

5-3-2022

Temporary Protected Status for Ukraine – how are countries selected for TPS and who qualifies?

Golden Gate University School of Law

Follow this and additional works at: https://digitalcommons.law.ggu.edu/ggu_law_review_blog



Part of the [International Law Commons](#)

Temporary Protected Status for Ukraine – how are countries selected for TPS and who qualifies?



Photo by [U.S. Department of Homeland Security](#) on [Flickr](#).

Following Russia's [invasion](#) of Ukraine, Secretary [Alejandro N. Mayorkas](#) of the Department of Homeland Security (DHS) announced that Ukraine has been designated for [Temporary Protected Status](#) (TPS) for 18 months from April 19, 2022 to October 17, 2023. [Eligible](#) Ukrainian nationals who receive TPS are protected from deportation, allowed to live and work in the United States, and may be granted travel authorization. Under the designation of [Ukraine](#), DHS estimates that roughly 59,000 individuals could be eligible to receive TPS. Despite the temporary nature of the program that allows TPS recipients to stay in the United States for a limited period of time, TPS can be [extended](#) indefinitely for additional periods of 6, 12 or 18 months by the DHS depending on the conditions of the designated country. Most TPS recipients from other designations have been living in the United States for [decades](#).

What is TPS?

In 1990, Congress established the temporary protected status program in the Immigration and Nationality Act ([INA](#)) under Section 244 with the objective of providing certain

immigrants [humanitarian relief](#). The [DHS](#) designates a country for TPS for periods up to 18 months, which allows nationals of the designated country or eligible individuals without nationality who last habitually resided in the designated country to receive temporary immigration status in the United States.

TPS has been a [blanket](#) form of humanitarian relief for many foreign nationals who are fleeing their home countries but do not qualify for asylum because they do not meet the legal definition of a refugee. Unlike asylum, TPS is country specific and is not based on the personal circumstances of the foreign national. If a country has been designated for TPS, the nationals of that country can apply for TPS as long as they meet all the conditions. TPS protects recipients from deportation and grants employment and/or travel authorization, but the program does not currently provide a [path to permanent status](#). Although TPS does not provide a path to permanent residency, it allows TPS recipients who are otherwise eligible for permanent residency to apply for that status. Examples include adjusting status to permanent residency through family-based or employment-based petitions. However, in 2021, the Supreme Court ruled that TPS recipients who initially entered the United State without inspection are not eligible to adjust to permanent status unless they leave the United States and return with a valid visa. Leaving the United States to return with a valid visa would trigger bars to re-entry for up to 10 years for many TPS recipients.



Photo by [Paola Garcia](#) on [Unsplash](#).

TPS Designation

Designating a country for TPS is [discretionary](#). Under the INA Section 244, the statute gives the Secretary of DHS authority to designate a country for TPS, after consulting the appropriate U.S. Government agencies, under one or more of the three [conditions](#):

- Ongoing armed conflict in a foreign state that poses a serious threat to persona safety;
- A foreign state request for TPS because it temporarily cannot handle the return of its nationals due to an environmental disaster such as an earthquake, hurricane, drought; or
- Extraordinary and temporary conditions in a foreign state that prevent its nationals from safely returning.

A country can be designated for TPS unless the Secretary of DHS determines that allowing nationals of the country to temporarily reside in the United States would go against U.S. national interest.

In the case of Ukraine, DHS reviewed [country conditions](#) and determined that the ongoing armed conflict combined with the extraordinary and temporary conditions in Ukraine (first and third conditions) called for an 18 month designation for TPS. Russia's invasion of Ukraine on [February 24, 2022](#) created ongoing armed conflict and a serious threat to the safety of Ukrainian nationals returning to Ukraine. Russian military engaged in continued and significant bombardment of major cities, including the capital, and destroyed infrastructure such as schools, hospitals, and apartment buildings, which led to scarcity in resources and lack of access to health care. The United Nations stated that there were least [3,039 reported civilian casualties](#). The invasion exacerbated the displacement of many Ukrainian citizens who had already been internally displaced by Russia-backed conflicts prior to the invasion and caused more than four million people to flee the country.

Other than Ukraine, there have also been [recent designations](#) for Afghanistan and Cameroon. DHS designated [Afghanistan](#) and [Cameroon](#) for TPS for 18 months for ongoing armed conflict and extraordinary and temporary conditions that prevent nationals from safely returning. Under the new TPS designations, DHS estimates that an additional 74,500 Afghan nationals and 11,700 Cameroonian nationals could be eligible to apply. There are also [12 additional countries](#) currently designated for TPS: Burma, El Salvador, Haiti, Honduras, Nepal, Nicaragua, Somalia, South Sudan, Sudan, Syria, Venezuela, and Yemen.

Who is eligible?

