NATIONAL IMMIGRATION PROJECT
Lawyers for the Movement

Practice Advisory:
Responding to Smuggling Allegations Against Venezuelan TPS Applicants[1]
November 4, 2024

I. Introduction

U.S. Citizenship and Immigration Services (USCIS) has increasingly alleged that Temporary Protected Status (TPS) applicants—primarily Venezuelans—have smuggled a family member when entering the United States. Smuggling allegations raise a variety of concerns for noncitizens because smuggling can render a noncitizen removable from the United States[2] and, in some cases, ineligible for immigration benefits.[3] The inadmissibility smuggling ground found at Immigration and Nationality Act (INA) § 212(a)(6)(E)(i), which applies in numerous contexts including TPS eligibility, renders inadmissible "any [noncitizen] who at any time knowingly has encouraged, induced, assisted, abetted, or aided any other [noncitizen] to enter or to try to enter the United States in violation of law."[4] While a generous waiver exists for TPS applicants that covers smuggling inadmissibility,[5] the waiver is discretionary. Moreover, smuggling allegations will affect applications for permanent forms of relief for which TPS applicants may be eligible in the future, and where there may not be such generous waivers available. Therefore, it is imperative that practitioners consider potential defenses to smuggling allegations during the TPS application process rather than merely conceding the allegation and relying on the TPS waiver.

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[2] *See* INA § 237(a)(1)(E)(i).

[3] Smuggling can impact benefits that require being admissible or benefits that require good moral character.

[4] As with many other immigration benefits, to qualify for TPS, an applicant must be admissible as an immigrant. *See* INA § 244(c)(1)(A)(iii).

[5] *See* INA § 244(c)(2)(A)(ii) (all grounds not specified in INA § 244(c)(2)(A)(iii) may be waived "in the case of individual [noncitizens] for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest.").

This practice advisory begins by providing background on this issue. The practice advisory then discusses how smuggling allegations prejudice Venezuelan TPS applicants given their unique circumstances such as geography, family ties, residence in other countries after fleeing Venezuela, and dual citizenship. Next, the practice advisory suggests how practitioners can analyze INA § 212(a)(6)(E)(i), address question 22 in Part 7 on the TPS application, and respond to a Request for Evidence, Notice of Intent to Deny, or Notice of Intent to Withdraw.[6] Finally, the practice advisory describes the basics of filing the INA § 244(c)(2)(A)(ii) TPS inadmissibility waiver.

II. Smuggling Allegations Against Venezuelan TPS Applicants: Background

Thousands of Venezuelan families have fled their homes and looked for safety in other Latin American countries and, eventually, the United States. Some Venezuelan families chose to seek protection in the United States despite being dual citizens of other countries. Once at the U.S.-Mexico border, some Venezuelan families presented themselves at a port of entry while others crossed between ports of entry intending to present themselves to Custom and Border Protection (CBP) to seek protection. However they entered, the DHS-issued Form I-213 and the Notice to Appear may not fully or accurately reflect the facts of entry.

DHS designated Venezuela for TPS in 2021 and again in 2023. Venezuelans who have been physically present in the United States since July 31, 2023 can register for TPS with registration open through April 2, 2025.[7] Question 22 of the TPS application, Form I-821, asks the following: "have you ever assisted any other person to enter the United States in violation of the law?" Some Venezuelans—whether pro se, with the assistance of legal counsel at a clinic, or through a legal representative—answered "yes" to this question while others answered "no," perhaps because they did not believe that they "assisted" their family member or did so "in violation of the law." Regardless of whether Venezuelans who entered with a family member answered "yes" or "no," USCIS has in many cases issued Requests for Evidence (RFEs), Notices of Intent to Deny (NOIDs), or Notice of Intent to Withdraw (NOIWs), alleging that the TPS applicant smuggled a family member when they entered the United States.[8]

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[6] This practice advisory focuses on TPS applicants who entered between ports of entry because these are the facts that have seemingly prompted the recent USCIS smuggling allegations. The author has reviewed over 50 RFEs, NOIDs, and NOIWs issued to Venezuelan TPS applicants on smuggling inadmissibility grounds in which USCIS alleges that the noncitizen entered with a family member between ports of entry. If a smuggling allegation arises for a client who entered with family through a port of entry, different considerations come into play such as whether the client committed fraud or misrepresentation regarding the family member. *See e.g., Perez-Arceo v. Lynch*, 821 F.3d 1178, 1180 (9th Cir. 2016) (presenting someone else's documents for family members at a port of entry).

[7] USCIS, Temporary Protected Status Designated Country: Venezuela, (last updated Oct. 11, 2024), https://www.uscis.gov/humanitarian/temporary-protected-status/temporary-protected-status-designated-country-venezuela.

[8] *See supra* note 6.

The RFEs, NOIDs, and NOIWs issued to Venezuelan TPS applicants alleging smuggling inadmissibility typically instruct applicants to respond in one of two ways:

1. With a statement explaining why they have not triggered INA § 212(a)(6)(E)(i);[9] or
2. By filing an application for a waiver of inadmissibility (Form I-601).

However, many of the RFEs reference the wrong waiver. The RFEs often reference the waiver found at INA § 212(d)(11), which is available to those seeking a family-based immigrant visa or adjustment of status, rather than the TPS-specific inadmissibility waiver found at INA § 244(c)(2)(A)(ii), which is much more generous.[10] The INA § 212(d)(11) waiver is available only to noncitizens who smuggled a parent, spouse, son, or daughter. In contrast, the TPS inadmissibility waiver under § 244(c)(2)(A)(ii) is available regardless of who was purportedly smuggled if the applicant shows that a waiver is warranted for humanitarian purposes, to assure family unity, or because it is otherwise in the public interest. Because many RFEs reference the wrong, and more restrictive, waiver statute, some TPS applicants may erroneously conclude that they are ineligible for a waiver and consequently abandon their TPS application.[11] This incorrect waiver reference also raises concerns that the USCIS adjudicator will decide the waiver based on the wrong standard.

III. Smuggling Allegations Against Venezuelan TPS Applicants: Long Term Potential Impact

Venezuelan TPS applicants who concede the smuggling allegation and submit a discretionary waiver under INA § 244(c)(2)(A)(ii) will likely find that USCIS will approve their waiver and TPS application given the generous standard. However, Venezuelan TPS applicants should be prepared for the long-term consequences of conceding smuggling allegations or USCIS finding that they engaged in smuggling. The long-term consequences for Venezuelans are particularly prejudicial because of their unique facts.

Geography, combined with the broad definition of the family unit in Venezuelan culture, disadvantages Venezuelans who may be eligible for a family-based immigrant visa or adjustment of status in the future. Unlike individuals from some of the other TPS-designated countries like Ukraine, Afghanistan, or Nepal, Venezuelans do not have to traverse a large body of water to reach the United States. The land route between Venezuela and the United States—including the

[9] In some cases, USCIS requests a "signed" statement, perhaps signaling that USCIS seeks to ensure that it was the applicant, rather than a preparer, who made the assertion. In some cases, USCIS asked that the statement explain or refute the information/circumstances found in USCIS records.

[10] For an example of such an RFE, please contact the author.

