

September 20, 2021

The Honorable Joseph R. Biden
The White House
1600 Pennsylvania Avenue NW
Washington, DC 20500

The Honorable Alejandro Mayorkas
Secretary
U.S. Department of Homeland Security
3801 Nebraska Avenue NW
Washington, DC 20016

RE: EXECUTIVE AUTHORITY TO ADMIT THOSE WHO FLEE OR CANNOT SAFELY RETURN TO THEIR HOME COUNTRY DUE TO CLIMATE CHANGE

Dear President Biden and Secretary Mayorkas:

The undersigned 75 immigration policy experts, including attorneys and professors, write to request that the administration use the powers that Congress has already delegated to it to offer aid and protection to those fleeing the effects of climate change worldwide. Climate change has displaced and will continue to displace increasing numbers of people as its effects amplify over time. Unable to return home, climate-displaced persons desperately need *legislative* protections. Nevertheless, the administration does have substantial executive authority to offer aid now. Our recommendations include:

- Utilizing “special humanitarian concern” admissions under Immigration and Nationality Act (INA) § 207(a)(3) for refugees fleeing climate change-related disasters and impacts;¹
- Designating countries affected by climate change-related effects and disasters for Temporary Protected Status (TPS) and/or Deferred Enforced Departure (DED) to prevent nationals from those countries from being forced to return to unsafe conditions;
- Directing U.S. Customs and Border Protection (CBP) and U.S. Citizenship and Immigration Services (USCIS) to utilize humanitarian parole and humanitarian deferred action for climate-displaced persons; and
- Directing U.S. Immigration and Customs Enforcement (ICE) to exercise prosecutorial discretion favorably and to utilize humanitarian parole and deferred action, where appropriate, for climate-displaced persons.

I. Climate Displacement

Climate change accelerates the rate and severity of environmental distress, resulting in both slow- and sudden-onset disasters. The latter category comprises familiar environmental disasters such as flooding, hurricanes, and more, and climate change is increasing their frequency. Slow-onset disasters include environmental degradation processes such as droughts and desertification, increased salinization, rising sea levels, rising average temperatures, and thawing of permafrost. These slow-onset disasters can also cause climate-induced displacement, particularly among those who are most proximately exposed and vulnerable.² Both kinds of disasters exacerbate existing internal problems, such as poverty, disease, and conflict. For this reason, climate change is considered a “threat multiplier.”

The Internal Displacement Monitoring Centre (IDMC), a project dedicated to tracking internal displacement helmed by the Norwegian Refugee Council, has estimated that between 2008 and 2015, climate change forced at least 26.4 million people every year to leave their homes but

¹ 8 U.S.C. § 1157(a)(7).

² Christopher B. Field et al., eds., *Managing the Risks of Extreme Events and Disasters to Advance Climate Change Adaptation: Special Report of the Intergovernmental Panel on Climate Change (IPCC)*, (New York, NY: Cambridge University Press, 2012), https://www.ipcc.ch/site/assets/uploads/2018/03/SREX_Full_Report-1.pdf.

remain within their country's borders.³ Thus, climate-induced displacement does not necessarily or immediately lead to mass international migration, but climate change coupled with diminishing living conditions on a large scale can do so. Climate-induced disruptions also prompt international—that is, external—migration, but without any instrument to track these numbers, tracking such external migration is difficult. For the purposes of this letter, we use the phrase *climate-displaced persons* to describe these migrants.⁴

Because the U.S. refugee system was not necessarily designed to receive climate-displaced persons, existing U.S. refugee mechanisms do not adequately meet their needs.⁵ In the United States, current executive powers lend themselves only to temporary solutions.⁶ These temporary solutions can help meet urgent immediate need for protection, but we emphasize that climate-displaced persons need statutory protection that recognizes the long-term nature of their displacement.

