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Hurricane Katrina-Related Immigration Issues and Legislation

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Summary

The devastation and displacement caused by Hurricane Katrina in the Gulf Coast region of the United States has very specific implications for foreign nationals who lived in the region. Whether the foreign national is a legal permanent resident (LPR), a nonimmigrant (e.g., temporary resident such a foreign student, intracompany transferee, or guest worker) or an unauthorized alien (i.e., illegal immigrant) is a significant additional factor in how federal laws and policies are applied. *In this context, the key question is whether Congress should relax any of these laws pertaining to foreign nationals who are victims of Hurricane Katrina.*

Many of the victims of Hurricane Katrina lack personal identification documents as a result of being evacuated from their homes, loss or damage to personal items and records, and ongoing displacement in shelters and temporary housing. As a result of the widespread damage and destruction to government facilities in the area affected by the hurricane, moreover, many victims will be unable to have personal documents re-issued in the near future. Lack of adequate personal identification documentation, a problem for all victims, has specific consequences under immigration law, especially when it comes to employment and eligibility for programs and assistance.

Noncitizens — regardless of their immigration status — are not barred from short-term, in-kind emergency disaster relief and services, or from assistance that delivers in-kind services at the community level, provides assistance without individual determinations of each recipient's needs, and is necessary for the protection of life and safety. As legislation to ease the eligibility rules of major federal programs for Hurricane Katrina victims generally is under consideration, the question of whether to ease the specific rules for immigrants has arisen (S.1695).

Most avenues for immigration require that aliens have a family member or employer who is eligible, able, and willing to sponsor them. There are very few immigration opportunities based on self petitioning. The loss of life, devastation of businesses, or depletion of personal assets directly affects visa qualifications for otherwise eligible aliens who are victims of Hurricane Katrina or the family of victims. It also affects nonimmigrants whose purposes for the temporary visas are disrupted by the hurricane and its aftermath. Some are advocating legislation comparable to that enacted for surviving family of victims of the September 11, 2001 terrorist attacks.

Finally, at various times in the past, the government has given discretionary relief from deportation so that aliens who have not been legally admitted to the United States or whose temporary visas have expired nonetheless may remain in this country temporarily. Following the September 11, 2001 terrorist attacks, for example, family members of victims whose own immigration status was dependent on the victim's immigration status were assured that they should not be concerned about facing immediate removal from the United States. This report will be updated.

Contents

Introduction	1
Personal Identification and Employment Eligibility	2
Noncitizen Eligibility for Federal Assistance	3
Legal Permanent Residents	4
Unauthorized Aliens	5
Disaster Assistance	6
Preservation of Immigrant Visa Benefits	7
Loss of Sponsor	7
Public Charge Ground of Inadmissibility	9
Relief from Removal	10

Hurricane Katrina-Related Immigration Issues and Legislation

Introduction

The devastation and displacement caused by Hurricane Katrina in the Gulf Coast region of the United States pose a host of environmental, human resource, and other public policy challenges. Caught in the web of this tragedy and its sweeping dilemmas are a unique subset of immigration-related issues. The loss of livelihood, habitat, and life itself has very specific implications for foreign nationals who lived in the Gulf Coast region. Whether the noncitizen or foreign national is a legal permanent resident (LPR), a nonimmigrant (e.g., temporary resident such a foreign student, intracompany transferee, or guest worker) or an unauthorized alien (i.e., illegal immigrant) is a significant additional factor in how federal immigration and public welfare laws are applied. *In this context, the key question is whether Congress should relax any of these laws pertaining to foreign nationals who are victims of Hurricane Katrina.*

The total number of foreign nationals affected by Hurricane Katrina is not known. Survey data from the U.S. Bureau of Census estimate that over 270,000 foreign-born persons lived in Alabama, Louisiana, and Mississippi in 2004.¹ The Department of Homeland Security (DHS) estimates that 34,242 naturalized citizens, 24,087 LPRs, and 71,992 nonimmigrants may be affected by Hurricane Katrina.² Jeffrey Passel, a demographer who specializes in unauthorized migration, estimates that at least an additional 20,000 to 35,000 unauthorized aliens are victims of Hurricane Katrina.³

This report focuses on four immigration policy implications of Hurricane Katrina. It opens with a discussion of employment verification and other documentary problems arising for those who have lost their personal identification documents. It follows with an overview of the rules for noncitizen eligibility for federal benefits. Issues pertaining to how the loss of life or livelihood affects eligibility for immigration visa benefits are discussed next. The report closes with

¹ U.S. Bureau of the Census, published data for Alabama, Louisiana, and Mississippi from the 2004 American Community Survey.

