigrants are ineligible for the protection of TPS, despite the unsafe country conditions to which they would be returned by not being allowed to apply or gain TPS. More specifically, nationals of designated states are ineligible for TPS protection if (a) they have been convicted of any felony or two or more misdemeanors committed in the United States;⁶⁸ or (b) the Attorney General determines that:⁶⁹

- i. the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion;⁷⁰
- ii. the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States;⁷¹
- iii. there are serious reasons for believing that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States;⁷²
- iv. there are reasonable grounds for regarding the alien as a danger to the security of the United States;⁷³
- v. the alien is described in subclause (I), (II), (III), (IV), or (VI) of section 1182(a)(3)(B)(I) of this title or section 1227(a)(4)(B) of this title (relating to terrorist activity), unless, in the case only of an alien described in subclause (IV) of section 1182(a)(3)(B)(I) of this title, the Attorney General determines, in the Attorney General's discretion, that there are not reasonable grounds for regarding the alien as a danger to the security of the United States;⁷⁴ or

⁶⁸ 8 U.S.C. § 1254a(c)(2)(B)(i) (2000). See also *In re Luis Fernando Moncada*, 24 I&N Dec. 62, 2007 WL 198400 (B.I.A. 2007).

⁶⁹ 8 U.S.C. § 1254a(c)(2)(B)(ii) (specifying an "alien described in section 1158(b)(2)(A) of this title is ineligible").

⁷⁰ *Id.* § 1158(b)(2)(A)(i).

⁷¹ *Id.* § 1158(b)(2)(A)(ii).

⁷² *Id.* § 1158(b)(2)(A)(iii).

⁷³ *Id.* § 1158(b)(2)(A)(iv).

⁷⁴ *Id.* § 1158(b)(2)(A)(v).

vi. the alien was firmly resettled in another country prior to arriving in the United States.⁷⁵

To sum, non-immigrants described in 8 U.S.C. § 1158(b)(2)(A) are ineligible for TPS. Title 8 U.S.C. § 1158(b)(2)(A) is also the statutory provision that describes non-immigrants who are ineligible for asylum. Thus, the same non-immigrants who will not be granted asylum will also not be offered TPS as a protection. This is one way – and more ways will be described later – in which asylum is comparable to TPS.

However, there are other ineligible specifications that can be waived to continue to receive the benefits of TPS. For example, under 8 U.S.C. § 1182a “[a]ny alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible;”⁷⁶ however 8 U.S.C. § 1254A(c)(2)(A)(I) allows such inadmissibility to be waived when seeking TPS.⁷⁷ Moreover, any provision under 8 U.S.C. § 1182a may be waived for “humanitarian purposes, to assure family unity, or when it is otherwise in the public interest.”⁷⁸ However, some provisions may not be waived such as 8 U.S.C. § 1182a(2)(A) and 8 U.S.C. § 1182a(2)(B), which specify a conviction of certain crimes including crimes of moral turpitude,⁷⁹ violating any law involving controlled substances,⁸⁰ or being convicted of two or more offenses, “regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct . . . for which the aggregate sentences to confinement were 5 years or more is inadmissible.”⁸¹ Title 8 U.S.C. § 1182(a)(2)(c) may also not be waived, which includes certain drug offenses but does not include “a single offense of simple possession of 30 grams or less of marijuana.”⁸² Lastly, crimes described in paragraphs (3)(A), (3)(B), (3)(c), and (3)(E) of 8 U.S.C. § 1182a, “relating to national security and participation in the Nazi persecutions or those who have engaged in genocide”⁸³ may not be waived. Thus, it really depends on what type of inadmissible acts one may have committed in determining whether or not one will be eligible for TPS. Such complex statutory language makes an attorney necessary for those applying for TPS.

II. WHY TPS SHOULD BE CHANGED EITHER STATUTORILY OR THROUGH ITS ADMINISTRATION AND ENFORCEMENT

In determining very real reasons for changing TPS as it currently exists, the designation, extension, and termination of Montserrat will be examined. By closely detailing Montserrat in a case study, the humanitarian and practical everyday concerns of TPS recipients will allow the problems with the statute to become apparent. Moreover, several federal cases involving TPS litigation also

⁷⁵ *Id.* § 1158(b)(2)(A)(vi).

⁷⁶ *Id.* § 1182(a)(5)(A)(i).

⁷⁷ *Id.* § 1254a(c)(2)(A)(i).