[11] Moreover, as Venezuelans receive an RFE, NOID, or NOIW, they are being forced to pay for additional legal counsel and the waiver application fee or counsel's time for preparing a fee waiver application. Without an employment authorization document (EAD), these additional costs may force TPS-eligible Venezuelans to abandon their applications altogether.

Darién Gap in Colombia—is increasingly easier to successfully navigate.[12] As the chances of reaching the United States improve, Venezuelan families may be more likely to consider traveling together. For Venezuelans, the concept of family extends beyond the nuclear family, often including relatives such as aunts, uncles, grandparents, and cousins.[13] Therefore, it is not uncommon for Venezuelans to travel to the United States by land with extended family members.[14]

Venezuelans who fled to the United States with an extended family member and concede smuggling charges will not qualify for an INA § 212(d)(11) waiver if they become eligible for a family-based immigrant visa or adjustment of status in the future. Only noncitizens who smuggled their parent, spouse, son, or daughter are eligible for an INA § 212(d)(11) waiver.[15] Furthermore, that parent, spouse, son, or daughter relationship must have existed at the time that they entered the United States.[16] Those who do not qualify for an INA § 212(d)(11) waiver remain inadmissible pursuant to INA § 212(a)(6)(E)(i), meaning that they will never be able to gain lawful permanent resident status as an immediate relative or through a family preference petition. Instead, these noncitizens barred by INA § 212(a)(6)(E)(i) must look to other forms of relief that do not require being admissible, such as asylum, or that offer an exception or a waiver for this inadmissibility ground.

While many Venezuelans come to the United States seeking asylum—an application that does not require an individual to be admissible—they may still face obstacles to asylum eligibility,

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[12] Juan Zamorano, *Migrants Pass Quickly Through Once Impenetrable Darien Jungle as Governments Scramble for Answers*, Associated Press, Oct. 6, 2023, https://apnews.com/article/panama-darien-colombia-migrants-da582a3f695206f68952dddccaa93f6d.

[13] Nina Evason, *Venezuelan Culture: Family*, *Cultural Atlas*, 2019, https://culturalatlas.sbs.com.au/venezuelan-culture/venezuelan-culture-family ("Extended family ties play a particularly large role in outer-urban regions and rural areas."); *Venezuelans*, Encyclopedia.com, https://www.encyclopedia.com/humanities/encyclopedias-almanacs-transcripts-and-maps/venezuelans ("Venezuelans value family ties, and the bonds between the extended family—which includes grandparents, aunts, uncles, and cousins—are very important. [...] The extended family is regarded as a close source of support, particularly when there are young children, and also as a source of help in obtaining jobs in a society where personal contacts are important even to secure introductions that may lead to work opportunities. Extended families also gather on weekends or on short holiday visits to sites such as beaches.").

[14] It is also not uncommon for Venezuelans to flee the country with their pets. Caroll Alvarado, *A Venezuelan Family's Harrowing, 10-Country Trek to New York City, with Their Pit Bull in Tow*, CNN, Aug. 25, 2022, https://www.cnn.com/2022/08/25/us/venezuela-family-journey-new-york/index.html; Adolfo Flores, *Their Dogs Stuck with Them on the Perilous Journey to the US, Only to Get Separated at the Border*, BuzzFeed News, Aug. 13, 2022, https://www.buzzfeednews.com/article/adolfoflores/immigrant-families-reunited-with-pet-dogs; Angela Kocherga, *El Paso Woman Helps Reunite Migrant Families and Their Dogs Separated at the Border*, Texas Public Radio, Feb. 19, 2023, https://www.tpr.org/border-immigration/2023-02-19/el-paso-woman-helps-reunite-migrant-families-and-their-dogs-separated-at-the-border.

[15] "Son or daughter" encompasses married children and unmarried sons and daughters. *See* INA § 212(d)(11) ("...and in the case of [a noncitizen] seeking admission or adjustment of status as an immediate relative or immigrant under [INA § 203(a)] (other than paragraph (4) thereof))."

[16] The scope of this waiver was limited by § 351 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. ("IIRIRA"). *See Matter of Farias-Mendoza*, 21 I&N Dec. 269 (BIA 1996) (holding that the respondent was not married to her current husband at the time she assisted him to enter the United States and therefore is ineligible for a waiver, pursuant to section 351 of IIRIRA).

thereby leaving TPS as their only option. Many Venezuelans lived in other countries before seeking protection in the United States and may thus face firm resettlement allegations that they may not be able to overcome. Furthermore, many Venezuelans hold dual citizenship[17] and, unless they reside in the jurisdiction of the Second Circuit,[18] will have to prove that they merit asylum as to both countries, not just Venezuela.[19] Prevailing on an asylum claim for both Venezuela and a second country is a difficult feat.[20]

IV. Mitigating the Risks of a Smuggling Finding Against TPS-Eligible Venezuelans

It is crucial for TPS applicants to not admit or concede smuggling allegations during the TPS application process, if there are facts to support this strategy, since that admission may prevent them from benefiting from a family-based visa or adjustment of status in the future and asylum may be challenging. The following suggested analysis is intended to help practitioners assess how to respond accurately to question 22 in Part 7 on the TPS application and related RFEs, NOIDs, and NOIWs in a manner that does the least long-term harm.

A. Getting the Facts

When responding to question 22 in Part 7 on the TPS application, "have you ever assisted any other person to enter the United States in violation of the law?," it is important for practitioners to not assume that the response is "no" or that a "no" response will not matter. Likewise, practitioners should not assume that the answer is "yes" and that, because TPS includes a generous but nonetheless discretionary waiver, a "yes" answer does not matter. Practitioners should instead take the time to ask the client questions that will obtain the relevant facts that will

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[17] *See, e.g.*, *Migration Trends in the Americans, Bolivarian Republic of Venezuela*, International Organization for Migration (United Nations), Apr. 2018, https://americas.iom.int/sites/g/files/tmzbdl626/files/documents/National_Migration_Trends_Venezuela_in_the_Americas.pdf ("In 2017, around 200,000 people born in Venezuela were registered in Spain. The number of women (113,292) is larger than that of men (95,041). More than 60 per cent (127,825) have Spanish citizenship, related to the previous Spanish emigration towards Venezuela. [...] [Italy and Portugal] are receiving increased flows of Venezuelans. Similarly to Spain, many of them already have or are entitled to obtain European citizenship."); *Colombia - 2020 year-end report - Population trends*, UNHCR, https://reporting.unhcr.org/colombia-2020-year-end-report-population-trends ("...more than 845,000 Colombians and dual nationals are estimated to have returned from Venezuela since 2017,..."); Caterina Notargiovanni, *Por Qué Tantos en Venezuela Están Eligiendo Italia Para Huir de la Crisis*, BBC News Mundo, Aug. 16, 2017, https://www.bbc.com/mundo/noticias-america-latina-40899539 ("'Estimamos que hay 2 millones de descendientes de italianos en Venezuela,' le explica a BBC Mundo el primer secretario Lorenzo Solinas, encargado de prensa de la Embajada de Italia en Caracas. Buena parte de estos descendientes- "no todos", se apresura a aclarar Solinas- tienen derecho a la ciudadanía, dado que Italia se rige por el criterio jurídico Ius sanguinis -derecho de sangre, en latín-, por el cual la ciudadanía se concede por filiación biológica o adoptiva, independientemente del lugar del nacimiento.").