² The DHS estimates are based on an analysis of data from FEMA, the US Census Bureau, DHS Office of Immigration Statistics, and USCIS databases, and provided by USCIS Office of Congressional Relations, Sept. 15, 2005.

³ E. Eduardo Castillo, "Illegal Immigrants Afraid to Get Storm Aid," Associated Press, Sept. 9, 2005.

background on relief from removal options for Katrina-affected aliens. Legislation addressing these policy areas is discussed in the relevant sections.

Personal Identification and Employment Eligibility

Many of the victims of Hurricane Katrina lack personal identification documents as a result of being evacuated from their homes, loss or damage to personal items and records, and ongoing displacement in shelters and temporary housing. As a result of the widespread damage and destruction to government facilities in the area affected by the hurricane, moreover, many victims will be unable to have personal documents re-issued in the near future. Lack of adequate personal identification documentation, a problem for all victims, has specific consequences under immigration law, especially when it comes to employment.

The Immigration and Nationality Act (INA) requires employers to verify employment eligibility and establish identity through specified documents presented by the employee — citizens and foreign nationals alike. Specifically, §274(a)(1)(B) of the INA makes it illegal for an employer to hire any person — citizen or alien — without first verifying the person's authorization to work in the United States. Employers (and recruiters and referrers for a fee) must examine documents and attest that they appear to be genuine and relate to the individual. If a document does not reasonably appear on its face to be genuine and relate to the person presenting it, the employer may not accept it. Under INA §274(b), employers may not specify which document(s) the person must present. The INA and applicable regulations provide for three categories of documents: (1) those that establish both identity and employment eligibility; (2) those that establish identity only; and (3) those that establish work eligibility only.⁴

Employers who fail to properly comply as required by law are subject to sanctions. Specifically, employers who fail to complete, retain, and/or present the proper form (known as the I-9) for inspection may be subject to a civil penalty for violations ranging from \$110-\$1,100 per employee. For a violation of hiring unauthorized aliens, an employer can also face: \$275-\$2,200 fine for each unauthorized individual; \$2,200-\$5,500 for each employee if the employer has previously been in violation; and, \$3,300-\$11,000 for each individual if the employer was subject to more than one cease and desist order.⁵

On September 6, 2005, DHS, the federal department responsible for enforcing these provisions of law, issued a statement that it would not bring sanction actions against employers for hiring individuals evacuated or displaced as a result of Hurricane Katrina.

... the Department of Homeland Security will refrain from initiating employer sanction enforcement actions for the next 45 days for civil violations, under

⁴ For a more complete discussion, see CRS Report RS22180, *Unauthorized Employment of Aliens: Basics of Employer Sanctions*, by Alison Smith.

⁵ INA §274A(a)(1)(A) and §274A(a)(2). CRS Report RS22180, *Unauthorized Employment of Aliens: Basics of Employer Sanctions*, by Alison Smith.

Section 274A of the Immigration and Nationality Act, with regard to individuals who are currently unable to provide identity and eligibility documents as a result of the hurricane. Employers will still need to complete the Employment Eligibility Verification (I-9) Form as much as possible but should note at this time that the documentation normally required is not available due to the events involving Hurricane Katrina. At the end of 45 days, the Department of Homeland Security will review this policy and make further recommendations.⁶

Given that the individuals affected by Hurricane Katrina are now scattered across the United States, this moratorium on sanctioning employers may have broad implications and is not without its critics. Representative Lamar Smith, for example, is quoted as saying: "Hurricane Katrina has caused a situation unlike any we have ever had to endure, but that does not mean that the Department of Homeland Security has the authority to ignore important laws." Representative Smith, who sits on the House Committee on the Judiciary Subcommittee on Immigration, Border Security and Claims, continued, "the end result may be worthwhile, but that does not mean that federal agencies can disregard statutes put in place to protect American jobs."⁷

Meanwhile, U.S. Citizenship and Immigration Services (USCIS) has announced that the records in its New Orleans office were not damaged and that field offices are preparing to assist hurricane victims in replacing official documentation. USCIS stated that it will be verifying identity and immigration status before re-issuing any immigration related document and will be utilizing its electronic file data to perform identity verification where possible.⁸