⁷⁸ *Id.* § 1254a(c)(2)(A)(ii).

⁷⁹ *Id.* § 1182(a)(2)(A)(i)(I).

⁸⁰ *Id.* § 1182(a)(2)(A)(i)(II).

⁸¹ *Id.* § 1182(a)(2)(B).

⁸² *Id.* § 1254a(c)(2)(A)(iii)(II).

⁸³ *Id.* § 1254a(c)(2)(A)(iii)(III).

show the arbitrariness, unfairness, and contravention to public policy that the current enforcement and administration of TPS present. Consequently, the need to change TPS is evident from examining Montserrat and several other problematic federal cases.

A. *Montserrat: A Case Study*

The formerly-designated state of Montserrat presents a perfect case study of what is wrong with TPS and offers some precise reasons why TPS should be changed. The tiny Caribbean island of Montserrat was designated on August 28, 1997.⁸⁴ Since 1995, Montserrat has been endangered by an active volcano.⁸⁵ The volcano's eruptions have forced the evacuation of more than half the island, closed the airport, stopped most seaport activities, and destroyed three-fourths of the infrastructure of the island, which resulted in a "substantial disruption of living conditions on Montserrat."⁸⁶ However, Montserrat's designation was terminated on February 27, 2005.⁸⁷ Thus, the 292 Montserrat nationals who were protected under TPS will now be placed in removal proceedings, despite Senator Schumer's attempts to pass a bill giving them lawful temporary or permanent residency.⁸⁸

Unfortunately, the volcano still threatens Montserrat. Indeed, at the time of termination, there was still no airport open, and Montserrat is still generally considered an unsafe place to live.⁸⁹ Consequently, 292 nationals of Montserrat were thrown out of a country they had lived in for eight years and were not even able to fly home because there was no open airport at which they could safely land. Moreover, the eight years of taxes and Social Security those nationals of Montserrat paid are of no benefit to them now as they are forced

⁸⁴ Designation of Montserrat Under Temporary Protected Status, 62 Fed. Reg. 45,685 (Aug. 28, 1997).

⁸⁵ *Id.* at 48,686.

⁸⁶ *Id.*

⁸⁷ Press Release, U.S. Citizenship and Immigration Serv., Dep't of Homeland Sec., DHS Concludes Temporary Protected Status for Nationals of Montserrat (July 6, 2004), available at http://www.uscis.gov/files/pressrelease/MontserratTPS_7_6_04.pdf. See also Megan Tench, *A Show of Solidarity, From Olde Sod to Ashes of Montserrat*, BOSTON GLOBE, Mar. 27, 2006, at B1. (detailing that despite the "lack of clean water, damage to agriculture and health concerns on the island," Montserrat's designation was terminated because the volcanic eruptions were seen as unlikely to cease in the foreseeable future, thus making the designation no longer proper as "temporary").

⁸⁸ Press Release, Sen. Charles E. Schumer, Schumer Urges DHS to Grant Montserratians Deferred Enforced Departure (Mar. 15, 2005), available at http://schumer.senate.gov/SchumerWebsite/pressroom/press_releases/2005/PR41529.Montserratians%20DHS.031505.pf.html [hereinafter Schumer Press Release]. Since this article was written, no more attempts have been made to give Montserratians Deferred Enforced Departure status ("DED").

⁸⁹ Cheryl Blackerby, *Island Hopes to Rise From Ashes, Montserrat Slowly Recovering from Volcano's Devastation*, PALM BEACH POST, Feb. 26, 2005, at B1; Maria Cramer, *A 7-Year Hitch, and Now Bye?*, BOSTON GLOBE, Dec. 26, 2004, at 1; *Montserratians in USA Continue to Appeal for Temporary Protected Status*, BBC MONITORING INTERNATIONAL REPORTS, Feb. 15, 2005; Shelia M. Poole, *UGA Scholar May Face Deportation*, ATLANTA J.-CONST., May 10, 2005, at 14A; Nicholas Roe, *Journey to the Edge of Oblivion*, TIMES (London), Oct. 8, 2005, at 4; Adrian Walker, *Deserted Islanders*, BOSTON GLOBE, April 18, 2005; *Montserratians in USA Continue to Appeal for Temporary Protected Status*, BBC MONITORING INT'L REP., Feb. 15, 2005.

out of the country. Under the statute, if a national of Montserrat TPS recipient is found by USCIS, he will be placed in removal proceedings. To make matters worse, Montserrat's designation was essentially terminated because it was no longer "temporary" as defined by the Attorney General.⁹⁰ Thus, the health, well-being, or conditions to which the "temporarily protected" nationals of Montserrat would return were not considered at all in the Attorney General's termination of Montserrat as a designated state.

