

**IACHR 167th Extraordinary Period of Sessions, Bogotá, Colombia**  
**Thematic Hearing on the Situation of Human Rights of Persons Affected by**  
**the Cancellation of the TPS and DACA in the United States**

**U.S. Remarks, Feb. 27, 2018**

**Andrew Stevenson, U.S. Mission to the Organization of American States:**  
**Introductory Remarks**

- Distinguished Commissioners and others, I am Andrew Stevenson of the U.S. Mission to the Organization of American States, and I am here with James Bischoff of the U.S. Department of State's Office of the Legal Adviser to represent our delegation.
- I would again like to thank the Government of Colombia for hosting us here, and to again commend it for its unflagging commitment to human rights.
- I will turn the floor over to Mr. Bischoff to give some remarks specific to the subject of this hearing in a few moments.
- First, however, I would like to simply reiterate the remarks I gave at the beginning of the first hearing this morning, on Regulation of Gun Sales and Social Violence. In short, the United States has become increasingly concerned about the Commission's tendency to convene thematic hearings on domestic political and legal matters that are complex, fast-changing, and the subject of

open and robust debate, rather than focusing the bulk of its energy on addressing the severe backlog of individual petitions.

- Furthermore, we would urge the Commission to understand that encroachment on issues reserved by international law to the sovereign prerogative of States, such as a nation's sovereign management of its domestic immigration policies, is inconsistent with the Commission's mandate and undermines its credibility.
- This hearing squarely implicates these concerns. For example, the future immigration status of those persons who have benefited from the Deferred Action for Childhood Arrivals program, or DACA, is the subject of active consideration in the United States Congress and between Congress and the Executive Branch and is also the subject of pending litigation. As such, the ability of the present delegation to contribute meaningfully to this hearing is very limited: we cannot make any predictions about the future of DACA or its beneficiaries, nor would it be appropriate to discuss in this forum the Administration's views on the appropriate course of action or hypothetical outcomes that could emerge from the negotiations.
- I would refer you, Commissioners, and others who are interested, to go back to our remarks from this morning for a full elaboration of our serious concerns about the Commission's decision to convene these hearings.

- With that, I turn the floor over to Mr. Bischoff to give remarks specific to the topic of this hearing.

***James Bischoff, Office of the Legal Adviser***

- Distinguished Commissioners and Executive Secretary Abrão, good morning to you again. My name is James Bischoff, and today I will discuss the sovereign right of States to regulate the entry and presence of foreign nationals in their territory in accordance with applicable international treaty obligations. I will then give some points explaining Temporary Protected Status, or TPS; Deferred Action for Childhood Arrivals, or DACA; and the Administration's recent decisions with respect to those programs.

***Sovereign right of States to regulate immigration***

- The right to admit, exclude, expel, and regulate the presence of noncitizens within a State's borders is an inherent and inalienable right of every State, essential to its safety, independence, and welfare. As the Commission itself has acknowledged, international law has long recognized this sovereign right, subject to States' respective international treaty obligations.

- This principle is also set forth in the Havana Convention of 1928, which provides that “States have the right to establish by means of laws the conditions under which foreigners may enter and reside in their territory.”<sup>1</sup>
- Our domestic courts, including the U.S. Supreme Court, likewise have recognized this maxim of international law for more than a century. .
- Under our constitutional system, the U.S. Congress passes laws on the admission and exclusion of noncitizens. It also passes laws to prescribe the terms and conditions on which they be permitted to enter or on which they remain after having been admitted; and to establish rules for removing noncitizens who entered or have remained in violation of the law. In enforcing the immigration laws, Executive Branch agencies, such as the Department of Homeland Security (DHS) and its components such U.S. Immigration and Customs Enforcement (ICE), act in accordance with the U.S. Constitution, federal statutes and regulations, and the President’s enforcement priorities. The President also has inherent executive authority to control the entry of noncitizens.

### ***Temporary Protected Status***

- Congress established the statutory framework for Temporary Protected Status, or TPS, in 1990 by amending the Immigration and Nationality Act (INA).