[18] *Zepeda-Lopez v. Garland*, 38 F.4th. 315 (2d Cir. 2022). The jurisdiction of the Second Circuit includes New York, Connecticut, and Vermont.

[19] *Matter of B-R-*, 26 I&N Dec. 119 (BIA 2013).

[20] *See e.g.*, *Grimaldo-Rubiano v. U.S. Att'y Gen.*, 684 F. App'x 802, 803 (11th Cir. 2017) (unpublished) (affirming the denial of asylum when the petitioner did not meet the refugee definition because he feared persecution in Venezuela but not Colombia).

then allow practitioners to formulate an accurate response to question 22 in Part 7 on the TPS application. Practitioners should not rely on the I-213, Notice to Appear (NTA), or other DHS-issued documents for the facts as these documents may be factually incomplete or inaccurate.[21]

Below are some possible questions to ask the client that align with the "knowingly assist another [noncitizen] to enter or attempt to enter the country in violation of the law" elements of INA § 212(a)(6)(E)(i):

- Why did you come to the United States? If you came to the United States for protection, did you think that you had a right to ask the United States for protection?
- Where did you enter the United States? What was the closest city on the Mexico side?
- Why did you cross into the United States at that specific location?
- Did you try to present yourself at a port of entry? If not, why not?
- If you crossed into the United States where there was no port of entry, were you attempting to come to the United States at a port of entry?
- What did you know or understand about the legality of crossing the border where you crossed?
- What were your intentions relating to coming across (or avoiding) immigration officials?
- Describe the moment that led to you making contact with immigration officials.[22]
- How long did it take between crossing the physical border between Mexico and the United States and you making contact with an immigration official?
- Where were you when you made contact with an immigration official?
- When you made contact with an immigration official, what time was it approximately? Was there daylight or any artificial light that made the location visible?
- How did you react when you reached an immigration official? Did you run away? Did you obey their instructions? What did you say to them? Did they speak your language? What did they say to you?
- Did you present your authentic documents to the immigration official?
- Did you think that the immigration official would allow you into the United States once you presented your authentic documents?
- How old were you when you entered the United States?
- Who was with you when you entered the United States?
- What is your relationship to the person (or people) who were with you? If you entered with your current spouse, were you legally married at the time that you crossed the border?

[21] *See e.g., Aguilar Gonzalez v. Mukasey*, 534 F.3d 1204, 1207 (9th Cir. 2008) (noting that Form 1-213 indicated that the petitioner had presented borrowed birth certificates to immigration officials on behalf of two noncitizen infants while the Form G-166 indicated it was the petitioner's father who presented the borrowed birth certificates).
[22] This and the following questions regarding "making contact with an immigration official" may be tailored to the facts of the case. If the client sought out an immigration official, the practitioner could ask the question in terms of "reaching the immigration official."

- How old was the person at the time that you arrived at the U.S.-Mexico border?
- If the person was an adult, did the person have a physical or mental disability?
- If the person was an adult, do you think that your presence made any difference in their ability to get to the United States? Why or why not?
- Did you have assistance from a smuggler or guide to cross the border? If so, who paid for the smuggler/guide?

Through these questions, the practitioner will assess if a smuggling allegation could arise, how to advise the client, and possible rebuttals to the allegation, as discussed below.

Furthermore, practitioners should simultaneously assess the likelihood that asylum could be a viable route to future permanent relief, especially if possible smuggling allegations are present.[23] The practitioner should first ask questions about the nature of the asylum claim to assess its strength and weaknesses. Additionally, the practitioner should ask questions that determine whether asylum bars that are common in Venezuelan cases may apply. The following questions go to the firm resettlement bar and its exceptions as well as the potential existence of dual citizenship:[24]

- After leaving Venezuela and before coming to the United States, did you live in another country? If the answer is "yes," the practitioner could ask the following questions:
    - While you were living in this other country, did you obtain temporary legal status? What was your status?
    - While you were living in this other country, were you working? Did you have a work permit?
    - While you were living in this other country, did you have the opportunity to apply for permanent residence or other immigration statuses?
    - If you applied for permanent residence or other immigration statuses, what was the outcome of those applications?

[23] Practitioners should do a full assessment of the merits of an asylum claim before advising on or assisting with the asylum application (Form I-589).

[24] Many Venezuelans spent time in Colombia before leaving for the United States, which may raise firm resettlement bar issues. *See Matter of K-S-E-*, 27 I&N Dec. 818 (BIA 2020). Note that the Ninth Circuit vacated *Matter of K-S-E-*, but EOIR generally still views it as precedential. *See* Innovation Law Lab and Harvard Immigration and Refugee Clinic, Ninth Circuit Vacates *Matter of K-S-E-* (July 2021), https://harvardimmigrationclinic.org/files/2021/07/Practice-Advisory-Re-Format-4.pdf). Further, anyone who entered between ports of entry after May 11, 2023 will be subject to the Circumvention of Lawful Pathways rule and/or the Securing the Borders Rule. *See* NIPNLG, Asylum Restrictions Comparison Chart (Oct. 1, 2024) https://nipnlg.org/work/resources/asylum-restrictions-comparison-chart. Dual citizenship is also common for Venezuelans, so practitioners should do a complete intake on whether the Venezuelan asylum seeker may be a dual citizen. *See Matter of B-R-*, 26 I&N Dec. 119 (BIA 2013) (holding that an asylum applicant with dual citizenship must establish asylum eligibility as to both countries of citizenship). *But see Zepeda-Lopez v. Garland*, 38 F.4th. 315 (2d Cir. 2022) (holding that an asylum applicant with dual citizenship must establish asylum eligibility as to only one of their countries of citizenship).

    - While you were living in this other country, did you obtain or use fake documents such as a fake residency permit or fake visa?
    - How long did you live in that country?
    - While living in that country did you feel safe and free? If not, why not?
- Are you a citizen of another country besides Venezuela? If so, which country?
- Are you eligible to become a citizen of another country? If so, which country?

A full discussion of the effect of firm resettlement or dual citizenship on asylum eligibility is outside the scope of this resource. However, this resource nonetheless introduces these issues because of their relevance and importance to the long-term assessment and holistic advisals for Venezuelan TPS applicants facing smuggling allegations.[25]

B. Advising Based on the Facts

Once the practitioner has the facts, they should advise the client of the possible consequences of those facts. The following include possible scenarios and advice based on those scenarios.

- If the client entered with any family members between ports of entry, the client should know that it is possible that USCIS may allege smuggling of that family member and that this allegation does not disqualify them from TPS thanks to the generous TPS-based waiver at INA § 244(c)(2)(A)(ii).