The termination of Montserrat's TPS designation seems particularly arbitrary when compared to the extension and termination of other states. For example, compare Montserrat's termination to the termination of designation for Guinea-Bissau on March 20, 2000.⁹¹ The Attorney General offered much more concrete and actual reasons for terminating Guinea-Bissau's status.⁹² Particularly, the Attorney General specified that "[g]iven the high volume of returns and the relative civic stability evidenced by the successful and peaceful elections, it appears that Guinea-Bissauans can return in safety."⁹³ A complete description of Guinea-Bissau's history before designation was also described in relation to improved current conditions.⁹⁴

Whereas the history of Guinea-Bissau's designation was described when its designation was terminated,⁹⁵ Montserrat's termination was not discussed in relation to the current stability of the country, which has been labeled unsafe by many.⁹⁶ Instead, the Attorney General noted Montserrat's conditions no longer seemed to be "temporary" and the Attorney General did not consider the habitability of Montserrat or the condition of the country that would be forcing Montserratian nationals to return.⁹⁷ When reasons for extension or termination are vague and undefined, how are such actions not arbitrary? If there were valid reasons to not terminate Montserrat's status, unlike the termination of Guinea-Bissau, then should status be terminated merely because it is no longer temporary? The Attorney General should not be able to terminate a state's designation when the country is still unsafe and when return would be detrimental to the health and safety of those particular nationals, as well as against primary human rights concerns.

B. TPS Problems in Case Law

First, although family reunification is often touted as one of the ongoing goals of immigration policy in the United States,⁹⁸ TPS does not allow for any

⁹⁰ E.g., Schumer Press Release, *supra* note 88.

⁹¹ *INS Extends and Terminates TPS designation for Guinea-Bissau*, 77 INTERPRETER RELEASES 381 (2000).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ See sources cited *supra*, note 89.

⁹⁷ Termination of the Designation of Montserrat Under the Temporary Protected Status Program, 69 Fed. Reg. 40,642, 40,643 (July 6, 2004).

⁹⁸ See H.R. REP. NO. 85-1199, at 7 (1957), *reprinted in* 1957 U.S.C.C.A.N. 2016, 2020; H.R. REP. NO. 82-1365, at 29 (1952), *reprinted in* 1952 U.S.C.C.A.N. 1653, 1680 (noting Congress' express commitment to family reunification in enacting the Immigration and

hope of family reunification.⁹⁹ In *Escobar v. Gonzalez*, the United States placed the defendant/petitioner Escobar into removal proceedings.¹⁰⁰ Escobar then tried to petition for asylum to stay his removal.¹⁰¹ The Immigration Judge (“IJ”) concluded that Escobar’s claims for asylum, and withholding of removal, were based on membership in a cognizable social group, namely “abandoned street children,” which was persecuted by the Honduran government.¹⁰² However, the IJ denied Escobar’s claims for lack of credibility.¹⁰³ The Board of Immigration Appeals (“BIA”) held that even if Escobar’s claims were credible, Honduran street children did not constitute a “particular social group for purposes of asylum and withholding of removal.”¹⁰⁴

The Third Circuit upheld the BIA’s denial of asylum and withholding of removal for Escobar.¹⁰⁵ The Third Circuit, however, also glossed over the fact that Escobar’s mother was in the United States under the protection of TPS.¹⁰⁶ The court noted, “[u]nlike his mother, petitioner is not eligible for Temporary Protected Status because it is only available to those Honduran nationals who have resided in the United States continuously since December 30, 1998.”¹⁰⁷ The effects of denying TPS for family members of recipients thus has a real effect. In this case, Escobar was removed from his family merely because he had not continuously resided in the United States since an arbitrary date set by the Attorney General and his mother could not legally petition for him. Consequently, TPS breaks up families instead of reunifying them; TPS controverts one the basic premises behind immigration policy in this country, family reunification. If we allow non-citizens, and essentially non-immigrants, to come to our country and be protected because their country is virtually uninhabitable, we should not deny those same benefits to their family members.