---

<sup>1</sup> The Convention on the Status of Aliens (“Havana Convention”), Article 1, adopted Feb. 20, 1928, 132 L.N.T.S. 301, T.S. 815, 46 Stat. 2753, 2 Bevans 710, 4 Malloy 4722.

Congress designed TPS as a discretionary humanitarian measure to provide temporary safe haven to foreign nationals already present in the United States who meet certain requirements and are temporarily unable to return to their home country due to an ongoing armed conflict, environmental disaster resulting in a substantial, but temporary, disruption of living conditions in the area affected, or extraordinary and temporary conditions. The foreign national must request TPS.

- Congress, through the INA, has given the Secretary of Homeland Security the authority to designate a country for TPS and to extend or terminate a country's existing designation. TPS designations and any extensions are limited to periods of up to 18 months before they must be reviewed and assessed to determine whether they should continue.
- Prior to the expiration date of a country's existing TPS designation, DHS reviews conditions in the country and, after consultation with appropriate federal agencies, determines whether the statutory conditions for TPS continue to be met. If DHS determines that the conditions upon which the country's designation is based continue to be met, it will extend the designation, which prolongs TPS for existing beneficiaries who timely re-register. DHS has the discretion to make a new designation for TPS on the same or an alternative basis, which could allow for new beneficiaries.

- If, on the other hand, DHS determines that the statutory conditions for the existing TPS designation are no longer met, it must terminate the designation. Termination ends a country's TPS designation and establishes a date by which beneficiaries who do not hold another lawful immigration status must depart the United States. DHS generally allows for a period of between six and eighteen months for such individuals to retain TPS and TPS-based employment authorization while they prepare for their orderly departure.
- TPS is only available to individuals who were physically present in the United States prior to the date of their country's designation for TPS, as well as meeting other criteria. Throughout the period of designation, DHS cannot detain TPS beneficiaries because of their immigration status, and it cannot remove them from the United States, although TPS may be withdrawn from certain individuals who are no longer eligible to receive it. Beneficiaries are authorized for employment and may obtain permission to travel outside the United States and return.
- It is important to emphasize that TPS is at its heart designed to be a *temporary* benefit. DHS may only designate TPS for a given country for a maximum of 18 months, and must then re-examine the conditions in the country in order to determine whether to extend or terminate the TPS designation..

- DHS makes this temporary nature clear to applicants, informing them through various channels of the expiration date associated with a designation that TPS does not lead to lawful permanent resident status or give any other immigration status on its own, and that, upon termination, TPS beneficiaries continue in any other immigration status they maintained or obtained while holding TPS, unless that other immigration status has expired. Individuals granted TPS must re-register each time their country's TPS designation is extended by submitting an application to DHS, and must also apply to extend their employment authorization documentation.
- Beneficiaries of TPS and other stakeholders are provided notice of all TPS decisions. In addition to a notice in the *Federal Register*—the official journal of the U.S. government—TPS decisions are announced on the DHS website and the website of USCIS, the DHS component that administers TPS programs.
- TPS does not preclude an individual from seeking a different immigration status. For example, a TPS beneficiary could petition for a change to nonimmigrant status, file for adjustment of status to permanent resident based on an immigration petition (for example, based on marriage to a U.S. citizen) or seek asylum or withholding of removal—that is, withholding of deportation—if he or she fears persecution or torture in his or her home country.

- In 2017, DHS announced decisions on TPS designations for 7 countries that were set to expire: Haiti, Honduras, Nicaragua, Somalia, South Sudan, Sudan, and Yemen. Following careful consideration of available information, including recommendations from other Executive Branch agencies, DHS determined that the conditions supporting the designation for TPS continued to exist in Somalia, South Sudan, and Yemen.
- Thus far in 2018, DHS has announced decisions on TPS designations for two countries that were set to expire: El Salvador and Syria. Following careful consideration of available information, including recommendations from other Executive Branch agencies, DHS determined that the conditions supporting the designation for TPS continued to exist in Syria.
- For El Salvador, Haiti, Nicaragua, and Sudan, DHS determined that the conditions supporting the designation of these countries for TPS no longer existed, and therefore the designations could not legally be extended.
- In sum, Congress designed TPS to be a temporary humanitarian measure that does not lead to permanent residence or a path to citizenship. The law requires the Executive Branch to terminate a country's TPS designation when the conditions that led to the designation no longer exist.
- The United States has provided significant resources and support to the governments of Haiti and Central America to help them recover from the events

that prompted their TPS designations and promote a safe and prosperous region. Thankfully, conditions in these countries are now better, and as a result, those individuals who benefited from TPS may now return home or seek another lawful immigration status allowing them to remain in the United States.