    - If the client entered the United States with a parent, spouse, son, or daughter and USCIS ultimately finds that the client engaged in smuggling, the client should know that they would qualify to apply for an INA § 212(d)(11) waiver if they have the opportunity to seek a family-based immigrant visa or adjustment of status in the future.[26]

    - If the client entered the United States with a family member who was not a parent, spouse, son, or daughter and USCIS ultimately finds that the noncitizen engaged in smuggling, they would not qualify for an INA § 212(d)(11) waiver if they have the opportunity to seek a family-based immigrant visa or adjustment of status in the future. However, if they are instead seeking certain humanitarian immigration

[25] Even if practitioners identify a potential firm resettlement or dual citizenship issue in the noncitizen's asylum case, neither of these bars is absolute. The practitioner must do a more in-depth assessment of whether potential exceptions exist and how to address those issues in completing the I-589. Furthermore, there are many other bars to asylum which practitioners should consider. This practice advisory highlights only these two bars because they arise frequently in Venezuelan cases.

[26] For more guidance on navigating the INA § 212(d)(11) waiver, see ILRC, *Practice Advisory: Alien Smuggling: What It Is and How It Can Affect Immigrants* (July 2017), https://www.ilrc.org/sites/default/files/resources/alien_smuggling_practice_advisory-20170728.pdf.

benefits, they may be eligible for relief-specific waiver that covers smuggling inadmissibility.[27]

- If the client is seeking asylum as well as TPS, smuggling will not impact their eligibility for asylum. However, if they win asylum, smuggling allegations will be relevant to their asylee adjustment application in the future.[28] Asylees seeking adjustment may apply to waive this ground of inadmissibility through an INA § 209(c) waiver, which, like the TPS waiver under INA § 244(c)(2)(A)(ii), can be based on humanitarian purposes, to assure family unity, or when it is otherwise in the public interest standard.

C. Assessing Question 22 in Part 7 on Form I-821

Question 22 in Part 7 on Form I-821 is intended to help USCIS determine if TPS applicants may be subject to INA § 212(a)(6)(E)(i) inadmissibility.[29] When responding to question 22 on the TPS application, it is important to first consider the INA § 212(a)(6)(E)(i) elements and to assess the facts to determine how to answer accurately.[30] Each of the elements of INA § 212(a)(6)(E)(i) is discussed in turn below.

a. Knowledge

Venezuelan TPS applicants may be able to rebut a smuggling allegation based on their lack of knowledge. Section 212(a)(6)(E)(i) of the INA requires that a noncitizen have knowledge of two sets of facts required by the statutory provision: (1) that they are encouraging, inducing, assisting, abetting, or aiding another noncitizen to enter or try to enter the United States and (2) that the alleged violator knew the entry would be "in violation of law."[31]

The seminal U.S. court of appeals case discussing the "knowledge" element in INA § 212(a)(6)(E)(i) comes from the Sixth Circuit. In *Tapucu v. Gonzales*, 399 F.3d 736 (6th Cir. 2005), Mr. Tapucu was driving back to Chicago from Toronto with three friends, including his Canadian friend whom Mr. Tapucu knew had lived in the U.S. for years without lawful status. The friends attempted to cross the border, but agents detained Mr. Tapucu (the driver of the car) and his friend (the undocumented Canadian). The agents assumed that Mr. Tapucu was smuggling his friend because he knew his Canadian friend did not have authorization to live in

[27] These include U nonimmigrant status (INA § 212(d)(14)), T nonimmigrant status (INA § 212(d)(13)), Special immigrant Juvenile Status-based adjustment of status (INA § 245(h)), and refugee and asylee adjustment of status (INA § 209(c)).
[28] INA § 209(b).
[29] Although USCIS can rely on a "yes" response to question 22 to determine INA § 212(a)(6)(E)(i) inadmissibility, USCIS may also rely on facts in the record to allege smuggling.
[30] *See Ramos v. Holder*, 660 F.3d 200, 206 (4th Cir. 2011) ("What constitutes knowing assistance will often depend on the totality of the circumstances, which the individual fact finder is best equipped to take into account as different factual circumstances arise.").
[31] *Marquez-Reyes v. Garland*, 36 F.4th 1195, 1201 (9th Cir. 2022).

the U.S.. However, Mr. Tapucu nonetheless thought that his undocumented friend could enter (and leave) the United States freely, since his friend had done so many times before. The Sixth Circuit held that Mr. Tapucu's knowledge of his friend's undocumented status did not prove that Mr. Tapucu knowingly assisted in his friend's unauthorized re-entry, and that there is nothing "illegal about driving a known illegal [noncitizen] with admittedly authentic papers to the American border for examination by the border guards."[32] In reaching this conclusion, the Sixth Circuit cited to footnote 4 of section 40.65 of the 1995 version of the U.S. Department of State Foreign Affairs Manual (FAM), which noted that a "belief that the [noncitizen] was entitled to enter legally, although mistaken, would be a defense to ineligibility for a suspected 'smuggler.'"[33] Beyond the *Tapucu* decision, it is important to note that most of the jurisprudence on INA § 212(a)(6)(E)(i) deals with an alleged smuggler traveling through a port of entry whose actions reflected an intent to evade or defraud the U.S. government, which suggest that the alleged smuggler knew that the entry would be "in violation of law."[34]

The circumstances surrounding many Venezuelan families' entry into the United States could compel the conclusion that they did not act "knowingly." Many Venezuelan families came to the United States seeking protection believing that they had the right to do so. Many Venezuelans may have reasonably believed that presenting their authentic papers to CBP for examination would have led to their lawful entry. Even if the family crossed the border between ports of entry, the family may not have understood or "known" that they were crossing the border without authorization.

For these families who crossed between ports of entry, the facts surrounding the entry will be key to proving their lack of knowledge that the entry would be "in violation of law." The time between when the family crossed the border and when they presented themselves to CBP is an important fact as is how the family reacted when they encountered CBP. For example, if the family crossed the border and then reached CBP just a few seconds or minutes later, and the family did not attempt to evade CBP and instead followed all of CBP's instructions, this behavior suggests that the family did not believe that they were entering in violation of the law. Similarly, if the family crossed during the daytime rather than waiting for nightfall, this action suggests that they did not plan to hide from CBP and that they believed they were acting lawfully.

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[32] *Tapucu v. Gonzales*, 399 F.3d 736, 739–40 (6th Cir. 2005).
[33] *Id.* at 739 (citing 9 FAM § 40.65 n. 4 (1995)). Although the current version of the Foreign Affairs Manual lacks reference to this defense, the language reflects a similar understanding. *See* 9 FAM 302.9-7(B)(3) ("In other words, to find an applicant ineligible under this provision, you must find that the 'smuggler' is or was aware of sufficient facts such that *a reasonable person in the same circumstances would conclude* that their encouragement, inducement, or assistance could result in the entry of the individual into the United States in violation of law.").
[34] *See e.g., Mariscal–Sandoval v. Ashcroft*, 370 F.3d 851, 852 (9th Cir. 2004) (concluding the petitioner committed smuggling where he "tried to evade inspection" while transporting six undocumented Mexican women into this country in his van); *Sidhu v. Ashcroft*, 368 F.3d 1160, 1163 (9th Cir. 2004) (concluding the petitioner committed smuggling where he agreed in advance to help a young man illegally enter the United States, guided him through immigration at the airport and was suspected of providing false documents).