Second, the concept of paying taxes and receiving no benefits goes against the basic policies of the United States Constitution.¹⁰⁸ In *Jahic v. Gonzalez*, natives of Bosnia were placed in removal proceedings when Bosnia’s TPS designation was terminated.¹⁰⁹ Once Bosnia’s designation was terminated, an extension of petitioner’s employment authorization was denied.¹¹⁰ Basically, the Jahics lived in the United States since 1992, working legally under the auspices of TPS, presumably paying taxes and Social Security for over ten

Nationality Act because family reunification is the cornerstone of the United States’ immigration policies).

⁹⁹ *Escobar v. Gonzalez*, 417 F.3d 363 (3d Cir. 2005).

¹⁰⁰ *Id.* at 365.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 365.

¹⁰⁵ *Id.* at 368.

¹⁰⁶ *Id.* at 364 n.1.

¹⁰⁷ *Id.* at 365 n.1. *See also Escobar v. United States Attorney Gen.*, 186 F. App’x 300 (3d Cir. 2006) (for the same general proposition of removal regardless of prior TPS status). *But see generally Velasquez-Rivera v. Gonzalez*, 208 F. App’x 558; (9th Cir. 2006) (granting the petition for review and remanding the BIA’s denial of a request for closure of removal proceedings because of TPS eligibility due to abuse of discretion).

¹⁰⁸ *Jahic v. Gonzales*, 142 F. App’x 125 (3d Cir. 2005).

¹⁰⁹ *Id.* at 126.

¹¹⁰ *Id.* at 126, 126 n.3.

years.¹¹¹ These taxes and Social Security payments were not returned to the Jahics when they were removed. The Jahics were thus removed from the country that provided them shelter for over twelve years and were forced to return to a place they could not recognize. Moreover, one of the Jahic's children, who was born in the United States, was also forced to leave her native country because she wanted to remain with her family.¹¹² Thus, not only was family reunification still a problem for these former recipients of TPS, but the unfairness of building a life and supporting a country through taxes for over ten year without any benefit is evident. This will later be compared to similar problems that have cropped up with guest worker programs and taxes.

Third, there is a definite lack of temporariness for TPS recipients from certain designated countries. Montserrat is the perfect example of the anomaly and problem as evinced above. How do we define temporary? Is five years temporary? What about ten years? If a country's nationals still need protection, we should not deny that protection simply because we can no longer call the nationals or the benefits they receive "temporary." It would arguably make more sense to set a marker by which TPS recipients could adjust status and become lawful permanent residents once they are no longer "temporary." This would provide needed stability and truly show the goodwill for which America was once famous. Indeed, there is a problem when countries are treated differently under TPS. Granted, each and every country has its own reasons for designation, but when comparing Somalia and Montserrat, extension versus termination seems particularly unfair.

Fourth, TPS is not always treated as a "status" in litigation by the government, which further shows that it is not a true status under immigration law.¹¹³ In *United States v. Orellana*, the government argued that TPS is not a status for criminal statutory protections and interpretation, although the court disagreed.¹¹⁴ In *Orellana*, the appellant Orellana was indicted for being an alien illegally in the United States in possession of a firearm.¹¹⁵ The district court denied Orellana's motion to dismiss, "finding that his TPS registration did not alter his status as an illegal immigrant."¹¹⁶ The trial court interpreted the statute to mean that TPS did not make a person legal to remain the United States, and thus, that TPS did not confer lawful "status" upon its recipients. Fortunately, the Fifth Circuit disagreed. On appeal, Orellana argued that the district court erred in failing to dismiss his indictment because he was legally and lawfully present in the United States at the time alleged in his indictment as a result of being a national of El Salvador registered and protected by being granted TPS.¹¹⁷ The Government still dismissed Orellana's argument, however, "contending that TPS confers nothing more than a temporary stay of removal and

¹¹¹ *Id.* at 125-26. Although the opinion does not directly refer to the Jahic's payment of Social Security or Federal and State income tax, there is nothing to suggest that the Jahics were delinquent in this regard.

¹¹² *Id.* at 125 n.1.

¹¹³ *United States v. Orellana*, 405 F.3d 360 (5th Cir. 2005).