Noncitizen Eligibility for Federal Assistance

Lack of sufficient documentation to confirm eligibility for federal programs and assistance is a core issue for all victims, not merely those who are noncitizens. The eligibility of noncitizens for public assistance programs, moreover, is based on a complex set of rules that are determined largely by the type of noncitizen in question and the nature of services being offered.⁹ The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (P.L. 104-193) is the key statute that spells out the eligibility rules for noncitizens seeking federal assistance. As legislation to ease the federal eligibility rules for public assistance for Hurricane Katrina victims

⁶ U.S. Department of Homeland Security, "Notice Regarding I-9 Documentation Requirements for Hiring Hurricane Victims," Press Release, Sept. 6, 2005.

⁷ Jerry Seper and Stephen Dinan, "Verification Rules for Workers Eased," *Washington Times*, Sept. 9, 2005.

⁸ U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, *USCIS Operations After Hurricane Katrina FAQ*, Sept. 8, 2005.

⁹ For a full discussion, see CRS Report RL31114, *Noncitizen Eligibility for Major Federal Public Assistance Programs: Policies and Legislation*, by Ruth Ellen Wasem; CRS Report RS21470, *Noncitizen Eligibility For Major Federal Public Assistance Programs: Legal Concepts*, by Alison Smith; and CRS Report RL32363, *State Policies on Immigrant Eligibility for Temporary Assistance for Needy Families (TANF)*, by Ruth Ellen Wasem.

generally is under consideration, the question of whether to ease the specific rules for noncitizens has arisen (S.1695).¹⁰

Legal Permanent Residents

Under current law, noncitizens' eligibility for the major federal means-tested benefit programs largely depends on their immigration status and whether they arrived in the United States (or were on a program's rolls) before August 22, 1996, the enactment date of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (P.L. 104-193). The basic rules are as follows:

- Refugees and asylees are eligible for SSI benefits and Medicaid for seven years after arrival, and for five years under TANF.¹¹ After this term, they generally are ineligible for SSI, but may be eligible, at state option, for Medicaid and TANF.
- LPRs with a substantial work history — generally 10 years (40 quarters) of work documented by Social Security or other employment records — or a military connection (active duty military personnel, veterans, and their families) are eligible for the full range of programs.
- All aliens who have resided in the United States for five or more years as “qualified aliens” — i.e., LPRs, refugees/asylees, and other non-temporary legal residents (such as Cuban/Haitian entrants) are eligible for food stamps.
- LPRs receiving SSI as of August 22, 1996, continue to be eligible.
- Medicaid coverage is required for all otherwise qualified SSI recipients (they must meet SSI noncitizen eligibility tests).
- Disabled LPRs who were legally resident as of August 22, 1996, are eligible for SSI.
- LPRs receiving government disability payments, so long as they pass any noncitizen eligibility test established by the disability program (e.g., SSI recipients would have to meet SSI noncitizen requirements in order to get food stamps) are eligible for food stamps.¹²
- LPRs who were elderly (65+) and legally resident as of August 22, 1996, are eligible for food stamps.
- LPRs who are children (under 18) are eligible for food stamps.

¹⁰ For discussion of these legislative activities, see CRS Report RS22258, *Federal Food Assistance: Hurricane Katrina*, by Joe Richardson; and CRS Report RS22246, *Temporary Assistance for Needy Families (TANF): Its Role in Response to the Effects of Hurricane Katrina*, by Gene Falk.

¹¹ Refugee/asylee treatment is accorded to Cuban/Haitian entrants, certain aliens whose deportation/removal is withheld for humanitarian purposes, Vietnam-born Amerasians fathered by U.S. citizens, and victims of human trafficking. For those aliens who arrive in the United States without one of these forms of humanitarian relief, the seven- or five-year period begins after the date the aliens receive the status.

¹² For SSI eligibility, disabled LPRs must meet SSI permanent and total disability standards. For food stamp eligibility, disabled LPRs must be receiving governmental benefits for disability (e.g., SSI, Social Security disability payments, certain veterans disability benefits).

- LPRs entering after August 22, 1996, are barred from TANF and Medicaid for five years, after which their coverage becomes a state option.¹³ For SSI, the five-year bar for new entrants is irrelevant because they generally are denied eligibility (without a time limit).