If practitioners assess that the client lacked the requisite knowledge, practitioners could include an explanation such as:

> "I did not knowingly help my [relationship] enter the United States in violation of the law. As I was approaching the U.S.-Mexico border with my [relationship] at approximately [time], I saw immigration officials on the U.S. side of the border. I could see them because [include the circumstances, such as they were not very far away and it was day time]. As soon as I crossed the border I turned myself in to those immigration officials. From the time that I crossed the border and then turned myself in to the immigration officials, it took [approximately time in seconds or minutes] because I was just [approximate distance] away from them. I did not try to run away from the immigration officials because I did not think that I was doing anything wrong. We came to the United States to seek protection so when we reached the immigration officials, we asked them for protection. [If applicable: Our pending asylum applications are proof that we came here seeking protection. I believed I had the right to seek asylum once in the United States]."[35]

b. Enter

The element of "to enter the United States" will likely be present in these cases. An "entry" refers to a person physically coming into the United States whether legally or without authorization, with or without inspection.[36] However, the INA does not define an "entry." Through the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Congress replaced the definition of "entry" with a definition for "admission" when it shifted from exclusion and deportation proceedings to removal proceedings.[37] The INA defines an "admission," as a "lawful entry" in the United States that meets certain other requirements.[38] Thus, the definition of "admission" supports the idea that "entry" means physically coming into the United States.

Since Venezuelan TPS applicants came to the United States with their family member who they allegedly smuggled, and to be eligible for TPS applicants must be present in the United States, it

[35] It is important not to use the exact language in this example, even if it fits a client's description, since USCIS may believe that practitioners are using a template instead of their client's actual circumstances.
[36] *See generally Matter of Quilantan*, 25 I&N Dec. 285 (BIA 2010) (discussing entry as a physical act and an admission as an entry following inspection and authorization by an immigration officer).
[37] *See* IIRIRA, Div. C of Pub. L. No. 104-208, 110 Stat. 3009-546. INA § 101(a)(13) (1994); s*ee also Matter of Martinez–Serrano*, 25 I&N Dec. 151, 153 (BIA 2009) (discussing an 'entry' as defined under former INA § 101(a)(13) prior to IIRIRA: (1) a crossing into the territorial limits of the United States, i.e., physical presence; (2)(a) an inspection and admission by an immigration officer, or (b) an actual and intentional evasion of inspection at the nearest inspection point; and (3) freedom from official restraint.").
[38] INA § 101(a)(13)(A) (defining "admission" as "the lawful entry of the [noncitizen] into the United States after inspection and authorization by an immigration officer.").

is likely that their family member also successfully entered the United States. Whether CBP granted parole, released them on their own recognizance, or allowed them to enter through another medium, an entry into the United States occurred.

c. In Violation of the Law

It is also likely that the element of "in violation of the law" will be present in these cases. Noncitizens who do not enter with proper inspection at a port of entry or avoid examination or inspection enter in violation of the law.[39] As noted above, USCIS has primarily raised the issue of smuggling allegations when families enter between ports of entry. If the families entered between ports of entry, it is likely that they entered without permission and therefore in violation of the law.

d. Assistance

The element of "assistance" may provide Venezuelan TPS applicants a basis to rebut a smuggling allegation. The Ninth Circuit, Sixth Circuit, and First Circuit have determined that the plain meaning of INA § 212(a)(6)(E)(i) requires an affirmative act of help, assistance, or encouragement to cross the border.[40] The Ninth Circuit Court of Appeals has engaged in the most robust jurisprudence analyzing this element starting with *Altamirano v. Gonzales*, 427 F.3d 586 (9th Cir. 2005). In *Altamirano*, the Ninth Circuit found that a noncitizen's mere presence in a vehicle that was entering the United States, with knowledge that another individual was hiding in the trunk, did not amount to aiding and abetting or assisting that individual to enter the United States in violation of the law; rather, section 212(a)(6)(E)(i) of the INA required an act of assistance or encouragement.[41] Subsequently, the Ninth Circuit underscored this point in *Aguilar Gonzalez v. Mukasey*, 534 F.3d 1204, 1209 (9th Cir. 2008), in which it held that the 19-year-old petitioner had not committed an affirmative act of smuggling because she did not provide her son's birth certificate for use by another to enter the United States, but merely allowed her father to use it. The Ninth Circuit held that "acquiescence is not an affirmative act."[42] In *Tapucu v. Gonzales*, the Sixth Circuit also weighed in on the "assistance" element making it clear that there needs to be an affirmative act of assistance or encouragement beyond either "openly presenting [a noncitizen] to border officials with accurate identification and citizenship papers."[43] The case

[39] *See* INA § 212(a)(6)(A)(i); 8 U.S.C. § 1325.
[40] *See Tapucu v. Gonzales*, 399 F.3d 736, 737 (6th Cir.2005); *Altamirano v. Gonzales*, 427 F.3d 586, 592–93 (9th Cir. 2005); *Dimova v. Holder*, 783 F.3d 30, 40–41 (1st Cir. 2015). The remaining courts of appeals have not adopted the "affirmative act" standard. *See also Chambers v. Office of Chief Counsel*, 494 F.3d 274, 279–80 (2d Cir. 2007) (declining to decide whether the "affirmative act" standard adopted by the Ninth and Sixth Circuits applies).
[41] *See also Cortez–Acosta v. INS*, 234 F.3d 476, 483 (9th Cir. 2000) (reversing an INA § 212(a)(6)(E)-based removal because riding as a passenger in one of two vans where there was a noncitizen in the other van did not constitute smuggling).
[42] *Aguilar Gonzalez v. Mukasey*, 534 F.3d at 1209.
[43] 399 F.3d 736, 737 (6th Cir. 2005).

law from the Ninth Circuit, Sixth Circuit, and First Circuit suggests that, even if the alleged smuggler had knowledge that the entry into the United States was in violation of the law, mere presence at the time that the allegedly smuggled person entered the United States is insufficient to qualify as "assistance." However, the facts underlying these Ninth Circuit, Sixth Circuit, and First Circuit cases differ from the facts that characterize the cases of Venezuelan TPS applicants facing smuggling allegations, in that these cases mainly discuss alleged smuggling at a port of entry rather than while entering without inspection. In fact, most U.S. courts of appeals that have addressed smuggling as a ground of inadmissibility have done so mainly in the context of smuggling at the port of entry.[44] The cases that do discuss smuggling in the entering without inspection context tend to involve petitioners who had applied for non-lawful permanent resident cancellation of removal and admitted to the elements of INA § 212(a)(6)(E)(i) during testimony.[45]

Absent significant case law with analogous facts in the entering without inspection context, practitioners could nonetheless rely on the "affirmative act" analysis adopted by Ninth, Sixth, and First Circuits and offer creative arguments if the client has not engaged in an "affirmative act" to smuggle their family member.[46] A 2009 USCIS Interoffice Memorandum defines "encourage, induce, assist, abet, or aid" as "any affirmative action that leads an applicant to enter the United States illegally" while citing to *Altamirano* thereby seemingly adopting this

[44] *See e.g.*, *Chambers v. Office of Chief Counsel*, 494 F.3d 274 (2d Cir. 2007) (involving a port of entry at the U.S.-Canada border); *Barradas v. Holder*, 582 F.3d 754 (7th Cir. 2009) (discussing the Hidalgo, Texas port of entry); *Sandoval-Loffredo v. Gonzales*, 414 F.3d 892 (8th Cir. 2005) (presenting at a Pembina, North Dakota port of entry). *But see Ramos v. Holder*, 660 F.3d 200 (4th Cir. 2011) (parents were not with their children at the border and the children successfully crossed between ports of entry); *Soriano v. Gonzales*, 484 F.3d 318 (5th Cir. 2007) (petitioner drove undocumented noncitizens once they had crossed between ports of entry into the United States).