### ***DACA***

- I will now say a few words about the Deferred Action for Childhood Arrivals policy, known as DACA.
- DACA was established by a memorandum from the Secretary of Homeland Security on June 15, 2012. The stated purpose of the policy at the time was to protect from deportation those brought illegally to the United States as children.
- Under DACA, individuals who meet several key guidelines may request consideration of deferred action for a period of two years, subject to renewal. They also may apply for work authorization. DACA determinations are made on a case-by-case basis.
- Deferred action is a discretionary determination to defer removal of an individual as an act of prosecutorial discretion. Deferred action does not confer lawful status upon an individual. In addition, although an individual whose case is deferred will not be considered to be accruing unlawful presence in the United States during the period deferred action is in effect, deferred action does

not excuse individuals of any previous or subsequent periods of unlawful presence.

- Under the June 15, 2012 memorandum, individuals could be considered for DACA as a matter of discretion if they:
  - Were under the age of 31 as of June 15, 2012;
  - Came to the United States before reaching their 16th birthday;
  - Have continuously resided in the United States since June 15, 2007, up to the present time;
  - Were physically present in the United States on June 15, 2012, and at the time of their request for consideration of deferred action with USCIS;
  - Entered without inspection before June 15, 2012, or their lawful immigration status expired as of June 15, 2012;
  - Are currently in school, have graduated or obtained a certificate of completion from high school, have obtained a general education development (GED) certificate, or are an honorably discharged veteran of the Coast Guard or Armed Forces of the United States; and
  - Have not been convicted of a felony, significant misdemeanor, three or more other misdemeanors, and do not otherwise pose a threat to national security or public safety.

- DACA does not confer lawful permanent resident status or a path to citizenship, a fact that the U.S. administration made clear to the public and to individual requestors. Only the Congress, acting through its legislative authority, can confer these rights.
- On September 5, 2017, in light of pending litigation, DHS rescinded the original memorandum that had put DACA in place and announced that it would “take all appropriate actions to execute a wind-down of the program.”
- As part of the winding-down process, DHS stated that it would continue to adjudicate pending DACA initial and renewal requests and associated applications for employment authorization.
- More recently, in response to federal court orders, DHS resumed accepting requests to renew a grant of deferred action under DACA on the same terms as were in place before September 5, 2017. However, DHS is not accepting requests from individuals who have never before been granted deferred action under DACA. DACA recipients may not request permission to travel via advance parole.
- With Congress currently debating legislation to address the status of DACA and others who meet similar criteria and several pending lawsuits on the legality of DACA, it is clear that this matter is in flux and is working its way through the democratic political process to find a permanent solution.

- We are unable to comment further given the ongoing litigation before the federal courts.

***Conclusion***

- Distinguished Commissioners, that concludes our presentation today. We look forward to your comments, but stress again that we may be constrained in answering questions for the reasons we have noted.

Drafted: Kathryn Bacharach & James Bischoff, L/HRR, Feb. 2018

Approved: Kevin Sullivan, USOAS

Cleared:

Andrew Stevenson, USOAS (ok)

Rachel Owen, USOAS (ok)

Christine Sanford, L/HRR (ok)

Anna Melamud, L/HRR (ok)

Jeff Kovar, L/WHA (ok)

Sarah Rupert, Rafael Diaz, Eric Sigmon, WHA/CEN (ok)

Stacy Williams, WHA/HSC (ok)

Taryn Frideres, S/P (ok)

White House DPC (ok)

Christopher Ashe, PRM (ok)

Catherine Newling, DRL (info)

Elena Feroz & Others, DHS (ok)

Ryan Higginbotham & Others, DOJ (ok)