Several bills that would waive the categorical eligible requirements for various federal programs in the case of Hurricane Katrina victims have been introduced, but most are silent on the issue of noncitizens. On September 13, however, legislation to provide the Secretary of Agriculture with additional authority and funding to provide emergency relief to victims of Hurricane Katrina (S. 1695) was introduced, and, among other provisions, this bill would treat legal immigrants in the United States who are victims of Hurricane Katrina as refugees for the purposes of food stamps.¹⁴

Unauthorized Aliens

The PRWOR of 1996 (P.L. 104-193) also denies most federal benefits, regardless of whether they are means tested, to unauthorized aliens (often referred to as illegal aliens). The class of benefits denied is broad and covers: (1) grants, contracts, loans, and licenses; and (2) retirement, welfare, health, disability, housing, food, unemployment, postsecondary education, and similar benefits. So defined, this bar covers many programs whose enabling statutes do not individually make citizenship or immigration status a criterion for participation. Thus, programs that previously were not individually restricted — the earned income tax credit, social services block grants, and migrant health centers, for example — became unavailable to unauthorized aliens, unless they fall within the act's limited exceptions. These programmatic exceptions include:

- treatment under Medicaid for emergency medical conditions (other than those related to an organ transplant);¹⁵
- short-term, in-kind emergency disaster relief;¹⁶
- immunizations against immunizable diseases and testing for and treatment of symptoms of communicable diseases;
- services or assistance (such as soup kitchens, crisis counseling and intervention, and short-term shelters) designated by the Attorney General as: (i) delivering in-kind services at the community level; (ii) providing assistance without individual determinations of each

¹³ This five-year ban on eligibility for new entrants also applies to a program closely related to the Medicaid program — the State Children's Health Insurance program (SCHIP). It is the only categorical noncitizen eligibility rule affecting SCHIP.

¹⁴ For discussion of these legislative activities, see CRS Report RS22258, *Federal Food Assistance: Hurricane Katrina*, by Joe Richardson.

¹⁵ For analysis, see CRS Report RL31630, *Federal Funding for Unauthorized Aliens' Emergency Medical Expenses*, by Alison Siskin.

¹⁶ For further analysis, see CRS Congressional Distribution Memorandum, *Noncitizen Eligibility for Disaster-Related Assistance*, by Alison Siskin, Feb. 15, 2002.

recipient's needs; and (iii) being necessary for the protection of life and safety;¹⁷ and

- to the extent that an alien was receiving assistance on the date of enactment, programs administered by the Secretary of Housing and Urban Development, programs under Title V of the Housing Act of 1949, and assistance under Section 306C of the Consolidated Farm and Rural Development Act.¹⁸

P.L. 104-193 also permits unauthorized aliens to receive Old Age, Survivors, and Disability Insurance benefits under Title II of the Social Security Act (SSA), if the benefits are protected by that title or by treaty or are paid under applications made before August 22, 1996.¹⁹ Separately, the P.L. 104-193 states that individuals who are eligible for free public education benefits under state and local law shall remain eligible to receive school lunch and school breakfast benefits. (The act itself does not address a state's obligation to grant all aliens equal access to education under the Supreme Court's decision in *Plyler v. Doe*, 457 U.S. 202 (1982).) P.L. 104-193 expressly bars unauthorized aliens from most state and locally funded benefits. The restrictions on these benefits parallel the restrictions on federal benefits.

Disaster Assistance

As noted in the above discussion, noncitizens — regardless of their immigration status — are not barred from short-term, **in-kind** emergency disaster relief and services or assistance that deliver **in-kind** services at the community level, provide assistance without individual determinations of each recipient's needs, and are necessary for the protection of life and safety.²⁰ Moreover, the Robert T. Stafford Disaster Relief and Emergency Assistance Act,²¹ the authority under which the Federal Emergency Management Agency (FEMA) conducts disaster assistance efforts, requires nondiscrimination and equitable treatment in disaster assistance:

The President shall issue, and may alter and amend, such regulations as may be necessary for the guidance of personnel carrying out Federal assistance functions at the site of a major disaster or emergency. Such regulations shall include provisions for insuring that the distribution of supplies, the processing of applications, and other relief and assistance activities shall be accomplished in

¹⁷ *Federal Register*, vol. 61, no. 170, p. 45985, Aug. 30, 1996.