[45] *See e.g.*, *Marquez-Reyes v. Garland*, 36 F.4th 1195, 1200 (9th Cir. 2022) ("At his final hearing, however, Marquez-Reyes admitted that he was ineligible for cancellation of removal because he had twice 'encouraged' his son (who is not a United States citizen) to enter the country illegally."); *Ortiz-Villagomez v. Holder,* 348 Fed. Appx. 965, 967 (5th Cir. 2009) (unpublished) ("The IJ determined that Villagomez's testimony surrounding his trip in 2005 demonstrated his lack of good moral character because he knowingly aided others' illegal entry into the United States."); *Patel v. Mukasey*, 298 Fed. Appx. 525, 526 (7th Cir. 2008) (unpublished) ("At the hearing on his application for cancellation of removal, [...] Patel admitted that he was smuggled into the United States and that he paid to smuggle his other daughter, Rippalben, into the United States as well."); *Ramirez-Arenas v. Holder*, 578 Fed. Appx. 56, 57 (2d Cir. 2014) (unpublished) ("We need not reach this issue, however, in light of Petitioner's sworn testimony at his plea allocution admitting to conduct satisfying the smuggling bar.").

[46] For cases arising out of the remaining U.S. courts of appeals that have not decided the plain meaning of INA § 212(a)(6)(E)(i), practitioners could argue that the plain meaning of this statutory provision requires an affirmative act of help, assistance, or encouragement to cross the border, just as the Ninth, Sixth, and First Circuits found. Practitioners should note that a 2009 USCIS Interoffice Memorandum defines "encourage, induce, assist, abet, or aid" as "any affirmative action that leads an applicant to enter the United States illegally" while citing to *Altamirano* thereby seemingly adopting this standard.

standard.[47] If USCIS has since revoked this 2009 USCIS Interoffice Memorandum,[48] for cases arising out of the remaining U.S. court of appeals that have not decided the plain meaning of INA § 212(a)(6)(E)(i), practitioners could argue that the plain meaning of this statutory provision requires an affirmative act of help, assistance, or encouragement to cross the border, just as the Ninth Circuit, Sixth Circuit, and First Circuit found.

In assessing possible arguments, practitioners should consider both the family member's need for assistance, if any, and the Venezuelan TPS applicant's actions.

i. Family Member's Need for Assistance

Facts about the specific vulnerabilities of the person whom the Venezuelan TPS applicant allegedly smuggled are relevant to the concept of "assistance." Disability status and age are two such vulnerabilities that suggest that the person may have needed assistance to get into the United States. If the client entered with an adult family member who does not have a disability and the client believes that the adult family member would have been able to come to the United States with or without the client, the client could argue that they did not assist that family member. The client could attach an explanation such as, "I crossed the U.S.-Mexico border at the same time as my [relationship]. My [relationship] made the decision to come to the United States independent of my wishes to come to the United States. Although we entered at the same time, I did not provide them assistance in crossing the U.S.-Mexico border between ports of entry. My adult family member is not disabled and would have been able to come to the United States with or without me."

In contrast, if the client entered with a child, it is implausible that young children would have been able to enter the United States without the help of an adult, whereas for older teens, like the disability factor, there is no bright line rule that suggests whether the young person could have made the trip to the United States independently. Again, it is up to practitioners to ask questions and assess the facts. Nonetheless, even if the client entered with a young child and is unable to contest the "assistance" element of the smuggling definition, they may still disavow the allegation based on the "knowledge" element, as discussed above.

ii. Venezuelan TPS Applicants' Actions

[47] *See* Memorandum from Lori Scialabba, Assoc. Dir. for Refugee, Asylum & Int'l Operations Directorate, et al., USCIS, HQ 70/21.1 AD07-18, Section 212(a)(6) of the Immigration and Nationality Act, Illegal Entrants and Immigration Violators: Revisions to the Adjudicator's Field Manual (AFM) to Include a New Chapter 40.6, 2009 WL 888664, at *1 (Mar. 3, 2009).

[48] USCIS cited this memo in an unpublished Administrative Appeals Office (AAO) decision issued on July 11, 2022, which suggests that the memorandum is still valid or was valid until recently. *See* 19223661, Appeal of Director of the Queens, New York Field Office Decision on Form 1-212, Application for Permission to Reapply for Admission, USCIS Administrative Appeals Office, 2022.

Venezuelan TPS applicants' actions with regard to their family members are important to assessing whether they arguably did nothing more than merely being present with family members at the time that they entered the United States. Depending on the facts, the following are some possible arguments that practitioners could raise if the Venezuelan TPS applicant:

- Came to the United States for the first time seeking the same protection as the family member whom they allegedly smuggled, and did so without hiring a smuggler.[49] Practitioners could argue that their client lacked the experience or resources to guide or otherwise assist the family member as to how to successfully enter the United States without authorization.
- Did not influence their family member's decision to seek protection in the United States. Practitioners could argue that the family member came on their own initiative.[50]
- Did not drive or procure a vehicle for the family member whom they allegedly smuggled into the United States. Practitioners could argue that the family member entered on their own without the client's assistance.[51]
- Did not obtain, provide, or present fraudulent documents on behalf of the family member whom they allegedly smuggled into the United States. Practitioners could argue that this lack of action undercuts the element of "assistance." Indeed, the case law upholding the assistance element of INA § 212(a)(6)(E)(i) emphasizes that the alleged smuggler obtained, provided, or presented fraudulent documents on behalf of a noncitizen.[52] The practitioner could signal this material factual distinction between the case law and their Venezuelan TPS client's case.

e. Answering Question 22 in Part 7 on Form I-821 and Filing the Application

Once practitioners have assessed the INA § 212(a)(6)(E)(i) elements and the facts of the case, practitioners should answer question 22 on Part 7 of Form I-821, which asks "have you ever assisted any other person to enter the United States in violation of the law?"