II. Administrative Authority

A. Special Humanitarian Concern

Section 207(a)(3) of the Immigration and Nationality Act (INA) states that “[a]dmissions under this subsection shall be allocated among refugees of special humanitarian concern to the United States in accordance with a determination made by the President after appropriate consultation.”⁷ Currently, refugees of special humanitarian concern are considered second priority for processing, behind only refugees who are specifically identified by “the United Nations High Commissioner for Refugees (UNHCR), a United States Embassy, or a designated non-governmental organization (NGO).”⁸ The emergency refugee situation that now exists due to the negative impacts of climate change warrants the U.S. Refugee Admissions Program to allow refugees whose plight of displacement has been aggravated by climate change to access refugee resettlement.⁹

Likewise, as the largest resettlement country, the United States should encourage the United Nations: (1) to revise its own resettlement criteria to facilitate resettlement for those refugees who cannot access another durable solution due to the negative impact of climate change;¹⁰ and (2) to track and report on the number and circumstances of refugees and other displaced persons who are impacted by climate change.¹¹ These measures would not only signal to other nations that the United States stands ready to do its part in the fight against climate change, but

³ Norwegian Refugee Council, *Global Report on Internal Displacement 2019*, (Geneva, Switzerland: International Displacement Monitoring Center, 2020), <https://www.internal-displacement.org/global-report/grid2020/>.

⁴ For more information about the disproportionate effects of climate change on developing nations and solutions for climate-displaced persons, see Kyilah Terry & Lora Adams, U.S. Imm. Pol’y Ctr., *A Well-Founded Fear of Climate Change: Providing Relief for Climate-Displaced Persons* 5–11 (2021).

⁵ Elizabeth Keyes, *Environmental Refugees? Rethinking What’s in a Name*, 44 N.C. J. Int’l L. 463, 483–86 (2019). See also Amali Tower, *The United States Used to Have a Pathway That Covered “Natural Calamity” Prior to the 1980 Refugee Act*, *Climate Refugees* (2021), <https://www.climate-refugees.org/reports/policybrief-to-biden-co>.

⁶ *Id.* at 483 (“When repatriation is not possible, temporary regimes result in serious inequities.”).

⁷ 8 U.S.C. § 1157(a)(7).

⁸ *The United States Refugee Admissions Program (USRAP) Consultation and Worldwide Processing Priorities*, U.S. Cit. & Immigr. Serv., <https://www.uscis.gov/humanitarian/refugees-and-asylum/usrap> (last updated May 5, 2021).

⁹ This would only pertain to those who both suffer from negative impacts of climate change and already meet the refugee statutory requirements—that is, climate-displaced persons under this framework would still need to show that they have been “persecuted or . . . [have] a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.” Immigration and Nationality Act (INA) § 101(a)(42)(B), 8 U.S.C. 1101(a)(42)(B).

¹⁰ See *Resettlement Criteria*, U.N. High Comm’r for Refugees, <https://www.unhcr.org/en-us/protection/resettlement/558c015e9/resettlement-criteria.html> (last visited July 26, 2021).

¹¹ See *generally Climate Change and Disaster Displacement*, U.N. High Comm’r for Refugees, <https://www.unhcr.org/en-us/climate-change-and-disasters.html> (last visited July 26, 2021).

they would also improve our relationships with nations disproportionately affected by climate change and related disasters.

B. Temporary Protected Status (TPS) and Deferred Enforced Departure (DED)

The U.S. Department of Homeland Security (DHS) can exercise its existing authority to expand its use of Temporary Protected Status (TPS) and Deferred Enforced Departure (DED) to protect climate-displaced persons from being forced to return to unsafe conditions in their home countries.¹² By enacting INA § 244(b)(1), Congress gave the Secretary of Homeland Security the authority to provide TPS—that is, employment authorization and protection from deportation—to immigrants within the United States who are unable to return to their home country due to an armed conflict, environmental disaster, or other temporary and extraordinary conditions that make return unsafe.¹³