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 362.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

[thus] has no impact upon the legality of an alien's presence in the United States.¹¹⁸ The Fifth Circuit did not take the government's position, stating "[i]t is clear that an alien in receipt of TPS is in a valid status of some type."¹¹⁹

As such, the Fifth Circuit reversed and remanded Orellana's indictment. The court reasoned that the "[r]eceipt of temporary benefits such as employment authorization or a temporary stay of removal does not render an otherwise illegal alien's presence lawful,"¹²⁰ but TPS should be treated differently from a mere receipt of temporary benefits. That is, as the Fifth Circuit found, "an alien in receipt of TPS is in lawful status, whereas an alien who has merely been extended temporary benefits awaiting the disposition of his application for lawful status may be (and often is) in an unlawful immigration status."¹²¹ Thus, the court was able to hold that being granted TPS must offer some protection, and is a lawful status, despite the government's argument to the contrary, which would dismiss Orellana's indictment for having a firearm because he was lawfully in the country at the time. However, if the government itself argues that TPS is not a status, it is difficult to presuppose that TPS recipients will be able to maintain a life in the United States and feel stable, knowing they are looked at with such disdain, and that they may be removed on a whim at any time. This is an inherent problem with TPS: that it is not a status when compared to other benefits termed "status" by USCIS. For example, a status such as asylum has never been, and presumably will never be, challenged as a lawful status.

Moreover, TPS does not always protect a recipient from being placed in removal proceedings.¹²² In *Bah v. Ashcroft*, the petitioner was granted TPS in 1999 for meeting the requirements, registering properly, and being a national of the designated state of Sierra Leone.¹²³ However, the petitioner was eventually placed in removal proceedings by USCIS.¹²⁴ In considering Bah's application for asylum and withholding of removal, the Fifth Circuit did not consider his grant of TPS, nor how long he had lawfully been in the country.¹²⁵ As such, TPS did not help Bah stay in the country by withholding removal. Worse still, Bah's TPS "protection" was not even considered by the court except to find that he had been in the country legally for a period of time before he was placed in removal proceedings.

Furthermore, TPS did not prevent removal again in *Saccoh v. INS*.¹²⁶ Mrs. Saccoh, despite being protected under TPS as a national of Sierra Leone and being married to a U.S. citizen, was under a final order of deportation when

¹¹⁸ *Id.* at 362-63.

¹¹⁹ *Id.* at 369.

¹²⁰ *Id.* at 370.

¹²¹ *Id.*

¹²² *Bah v. Ashcroft*, 341 F.3d 348 (5th Cir. 2003); *Saccoh v. Immigration and Natural Serv.*, 24 F. Supp. 2d 406 (E.D. Pa. 1998). *But see* *Claros-Ramirez v. United States Attorney Gen.*, 183 F. App'x 271, 273 n.2 (3d Cir. 2006) (noting that an alien who applies for TPS "establishes a prima facie case of eligibility" for prohibition of removal).

¹²³ *Bah*, 341 F.3d at 350.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Saccoh*, 24 F. Supp. 2d at 406.

the Eastern District of Pennsylvania decided this case.¹²⁷ The court there, just as the Fifth Circuit in *Bah*, did not consider Saccoh's TPS as offering her any protection from removal. Instead, the court disregarded Saccoh's TPS, treating it as if it was not a status, and ordering her removed from the United States immediately.¹²⁸ Despite finding that Sierra Leone was designated for TPS because of civil unrest in the country, and that "the Attorney General retains authority to deport Mrs. Saccoh to Sierra Leone when her temporary protected status expires,"¹²⁹ the court still found authority to remove Mrs. Saccoh. In the end, her grant of TPS did not protect her from deportation.

Finally, TPS recipients are not protected from ineffective assistance of counsel in a "status" where counsel is needed because notice is scarce and the statutory construction is complicated: it is not easily maneuvered without the help of attorney.¹³⁰ In *Gbaya*, the petitioner "alleged that his original attorney had failed to inform him of his eligibility for Temporary Protected Status . . . to which certain Sierra Leone natives are entitled."¹³¹ In fact, a successful application for TPS would prevent Gbaya's impending removal. Indeed, the TPS statutory scheme is lengthy and complicated. As such, an attorney is needed to navigate the requirements of eligibility and meet the requirements of registering properly for TPS. However, the Eleventh Circuit did not even consider the complex nature of the TPS statute in denying Gbaya a stay of removal because his attorney did not inform him he was eligible for TPS.¹³² Although the court noted that "aliens enjoy the right to effective assistance of counsel in deportation proceedings,"¹³³ the Eleventh Circuit found that the BIA did not abuse its discretion because the point in the case of *Lozada* was "to prevent the BIA from having to examine the record in each and every ineffective assistance of counsel claim . . ." ¹³⁴ Thus, the court found it acceptable and appropriate not to review Gbaya's allegations because each and every ineffective assistance of counsel claim need not be reviewed. If an important policy of immigrant law in this country is that adequate counsel is needed and deserved, how can the court deny reviewing certain ineffective assistance of counsel claims? Picking and choosing which claims will be reviewed inherently allows at least a small number of valid claims to go unlitigated; it also promotes laziness and a lack of diligence on the part of attorneys in an area of law that sorely needs responsible and diligent counsel due to the complex and varying nature of the law and the claims under that law.

