

## 9th Circ. Loss For Migrants In Crisis Hurts Families, Biz

By **Suzanne Monyak**

*Law360 (September 15, 2020, 10:08 PM EDT)* -- The Ninth Circuit's decision Monday greenlighting an end to temporary immigration protections for hundreds of thousands of people could force separations of mixed-status families while harming critical sectors of the economy during the coronavirus pandemic, experts say.

The federal appeals court held in a 2-1 ruling that the Trump administration had "full and unreviewable discretion" to terminate Temporary Protected Status — which gives work permits and deportation relief to individuals from countries in crisis — for citizens from El Salvador, Nicaragua, Sudan and Haiti. The ruling could also sway a related case challenging the Trump administration's decisions to end TPS for individuals from Honduras and Nepal.

The decision — which paves the way for about 400,000 people, including thousands of essential workers, to lose permission to stay and work in the U.S. in 2021 — creates more uncertainty for families and businesses during a pandemic that has already shuttered companies and schools and claimed nearly 200,000 lives in the U.S., advocates said.

"The devastation to communities is undescrivable," said Anna Gallagher, executive director of the Catholic Legal Immigration Network Inc. "What that means for their employers, what that means for offices, for hospitals, for supermarkets, for health care, caring for older people, caring for children ... This is devastating, this is just devastating."

Wilna Destin, a TPS holder from Haiti who lives in Florida and is a plaintiff in the case, had already survived COVID-19, which infected both her and her husband, when she learned of the Ninth Circuit's ruling.

"There's so much going on. And we've been waiting for this [decision]," she told reporters on Monday. "For me, it's another disaster."

### **Business Uncertainty**

With hundreds of thousands of TPS holders at risk of losing work permits as soon as March, the appellate decision, if left intact, could push businesses that have struggled to find enough U.S. workers in the past to move operations abroad or to hire unauthorized immigrants, attorneys said.

"I think it's really going to be devastating to them," said Patricia Gannon, a partner in Greenspoon Marder LLP's immigration section. "It's a human issue, not just for the communities and the people they support, but also for the employers. They love these people, and this is not going to be easy for them."

Gannon, who previously worked as deputy district counsel for the Immigration and Naturalization Service, the predecessor agency to the U.S. Department of Homeland Security, said that she already has a client, a food manufacturing company, that has decided to move operations to Canada in light of the Trump administration's immigration policies.

The company has worked with the Canadian government to secure visas for many of its foreign-born workers, including employees on TPS, Gannon said. Some of those employees had jumped at the chance to move to Canada years ago, but others had chosen to wait for the results of the TPS litigation.

"This is a company with money and conscience," Gannon said of the client.

If TPS holders lose their work authorization next year, Gannon said some of her clients may try to sponsor their long-term employees with TPS for employment-based visas — a legal option for some living in certain circuits. However, those employers would need to show that no American workers were available or willing to fill those positions, a challenging hurdle during an unemployment crisis.

But even if the open jobs do fail to attract American applicants, many smaller companies may not have the funds to pay the legal and filing fees required to sponsor employees for green cards. Some businesses, Gannon said, may choose to hire immigrants without legal status and risk paying a civil penalty.

The loss of workers would also likely impact areas of the country unevenly. According to the Center for American Progress, TPS holders from Honduras, El Salvador and Haiti are most concentrated in six states: California, Texas, Florida, New York, Virginia and Maryland.

Angelo Paparelli, a partner at Seyfarth Shaw LLP, predicted that a loss of work permits for hundreds of thousands of workers could spur the business community to fight back.

"There's an interesting issue, and that is whether the employer community is going to mount some effort to save TPS," he said. "Three hundred thousand people interspersed through the economy might not seem like much, but there are a number of communities of interest here."

The employee losses could be felt most harshly by industries keeping critical services running during the pandemic. More than 130,000 TPS holders are essential workers, including 76,000 in the food supply industry and nearly 12,000 in health care, according to CAP.

In recognition of this crisis, the Trump administration has already shielded foreign workers in the food supply industry from its visa bans and border closures.

"At a time where we really need to be in touch with that food supply ... this seems untimely. It could have a dramatic effect," Gannon said.

### **'Family Separation 3.0'**

In addition to forcing businesses to make difficult choices, parents who have lived in the U.S. for years

on TPS could soon be forced to choose between bringing their American children to countries they have never known and separating the family.

About 270,000 U.S. citizen children have a parent with TPS, according to statistics gathered by immigrant advocates.

"This is family separation 3.0," Gallagher said, referencing the administration's 2018 policy to separate migrant families at the U.S.-Mexico border followed by its refusal to release migrant families together from immigration detention centers during the COVID-19 outbreak.

But Elora Mukherjee, director of the immigrant rights clinic at Columbia Law School, said that if allowed to stand, the Ninth Circuit decision could usher in a more massive family separation crisis than the previous two actions.

The administration's 2018 border policy led to the separation of more than 5,000 children from their parents, and advocates have pushed for the release of several hundred families held in detention centers during the pandemic.

"This would be family separation on a much larger scale than we've seen before," Mukherjee said.

Her TPS clients who have American children are "understandably really devastated, and are trying to figure out and plan for the unknown," she said.

### **Will It Stand?**

Ahilan Arulanantham of the American Civil Liberties Union, who argued the case on behalf of TPS holders and their families, has already announced that he plans to request an en banc rehearing of the panel decision and to bring the case to the U.S. Supreme Court if necessary.

The Second Circuit is also poised to rule on a separate injunction, issued by a New York federal court, that preserves protections for Haitian TPS beneficiaries.

Mukherjee said she was hopeful that the full Ninth Circuit would grant rehearing and reverse the panel's ruling. The panel decision had rendered the legal precedent that allows courts to examine racial animus behind government decisions, named for the 1977 U.S. Supreme Court case known as Arlington Heights, "virtually meaningless," she said.

The Trump administration's decision to end TPS for those countries is "inexplicable except for racial animus, which the plaintiffs clearly provided in my review," she said.

Other attorneys were less optimistic.

"I'm not surprised. If the administration has the authority to grant Temporary Protected Status, then they certainly have the authority to terminate it," said Paul Virtue of Mayer Brown LLP, former general counsel of INS.

However, all hope is not lost for TPS holders, even if the panel decision remains. With TPS preserved for individuals from five countries until March, and for Salvadorans until November 2021, timing could be one factor in their favor if Democratic presidential nominee Joe Biden wins the election this year and

decides to revive the programs.

Court appeals could also push those expiration dates back, according to Arulanantham.

Congress also has the ability to shield TPS recipients from deportation.

The Democratic-controlled House has passed legislation that would provide a path to citizenship for TPS holders, but that measure has stalled in the Republican-led Senate. Following the release of the Ninth Circuit's decision, immigrant advocacy organizations, including Refugees International and FWD.us, issued statements calling on Congress to pass legislation creating a permanent pathway for TPS holders.

A disproportionate effect on state economies and local communities could ignite interest in passing legislation to save TPS holders.

"Some members have a lot more constituent interests in seeing this happen than others," said Theresa Cardinal Brown, immigration director at the Bipartisan Policy Center, who had worked at DHS and U.S. Customs and Border Protection during the Bush and Obama administrations.

However, policy analysts and former officials were not optimistic that the appeals court ruling would be enough to light a fire under the Senate to pass a bipartisan fix, especially during an election year.

"We're going to almost certainly continue to see the same stalemate," Virtue said. "The formula is not there for a lame duck session to pass favorable immigration legislation in my view and in my experience."

--Editing by Emily Kokoll and Jill Coffey.