Generally, once the DHS designates a country for TPS, immigrants who are nationals or immigrants without nationality who habitually resided in the designated country can apply for TPS. Foreign nationals who attempt to enter the United States must be admitted pursuant to the INA. The INA allows admission for immigrants who are entering the United States permanently and nonimmigrants who are entering on visas. Foreign nationals who lack lawful immigration status such as those who entered the country without inspection are subject to removal as they are in violation of the INA. The executive branch can grant temporary reprieves from removals to immigrants who did not enter the United States pursuant to the INA. However, there are

specific [grounds of inadmissibility](#) that cannot be waived, such as those relating to criminal convictions, terrorist activity, drug offenses, and the persecution of others.

Under Section 244, TPS provides temporary relief from removal and work authorization to immigrants [regardless of their immigration status](#). Immigrants with valid visas, other nonimmigrant status, expired visa, or who entered the United States without authorization can apply so long as they meet certain conditions.

The following [eligibility requirements](#) must be met to receive TPS:

- Be a national of a country designated for TPOS or a person without nationality who has habitually resided in the designated country;
- File during the registration period (initial or re-registration) or meet the requirements for late initial filing during any extension of the country's TPS designation;
- Have been continuously physically present in the United States since the effective date of the most recent designation date of the country; and
- Have been continuously residing in the United States since the date specified for the country. Brief, casual, and innocent departures from the United States qualify for exceptions to this requirement.

Therefore, foreign nationals of designated countries who are outside the United States are not eligible to apply for TPS. Each designation specifies the date which the foreign national must have been [continuously physically present or continuously residing](#) in the United States to be eligible. For example, the [designation for Ukraine](#) extends eligibility to those who have continuously resided in the United States since April 11, 2022 and have been continuously physically present in the United States since April 19, 2022.

There are about [354,625 foreign nationals](#) who are protected by TPS in the United States as of February 16, 2022. TSP recipients are considered as being in "lawful status as a nonimmigrant" during the protected period.



Photo by [Fabian Fauth](#) on [Unsplash](#).

Terminating a Designation

At least [60 days before expiration](#) of the TPS designation, the DHS secretary must review the country conditions of the country to determine whether they continue to meet the conditions for TPS designation.

When the Secretary [terminates](#) a foreign state's TPS designation, beneficiaries return to one of the following: (1) the same immigration status or category that they maintained before receiving TPS or (2) any other lawfully obtained immigration status obtained while registered for TPS, as long as it is still valid beyond the date TPS terminates. For example, TPS recipients who entered the United States without inspection would return to being undocumented if they do not qualify for another immigration status.

In 2017 and 2018, the Trump administration [terminated TPS](#) designation of El Salvador, Haiti, Nicaragua and Sudan. In 2021, the Biden administration [widened the scope](#) for TPS by designating TPS to new countries like Myanmar (Burma) and Venezuela and extending TPS into 2022 and beyond for existing countries. It also proposed legislation to provide TPS recipients a pathway to U.S. citizenship.

These are some of the countries that had TPS [designations in the past](#) and were terminated over the years: Angola, Bosnia-Herzegovina, Burundi, Guinea, Kuwait, Lebanon, Rwanda, and Sierra Leone.

Further considerations

Despite garnering both Democrats and Republican support in the past, TPS is a controversial topic. As a result of the continued extensions of designated countries, there are TPS recipients who have been living in the United States for decades under a program which was created to provide temporary relief. Some argue that this result not only goes against congressional intent for TPS but also locks TPS recipients into a “[legal limbo](#),” which prevents them from fully integrating into the United States with no path to lawful permanent residency or citizenship. In response to the debate whether TPS recipients who have lived in the United States for long periods of time should be eligible to apply for lawful permanent residence (LPR) status [two bills](#) that would provide a pathway to lawful LPR have passed the house. Terminating TPS for thousands of people who have been living in the United States for more than a decade would not only harm TPS recipients who have set down roots, built families, and pursued careers in the United States but also negatively impact the [U.S. economy](#). The [labor force participation](#) for TPS holders is over 80% and it is projected that TPS holders will contribute \$164 billion to the national GDP over the next decade.

There are also cases discussing the [role of race](#) and how racial animus has been a factor in decisions to terminate TPS designations. In the 9th Circuit case [Ramos v. Nielsen](#), the court vacated an injunction that prohibited the DHS under Trump from terminating TPS for El Salvador, Haiti, Nicaragua and Sudan. The lower court barred Trump from terminating TPS for these four countries after TPS recipients argued that the terminations were [racially motivated](#). More recently, after Ukraine was designated for TPS, the Biden Administration was [criticized](#) for not extending protection to non-white nationals of other countries with ongoing conflict, creating a [double standard](#). Unlike Ukraine where the United States government took [less than two months](#) to designate TPS, the United States took seven months to designate TPS for Afghanistan when the Taliban recaptured it. Furthermore, Ukrainians were exempted from [Title 42](#), which was used by the Biden administration more than a million times to expel migrants primarily from Latin America.

It would be interesting to see whether the U.S. government continues to expand TPS, whether a pathway to citizenship is established for TSP recipients who have lived in the United States for decades, and which countries become designated in the future. With the House of Representatives passing the American Dream and Promise Act and the President including a pathway for TPS holders in the U.S. Citizenship Act, Congress has the opportunity to not only change the future for many TPS recipients but also the TPS program itself.