C. Method, Manner, and Review of TPS are Arbitrary

The arbitrariness in regard to designation date is shown in *Pieterston v. Ashcroft*.¹³⁵ In *Pieterston*, the petitioner entered the United States eight months

¹²⁷ *Id.* at 407.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Gbaya v. United States Attorney Gen.*, 342 F.3d 1219 (11th Cir. 2003).

¹³¹ *Id.* at 1221.

¹³² *Id.* at 1222.

¹³³ *Id.* at 1221 (internal citation omitted).

¹³⁴ *Id.* at 1222.

¹³⁵ *Pieterston v. Ashcroft*, 364 F.3d 38 (1st Cir. 2004).

after the registration date for TPS protection as a national of Sierra Leone.¹³⁶ Pieterston was removed after being denied asylum and forced to return to a country still designated under TPS. Essentially, the court determined that although the government would not return some Sierra Leone nationals because the country was unsafe and unable to handle their return, Pieterston did not register properly for TPS and thus was forced to return, regardless of her personal safety in Sierra Leone. Of course, there has to be some cut off for registration of TPS, but in the case of dire circumstances and human rights considerations, should there be exceptions. Typically, ignorance is no excuse for violation of, or in this case not complying with, the law.

Moreover, after careful research, the U.S. Committee for Refugees (the "USCR") noted that the process by which TPS is granted, extended, and terminated "suffers from a severe lack of transparency."¹³⁷ Such designations are continually made in an arbitrary manner, especially when considered against other so-called "status" for which the USCIS is responsible. Simply examining Montserrat compared to Liberia and Sierra Leone, one cannot find a constant as to why states' designations are extended or terminated. Furthermore, Somalia has been extended since 1991, which is well over ten years, and that has not been found to be no longer "temporary" and thus terminated. A question must then be asked, why is Somalia continually extended while we did not care about the nationals of Montserrat? As one scholar suggests, "the duration of TPS is susceptible to significant political influence and is not necessarily tied to the severity of the danger prevailing in the state of origin."¹³⁸ If this is true, that a state's designation is largely decided upon politics, then surely TPS is itself arbitrary and is truly not a status.

III. HOW TPS SHOULD BE CHANGED

There are lessons to be learned from other immigration measures and policies in order to better TPS. Specifically, programs that have, by definition, allowed temporary or limited status in the United States are helpful in advising what changes should be made to TPS. From past guest worker programs in the U.S., namely the Bracero program, we can learn what problems arose in allowing non-immigrants to reside in the U.S. temporarily. Moreover, temporary protection ("TP") in Europe is useful to analyze for its differences from TPS, and the success such differences have made for TP recipients in European countries. Lastly, comparing TPS to asylum is important because asylum is a permanent, yet limited, immigration benefit that is similar in ways to TPS, but that also has many problems. From these comparisons, a change in law may be suggested in order to make TPS truly a status. Primarily, once TPS is no longer temporary, adjustment of status to lawful permanent residency should be available.

¹³⁶ *Id.* at 42.

¹³⁷ Joan Fitzpatrick, *Temporary Protection of Refugees: Elements of a Formalized Regime*, 94 AM. J. INT'L L. 279, 302 n.185 (2000) (citing *United States Designates Three African Countries for TPS*, REFUGEE REP., Nov. 30, 1997, at 12.).

¹³⁸ Fitzpatrick, *supra* note 137, at 285.