Additionally, the President—as part of his constitutionally enumerated power to conduct foreign relations—may designate a country or region for DED, thereby providing individuals from designated countries and regions with employment authorization and protection from removal from the United States for a designated period of time.¹⁴

C. Prosecutorial Discretion and Parole

Prosecutorial discretion is a tool that the administration uses to “make[] immigration [enforcement] decisions[,]” either by sustain[ing], chang[ing], or terminat[ing] existing immigration policies” within the scope of the executive branch’s existing powers.¹⁵ President Biden should instruct U.S. Citizenship and Immigration Services (USCIS) and Customs and Border Protection (CBP) to offer *humanitarian parole* for climate-displaced persons. Humanitarian parole “allows an individual, who may be inadmissible or otherwise ineligible for admission into the United States, to [enter without being admitted to] the United States for a temporary period” due to significant humanitarian and/or public benefit.¹⁶ Additionally, the President should instruct USCIS and ICE to grant *humanitarian deferred action* to climate-displaced persons. Furthermore, President Biden should use his existing authority to promulgate a memorandum that directs ICE to *exercise prosecutorial discretion* favorably in the cases of climate-displaced persons—that is, ICE should not arrest, detain, or deport climate-displaced persons.

¹² See generally *What Are Temporary Protected Status & Deferred Enforced Departure?*, TPS-DED Admin. Advoc. Coal., <https://www.tpsdedaac.org/what-are-tps-ded> (last visited July 26, 2021).

¹³ INA § 244(b)(1), 8 U.S.C. § 1254a(b)(1) (allowing designation of a country or region thereof for TPS “only if . . . there is an ongoing armed conflict within the state . . . there has been an earthquake, flood, drought, epidemic, or other environmental disaster in the state resulting in a substantial, but temporary, disruption of living conditions in the area affected . . . [or] there exist extraordinary and temporary conditions in the foreign state that prevent aliens who are nationals of the state from returning to the state in safety”). See also *List of Countries with Conditions that Satisfy Grounds for TPS*, TPS-DED Admin. Advoc. Coal., <https://bit.ly/TPSChart> (last updated August 17, 2021). In recent years, TPS has been extended to those fleeing the 2010 earthquake in Haiti, the 2001 earthquake in El Salvador, and a 1998 hurricane in Honduras and Nicaragua.

¹⁴ *Deferred Enforced Departure*, U.S. Cit. & Immigr. Serv., <https://www.uscis.gov/humanitarian/deferred-enforced-departure> (last updated Mar. 12, 2021). Currently, Liberia and Venezuela are the only countries designated for DED, but the President could easily designate nations that are severely impacted by climate change for DED.

¹⁵ Shoba Sivaprasad Wadhia, Banned: Immigration Enforcement in the Time of Trump 54 (2019). See also Ellen E. Findley, *Bridging the Gap Between DACA and the DREAM: The BRIDGE Act, What It Means, and Why It Matters*, 7 Penn. St. J.L. & Int’l Aff. 304, 311 (2019), <https://elibrary.law.psu.edu/jlia/vol7/iss1/24>.

¹⁶ *Humanitarian or Significant Public Benefit Parole for Individuals Outside the United States*, U.S. Cit. & Immigr. Servs., <https://www.uscis.gov/humanitarian/humanitarian-or-significant-public-benefit-parole-for-individuals-outside-the-united-states> (last updated June 4, 2021). See also Dep’t Homeland Sec., U.S. Cit. & Immigr. Servs., *Instructions for Application for Employment Authorization 16* (2020).

III. Conclusion

Climate change continues to threaten the safety and livelihood of people worldwide. As a free and prosperous country, it is our duty to offer protections to peoples displaced by climate change through the above mechanisms, especially given the United States' outsized role in causing climate change.

If you have any questions, please contact Lora Adams (lora@masadc.com).

Thank you for your time and consideration.

Sincerely,

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