[49] *See Garcia-Olivares v. Gonzales*, 168 Fed. Appx. 194 (9th Cir. 2006) (unpublished) (holding that the adult petitioners, who paid a smuggler to assist them and their minor children to enter the United States without inspection were ineligible for cancellation of removal because they triggered smuggling inadmissibility and thus lacked good moral character).
[50] *See Carmona v. Gonzales*, 152 Fed. Appx. 599, 603 (9th Cir. 2005) (unpublished) ("But this does not establish that Mr. Nova smuggled [his adult sister]; the record does not show whether Mr. Nova aided or influenced his sister's entry in any way. If she planned to come anyway, on her own initiative, and Mr. Nova only influenced her choice to bring the twins along, it would seem that Mr. Nova did not 'smuggle' anyone but his daughters.").
[51] *See e.g., Sanchez–Marquez v. INS*, 725 F.2d 61, 63 (7th Cir. 1984) (explaining that the petitioner's pre-arrangement to drive seven noncitizens from the Texas–Mexico border to San Antonio in exchange for compensation constituted "assistance").
[52] *See e.g., Olowo v. Ashcroft*, 368 F.3d 692, 697 (7th Cir. 2004) (emphasizing that the petitioner delivered plane tickets to three noncitizens and hid their actual passports from the INS inspectors, and also provided false information and false documents to the INS to assist the child to enter illegally).

Unlike INA § 212(a)(6)(E)(i), which contains four elements, question 22 consists of three elements. Question 22 overlaps with INA § 212(a)(6)(E)(i) by analyzing if the person: (1) assisted another person (2) enter the United States (3) in violation of the law. However, INA § 212(a)(6)(E)(i) requires a mens rea element of "knowledge," which question 22 lacks. This misalignment between question 22 and INA § 212(a)(6)(E)(i) means that question 22 is broader than INA § 212(a)(6)(E)(i), as question 22 focuses on conduct alone.

Practitioners have several options on how to respond to question 22 in Part 7 on Form I-821:

- Answer "yes" with an explanation. Practitioners could include an explanation noting that INA § 212(a)(6)(E)(i) requires knowledge, the client did not have knowledge, and therefore the client did not trigger this inadmissibility ground.
- Answer "no" without an explanation. However, this approach has not deterred USCIS from reviewing an applicant's record and sending an RFE seeking a waiver or a statement as to why the applicant answered "no" despite having entered with a family member. Furthermore, this approach could lead to allegations of misrepresentation if the answer is not based on a full and accurate assessment of the facts.
- Answer "no" with an explanation. This approach has garnered varied responses from USCIS. USCIS has approved I-821s without further communication. USCIS has issued NOIWs following a prior approval. USCIS has also responded by issuing RFEs seeking a waiver or a statement.
- Avoid answering question 22, with a "see addendum" next to the "yes" or "no" boxes, and include an explanation. However, the strategy of not checking a "yes" or "no" will likely lead to an RFE due to the application being incomplete.

If proceeding with an explanation, practitioners could include a short explanation on Form I-821. The filing process will depend on whether practitioners file the I-821 as a hard copy or electronically.

i. *Hard Copy Filing*

To denote that an explanation is included on Form I-821, practitioners could handwrite an asterisk and the words "see Part 11" or "see addendum in Part 11" in the space beneath question 22. Practitioners would then include the explanation in Part 11 of Form I-821, which is reserved for additional information. Note that if the applicant seeks a fee waiver or is filing Form I-821 at an in-person clinic co-sponsored by USCIS, a hard copy filing of the I-821 is the only filing option.

ii. Electronic Filing

If wishing to include an explanation as part of the electronic Form I-821, practitioners could include an explanation in part 11 reserved for "Additional Information." Alternatively, practitioners could answer "yes" to question 22, which will prompt a text box field asking to explain the "yes" response. After including the explanation, practitioners should be able to go back and switch the answer to "no." Under USCIS's current system, switching the answer to "no" preserves the explanation. To ensure that the electronic application preserved the "no" answer with the explanation, practitioners should download and review the electronic draft of the I-821 along with the list of exhibits before filing the application. Otherwise, if filing electronically and submitting a separate statement, practitioners would include the separate statement as an exhibit.

D. Responding to a Request for Evidence, Notice of Intent to Deny, or Notice of Intent to Withdraw[53]

Many Venezuelan TPS applicants have received RFEs, NOIDs, or NOIWs with allegations of INA § 212(a)(6)(E)(i) smuggling grounds of inadmissibility. Some, but not all RFEs, NOIDs, or NOIWs, expressly request a waiver[54] while others request only a statement. For those RFEs, NOIDs, or NOIWs that do not expressly request a waiver, practitioners have two options for responding.

- The first option is for practitioners to submit a statement in the form of a sworn affidavit or declaration under the penalties of perjury without a waiver.[55] The statement would include the client's explanation of the factual circumstances of their entry into the United States with the family member. If practitioners have determined that the facts do not support a smuggling finding, it is important for this statement to include those facts.[56]

[53] Note that practitioners may submit RFE responses, including statements, electronically. There is an option to upload documents and categorize them as "other evidence" or "additional information." The drop-down menu offers a list of options including "RFE response," "Statement," etc.

[54] If the RFE, NOID, or NOIW requests a waiver, please refer to section V. If the client did not have the opportunity to submit a statement with facts rebutting the smuggling allegation prior to USCIS requesting a waiver, the client could include these facts in the statement submitted in support of the waiver.

[55] Practitioners report having had success with this approach. That is, USCIS approved the I-821 without requesting a waiver.

[56] This approach is reflected in an unpublished AAO decision. A Salvadoran TPS applicant stated on his TPS re-registration that he had assisted his daughter enter the United States unlawfully. The Vermont Service Center issued a NOID informing him that he was inadmissible under INA § 212(a)(6)(E) and requesting a waiver. The applicant submitted a statement explaining that the individual who prepared the re-registration filing incorrectly assumed that he assisted in bringing his stepdaughter to the United States and that the preparer neither asked him about the circumstances of his stepdaughter's entry nor went over the form with him in Spanish. The explanation noted that when his stepdaughter arrived in the United States at the age of three years he and her mother were not living together and that, because she was not his biological child, he did not take part in making the decision or arrangements to bring her into the country and did not provide any money or assistance to pay for her trip to the

The cover letter to the response would include any plausible arguments as to why the INA § 212(a)(6)(E)(i) elements are not satisfied, as discussed above.

- The second option is for practitioners to submit a statement from the client and pre-emptively include a waiver pursuant to INA § 244(c)(2)(A)(ii).[57] The cover letter to this response would also include any plausible arguments as to why the INA § 212(a)(6)(E)(i) elements are not met. The response could also include a sentence expressly stating that filing a waiver does not constitute an admission to an INA § 212(a)(6)(E)(i) allegation but that the client is filing the waiver, in the event that USCIS disagrees and finds that there is a smuggling ground of inadmissibility.[58] Practitioners could also explain that the client has chosen to file the waiver to expedite the TPS and EAD approval process and then note the financial hardship that their client is facing as they try to survive and support their family without an EAD. Of course, the client declaration should include the facts that support the claim that they are facing financial hardship.

Practitioners should consider supplementing their clients' statements with documentary evidence related to their clients' manner of entry. In recent years, many asylum seekers have taken photos and videos at the time of entry into the United States using their smartphones. If the client has these images and these images support their recollection of the facts at the time of entry, practitioners may wish to include these with the filing.

V. Filing the Waiver Pursuant to INA § 244(c)(2)(A)(ii)

If a waiver is needed or requested,[59] practitioners should familiarize themselves with, and instruct clients about, the application process for the INA § 244(c)(2)(A)(ii) waiver, including the fee, the legal standard, what documentary evidence to include, and, if approved, future TPS re-registrations.