A. Guest Worker Programs in the United States

Guest worker programs are helpful for showcasing problems that have arisen in the past regarding allowing people to come to the United States “temporarily.” The Bracero program was a guest worker program executed in the 1940s and 1950s that allowed Mexican agricultural workers to enter the United States to work legally and temporarily.¹³⁹ The Bracero program, however, had many faults that are instructive when suggesting a change in TPS.¹⁴⁰ Moreover, President Bush’s proposed guest worker program, similar to the Bracero program, is useful to see what scholars of immigration law have suggested to make a new guest worker program better by learning from the mistakes of the original Bracero programs.¹⁴¹ The biggest problems with both programs are the feelings of temporariness that the workers experience. For example, under the Bracero program, workers were not treated as equal to United States citizen workers.¹⁴² They were given insufficient food, housing, and wages.¹⁴³ Bush’s proposals for a new guest worker program may remedy such discrepancies, but it is unclear whether the taxes paid by guest workers would be returned to them upon leaving the country inasmuch as taxes were not returned to Bracero workers. Again, a feeling of temporariness and inequity are the biggest problem in allowing “temporary” guest workers into the United States solely to work. TPS does not offer a remedy to either problem, which points to the inequity of temporariness in the first place.

B. Temporary Protection in Europe

Furthermore, comparing TPS to temporary protection (“TP”) under the UN and the EU¹⁴⁴ is valid to show how other countries institute similar programs and how they have avoided problems that have arisen with the enforcement and administration of TPS in the United States. In particular, the Scandinavian and Swiss models are very helpful and useful models. Each

¹³⁹ Maria Elena Bickerton, *Prospects for a Bilateral Immigration Agreement with Mexico: Lessons from the Bracero Program*, 79 TEX. L. REV. 895, 895 (2001).

¹⁴⁰ *Id.* at 909.

¹⁴¹ See Alan Lee, *The Bush Temporary Worker Proposal and Comparative Pending Legislation: An Analysis*, 81(15) INTERPRETER RELEASES 477 (2004); Philip Martin, *Does the U.S. Need a New Bracero Program?*, 9 U.C. DAVIS J. INT’L L. & POL’Y 127 (2002); Kristi L. Morgan, *Evaluating Guest Worker Programs in the U.S.: A Comparison of the Bracero Program and President Bush’s Proposed Immigration Reform Plan*, 15 LA RAZA L.J. 125 (2004); *Senate Committee Conducts Hearing on Immigration Reform Legislation*, 82(30) INTERPRETER RELEASES 1243 (2005); *Presidents Bush, Fox Agree to U.S.-Mexico Bilateral Working Group on Migration*, 78(8) INTERPRETER RELEASES 414 (2001); *Senate Holds Hearing on Agriculture Workforce Needs*, 76(21) INTERPRETER RELEASES 854 (1999).

¹⁴² Bickerton, *supra* note 139, at 909.

¹⁴³ *Id.*

¹⁴⁴ Susan M. Akram & Terry Rempel, *Temporary Protection as an Instrument for Implementing the Right of Return for Palestinian Refugees*, 22 B.U. INT’L L.J. 1 (2004); Joan Fitzpatrick, *The End of Protection: Legal Standards for Cessation of Refugee Status and Withdrawal of Temporary Protection*, 13 GEO. IMMIGR. L.J. 343 (1999); Mark R. Von Sternberg, *Immigration and Nationality Law*, 38 INT’L LAW. 415 (2004); Nadia Yakoob, *Report on the Workshop on Temporary Protection: Comparative Policies and Practices*, 13 GEO. IMMIGR. L.J. 617 (1999).

allows for adjustment after TP has existed for an enumerated time.¹⁴⁵ Furthermore, some countries allow TP recipients to work while others do not and merely give them social benefits.¹⁴⁶ Nadia Yakoob's article details a study done to show the difference between countries who allow TP recipients to work versus those who do not allow work authorization under TP.¹⁴⁷ This study found that "voluntary repatriation was most successful where the rights to work, housing, health, family reunification and education were granted."¹⁴⁸ Indeed, where rights to family, work, etc. were withheld, recipients of TP felt pressured to return to their home countries because the conditions in which they lived were "unbearable."¹⁴⁹ Thus, the study ultimately concluded that when a host state makes TP as short as possible, essentially ignoring the rights they withhold from TP recipients, the very purpose of temporary protection is disregarded completely.¹⁵⁰

C. *Asylum and Other Immigration Statuses in the U.S.*

Moreover, it is useful to compare TPS to asylum and refugee status, which are inherently more permanent statuses under immigration but also are similar to TPS. Indeed, the low percentage of Salvadorans being granted asylum was one reason for enacting TPS in the United States in the first place.¹⁵¹ In asylum and refugee status, an individual person suffers from persecution such that he could not live in his home country in safety.¹⁵² Under TPS, no one (theoretically) can inhabit the country because of a national disaster or widespread violence from political, etc. uprising. However, the two statuses are treated completely differently. There are likely practical reasons for this different treatment.