¹⁸ Subtitle E of Title V of the Illegal Immigration Reform and Immigrant Responsibility Act (Division C of P.L. 104-208) later facilitated the removal of unauthorized aliens from housing assistance. For analysis, see CRS Report RL31753, *Immigration: Noncitizen Eligibility for Needs-Based Housing Programs*, by Alison Siskin and Maggie McCarty.

¹⁹ The SSA requires that aliens be "legally present" to actually receive benefits in the United States. For further discussion, see CRS Report RL32004, *Social Security Benefits for Noncitizens: Current Policy and Legislation*, by Dawn Nuschler and Alison Siskin.

²⁰ For a more complete analysis, see CRS Congressional Distribution Memorandum, *Noncitizen Eligibility for Disaster-Related Assistance*, by Alison Siskin, Feb. 15, 2002.

²¹ 42 USC 5121 et. seq.

an equitable and impartial manner, without discrimination on the grounds of race, color, religion, nationality, sex, age, or economic status.²²

FEMA assistance provided under the Stafford Act includes (but is not limited to) grants for immediate temporary shelter, cash grants for uninsured emergency personal needs, temporary housing assistance, home repair grants, unemployment assistance due to the disaster, emergency food supplies, legal aid for low-income individuals, and crisis counseling.²³

Media accounts of aliens who are fearful of seeking emergency assistance following Hurricane Katrina infer that the reported reluctance is due more to the risk of deportation than restricted access to benefits. "We want to provide food, water, shelter and medical supplies to everyone," stated DHS spokesperson Joanna Gonzalez. She further assured, "No one should be afraid to accept our offers to provide safety." According to Gonzalez, rescuers have not been asking people whether they are in the country legally when they are rescuing them. DHS, however, has not yet issued a statement clarifying whether information that FEMA gathers on unauthorized aliens would be shared with law enforcement agencies, most notably the DHS Immigration and Customs Enforcement (ICE) bureau.²⁴

Preservation of Immigrant Visa Benefits

Immigration admissions are subject to a complex set of numerical limits and preference categories that give priority for admission on the basis of family relationships, needed skills, and geographic diversity. There are very few immigration avenues based on self petitioning; most require that aliens have a family member or employer who is eligible, able, and willing to sponsor them. The loss of life, devastation of businesses, or depletion of personal assets directly affects visa qualifications for otherwise eligible aliens who are victims of Hurricane Katrina or the family of victims. It also affects nonimmigrants whose purposes for the temporary visas are disrupted by the hurricane and its aftermath.

Loss of Sponsor

The largest number of immigrants is admitted because of a family relationship to a U.S. citizen or LPR. Specifically the family relationships are: immediate relatives of U.S. citizens;²⁵ the spouses and children of LPRs; the adult children of

²² 42 USC §5151.

²³ For a full discussion of available assistance, see CRS Report RL33053, *Federal Stafford Act Disaster Assistance: Presidential Declarations, Eligible Activities, and Funding*, by Keith Bea.

²⁴ Suzanne Gamboa, "Feds Stop Short in Assurances for Illegal Immigrants," Associated Press, Sept. 8, 2005.

²⁵ "Immediate relatives" are defined by the INA to include the spouses and unmarried minor children of U.S. citizens, and the parents of adult U.S. citizens.

U.S. citizens; and, the siblings of adult U.S. citizens.²⁶ As of July 2005, most relatives of U.S. citizens and LPRs were waiting in backlogs for a visa to become available, with the brothers and sisters of U.S. citizens waiting almost 12 years.²⁷ Married adult sons and daughters of U.S. citizens who filed petitions seven years ago (February 1, 1998) were being processed for visas in July. Prospective family-sponsored immigrants from the Philippines have the most substantial waiting times before a visa is scheduled to become available to them; consular officers are now considering the petitions of the brothers and sisters of U.S. citizens from the Philippines who filed 22 years ago. If the person in the United States who is petitioning for the relative dies while the alien is waiting for the visa, the prospective LPR is no longer eligible for the LPR visa.

In terms of most employment-based LPRs, employers hiring prospective LPRs to work for them petition with USCIS on behalf of the alien and submit applications with the Employment and Training Administration in Department of Labor (DOL) to certify employment of the worker. The prospective LPR must demonstrate that he or she meets the qualifications for the particular job as well as the INA preference category. If DOL determines that a labor shortage exists in the occupation for which the petition is filed, labor certification will be issued.²⁸ If the petitioning employer no longer can employ the worker, the prospective LPR is no longer eligible for an immigrant visa.