United States. His TPS re-registration was ultimately approved with a waiver. *See* 32830454 Appeal of Vermont Service Center Decision Form I-821, Application For Temporary Protected Status, 2024 WL 3665132, at *1.

[57] Some practitioners in the legal clinic setting have opted for this strategy because there is no guarantee that the TPS applicant will have access to a competent and authorized legal representative in the future.

[58] Although this sample sentence clearly states that the applicant is not admitting to smuggling, it is important to note the phrasing of Section C of Part 4 of Form I-601: "Select the grounds of inadmissibility that *you believe, to the best of your knowledge*, apply to you." (emphasis added). Between a clear statement that the waiver submission is not an admission and the language of Section C, Part 4 of Form I-601, applicants have a strong argument that filing a waiver is not an admission.

[59] If the practitioner disagrees with USCIS's request for a waiver, it is possible to submit the waiver under protest with the client statement containing this or similar language: "I submit this waiver under protest because the USCIS is alleging that I have engaged in smuggling." The practitioner could also include the language suggested above in the second option under Part IV, Section D of this practice advisory.

Form: The waiver is submitted via Form I-601.[60] Question 31 on Section C of Part 4 of the current Form I-601 is the relevant question.

Fee: Form I-601 has a fee of $1,050. However, a fee waiver is available for any application or petition that is related to TPS, which includes the I-601.[61]

Qualifying Relative: None. Although Form I-601 is often associated with the requirement of having a qualifying relative, a waiver pursuant to INA § 244(c)(2)(A)(ii) does not require a qualifying relative.

Legal Standard: USCIS may grant this discretionary waiver for humanitarian purposes, to assure family unity, or because it is otherwise in the public interest.[62] Humanitarian purposes could encompass facts regarding the client and their family's medical needs, ongoing mass hunger, malnutrition, crumbling infrastructure, civil unrest, human rights violations, and alleged election fraud that have plagued Venezuela since 2013 when President Hugo Chavez died and Vice President Nicolas Maduro took power. In general, the country conditions that gave rise to the TPS designation, as reflected in the original Federal Register Notice[63] and redesignation[64] may form the basis for a "humanitarian purposes" based waiver.[65] The "assure family unity" ground arises if the client would be forced to separate from family members in the United States, especially any U.S. citizens or lawful permanent residents. The "otherwise in the public interest" ground presents an opportunity for practitioners to highlight the client's ties and contributions to their community in the United States. Despite this generous standard, the INA § 244(c)(2)(A)(ii) is nonetheless discretionary so applicants should offer facts for all three enumerated grounds whenever possible.

If the TPS applicant has filed an asylum application, practitioners could include the assertions listed on the asylum application to bolster the humanitarian purposes and public interest grounds of the waiver. Even if practitioners do not rely on the assertions in the asylum application,

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[60] Form I-601, Application for Waiver of Grounds of Inadmissibility, https://www.uscis.gov/sites/default/files/document/forms/i-601.pdf.
[61] Form I-912, Instructions for Request for Fee Waiver, https://www.uscis.gov/sites/default/files/document/forms/i-912instr.pdf, at page 2.
[62] INA § 244(c)(2)(A)(ii).
[63] *See* 86 Fed. R.13574 (March 9, 2021), https://www.federalregister.gov/documents/2021/03/09/2021-04951/designation-of-venezuela-for-temporary-protected-status-and-implementation-of-employment.
[64] See 88 Fed. R.1 68130 (October 3, 2023), https://www.federalregister.gov/documents/2023/10/03/2023-21865/extension-and-redesignation-of-venezuela-for-temporary-protected-status.
[65] For example, in an unpublished AAO decision, the AAO sustained the applicant's appeal of the denial of an INA § 244(c)(2)(A)(ii) waiver citing to "the volatile and unpredictable civil war currently happening throughout Syria and the dangerous situation the applicant would face if she returned to Syria" as a favorable factor. *See* https://www.uscis.gov/sites/default/files/err/M1%20-%20Application%20for%20Temporary%20Protective%20Status/Decisions_Issued_in_2014/JUL292014_02M1244.pdf. The Syrian Revolution led to Syria's TPS designation (and the war that followed led to subsequent extensions). *See* 77 Fed. R.19026 (March 29, 2012), https://www.federalregister.gov/documents/2012/03/29/2012-7498/designation-of-syrian-arab-republic-for-temporary-protected-status.

practitioners should ensure that the facts included in the waiver align with the facts presented in the asylum application.

Format for Proving the Legal Standard: To prove that there are humanitarian, family unity, or public interest reasons for granting the waiver, it is best practice for practitioners to put forth arguments in a cover letter. The arguments should cite to the documentary evidence submitted in support of the waiver. The cover letter should also include a list of the documentary evidence included in the filing.

Documentary Evidence: It is important to include documentary evidence with the waiver to prove the existence of facts that support the humanitarian purposes, family unity, or public interest for approving the waiver. Documentary evidence includes statements (from the client or other individuals) and photographs. The client's statement should include all the facts that are relevant to humanitarian purposes, to assure family unity, or because it is otherwise in the public interest standard. If the cover letter to the RFE, NOID, or NOIW response includes arguments as to why the client believes that they never assisted any other person to enter the United States in violation of the law, the statements should also provide any facts that support those arguments. Photographs that go to any of these factors may be helpful in humanizing the client to USCIS. Finally, the client's statement could include a sentence expressly stating that filing a waiver does not constitute an admission to an INA § 212(a)(6)(E)(i) allegation and explain that they are choosing to file the the waiver to expedite the TPS and EAD approval process because of the financial hardship they are facing.

Future TPS Re-Registrations: If USCIS approves the INA § 244(c)(2)(A)(ii) waiver for the alleged smuggling, the client does not have to submit another waiver when they re-register for TPS. When re-registering for TPS, the applicant may wish to note in the "Additional Information" section that USCIS previously approved a INA § 244(c)(2)(A)(ii) waiver for question 22 in Part 7 (or, if the application form has changed, whatever question corresponds with former question 22 in Part 7).

Future Applications for Immigration Benefits: If USCIS ultimately finds that the TPS applicant is inadmissible due to smuggling regardless of whether the applicant avoided conceding the allegation, this finding will affect future applications for immigration benefits. Because the INA § 244(c)(2)(A)(ii) waiver is valid only in the TPS context, an application for any other immigration benefit will require separate analysis and another waiver, assuming the client qualifies for that waiver.

VI. Conclusion

The increase in smuggling allegations against TPS applicants, especially Venezuelan TPS applicants, is seemingly unprecedented and definitely concerning. Smuggling allegations are concerning because TPS may be the only real chance for Venezuelans to obtain any legal status

in the United States given the unique challenges faced by Venezuelan asylum seekers. Even though TPS applicants can benefit from a generous discretionary waiver that covers INA § 212(a)(6)(E)(i) inadmissibility, an admission or finding of smuggling will likely impact other legal benefits for which they may be eligible in the future. Practitioners should consider these long-term consequences, determine if the facts present the opportunity to challenge the smuggling allegation, and confront that challenge in a strategic and persuasive manner.