What we can learn from asylum is that asylum recipients can adjust, in limited numbers.¹⁵³ This means that USCIS is not completely opposed to putting restrictions on the number of people allowed to adjust, and a similar step could be instituted for long-time TPS recipients. Such numerical limitations could easily be applied to TPS if the number of TPS recipients allowed to adjust status once TPS is no longer temporary becomes too high to be practical.

¹⁴⁵ See, e.g., Yakoob, *supra* note 144, at note 23-24 (citing Swiss Asylum Act of 26 June 1998, SR 121.31; No. 64, Act Concerning the Entry of Foreign Nationals Into the Kingdom of Norway and Their Presence in the Realm (Immigration Act), (2002) (Nor.); Swedish Aliens Act, No. 529 (1997)).

¹⁴⁶ Yakoob, *supra* note 144, at 622-23.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 623.

¹⁵⁰ *Id.*

¹⁵¹ 136 CONG. REC. S17,106 (1990). *But see* Matthew E. Price, *Persecution Complex: Justifying Asylum Law's Preference for Persecuted People*, 47 HARV. INT'L L.J. 413, 431-51 (2006) (drawing various distinctions between temporary protection, TPS, and asylum).

¹⁵² Anwen Hughes, *Asylum and Withholding of Removal – A Brief Overview of the Substantive Law*, in BASIC IMMIGRATION LAW 295, 297 (Practicing Law Institute ed., 2005).

¹⁵³ *Id.* at 307.

D. Allow Recipients to Adjust Status Under TPS

Once TPS is no longer temporary, possibly once a state is routinely redesignated beyond five years, there should be a means to adjust to lawful permanent resident (“LPR”) status for those individuals. There could be a cap for adjustment like asylum if the numbers would be outrageous. Moreover, the ways in which TPS is not a status, such as in the wording of litigation in some federal cases, and also being unable to receive public benefits, should be changed within the statute and its administration and enforcement. . For example, in instances where TPS is truly temporary, those who pay taxes and pay into Social Security should be paid back. The United States government, in cooperation with Mexico, tried this in the Bracero program but no one was actually paid back: this was one of the biggest problems with the program. Not allowing back taxes or Social Security returned, or alternatively allowing social benefits, is unfair on its face. Lastly, the arbitrariness of state’s designations, extensions, and terminations should be subject to judicial or Congressional review because of the inherent problem of transparency in not allowing such review. The need for such changes are evidenced simply by one reporter’s interview of an immigration attorney in Florida, “We’ve helped you, but now we’re not. You could stay, but now you’ve got to go back.”¹⁵⁴54

CONCLUSION

As it is currently administered and statutorily constructed, TPS presents a problem in its use of the words “temporary” and “status.” That is, because of the unfair administration of TPS and the arbitrariness of certain sections of the statute, TPS is currently not a status when compared to other forms of immigration relief termed “status” by USCIS. Furthermore, the notion of “temporary” as it exists under the current TPS statute and its administration often no longer fits traditional notions of “temporary.” From examining the statutory construction of TPS, including its legislative history and the complex requirements the statute defines, the arbitrariness and unfairness of the statute are evident. Moreover, the problems with TPS as it currently exists, particularly the enforcement and administration of TPS in the case study of Montserrat fail to consider humanitarian concerns of TPS recipients, instead offering invalid reasons for terminating Montserrat’s designation: because it was no longer temporary.

Finally, by dissecting what other countries, other forms of United States immigration relief, and former guest worker programs can demonstrate about allowing nationals of other countries to come into the U.S. temporarily, we may learn distinct and varied ways that TPS should be changed for the better. Ultimately, once TPS is no longer temporary or no longer provides status for its recipients, adjustment of status for lawful permanent residency should be available for TPS recipients. Such a change will allow fairness, justice, stability, and shelter for many uprooted immigrants while favoring the original policies of immigration law in the U.S., including family reunification. The idea behind

¹⁵⁴ 54 Erin Gillespie, *Temp Status Buys Time; Immigrants from Nations in Turmoil Are Protected*, THE NEWS-PRESS (Fort Myers, FL), Oct. 10, 2006, at 1A.

TPS was always a good one; hopefully, a change in the statute and its enforcement will return TPS to the basic concept of providing hope and protection for those who truly need it.