Some are calling for immigration relief legislation comparable to that provided for family members of those killed by the September 11, 2001 terrorist attacks. The USA PATRIOT Act (P.L. 107-56), a broad anti-terrorism measure, contained provisions designed to insure that certain aliens did not lose immigration benefits due to circumstances resulting from the September 11, 2001 terrorist attacks against the United States. The act granted immigration benefits to some surviving spouses, children, and in some cases, parents, of U.S. citizens or LPRs killed or disabled on September 11, 2001. More specifically under §421 of the Patriot Act, a surviving spouse, child, or fiancé regained the chance to immigrate by self-petitioning for him or herself. The act also enabled a grandparent of a child orphaned by the events of September 11 to self-petition, if the alien was the grandparent of a child, both of whose parents died in the terrorist attacks.

²⁶ INA §203(a), §203(b) and §204; 8 U.S.C. 1153.

²⁷ According to the INA, family-sponsored and employment-based preference visas are issued to eligible immigrants in the order in which a petition has been filed. When visa demand exceeds the numerical limit, visas are prorated according to preference system allocations. For analysis of immigration admissions categories, numerical limits, and visa priority dates, see CRS Report RL32235, *U.S. Immigration Policy on Permanent Admissions*, by Ruth Ellen Wasem.

²⁸ The employment-based LPR visa categories that require employers to apply for certification from DOL are categories for the following: members of the professions holding advanced degrees or persons of exceptional abilities in the sciences, art, or business; skilled shortage workers with at least two years training or experience; professionals with baccalaureate degrees; and unskilled shortage workers. INA §212(a)(4)(c)(i); 8 U.S.C. §1182.

In addition, §421 of the Patriot Act allowed prospective employment-based LPRs who were beneficiaries of approved labor certifications that were revoked due to the disabling of the principal alien or the loss of his/her employment due to physical damage caused by the terrorist attacks of September 11 to pursue their visa petition. It also extended that opportunity to surviving spouses or children of aliens killed in the attacks who were employment-based LPR or who had employment-based petitions pending on September 10, 2001.

Finally, §422 of the Patriot Act automatically extended legal nonimmigrant visa status in the United States for some nonimmigrant visa holders. This provision covers those aliens who were disabled in the terrorist attacks of September 11, 2001, or spouses and children of an alien who died or was disabled in those attacks.

Public Charge Ground of Inadmissibility

The grounds of inadmissibility are an important basis for denying foreign nationals admission to the United States, and one of these grounds bars the admission of aliens who are considered likely to become a public charge (e.g., indigent).²⁹ All aliens seeking LPR visas who are family-based immigrants as well as employment-based immigrants who are sponsored by a relative must have binding affidavits of support signed by U.S. sponsors in order to show that they will not become public charges.³⁰ To qualify as a sponsor, the individual must be a U.S. citizen or legal permanent resident who is at least 18 years old, domiciled in the United States, and able to support both the sponsor's family and the alien's immigrating family members at an annual income level equal to at least 125% of the federal poverty guideline.³¹ The affidavit of support is a legally binding contract enforceable against the affiant (i.e., sponsor) if the immigrant collects any means-tested benefit.³²

At issue is whether victims of Hurricane Katrina will be considered public charges in the context of admissibility for LPR visas if they or their sponsors cannot now support their family at an annual income level equal to at least 125% of the federal poverty guideline.³³ In 1999, the former Immigration and Naturalization

²⁹ §212(a) of the INA; 8 U.S.C. §1182.

³⁰ In recent years, most LPR petitioners rejected on INA exclusionary grounds were rejected because the consular officers in the Department of State determined that the aliens were inadmissible as likely public charges. For this analysis, see "Table 1. Immigrants Refused Visa by Grounds of Inadmissibility," in CRS Report RL31512, *Visa Issuances: Policy, Issues, and Legislation*, by Ruth Ellen Wasem.

³¹ 8 U.S.C. §1183a(f)(1), as added by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, P. L. No. 104-208, §551(a), 110 Stat. 3009, 3009-675; 8 C.F.R. §213a.2(c).

³² 8 C.F.R. §213a.1 defines "means-tested public benefit." This includes Food Stamps, Medicaid, Supplemental Security Income (SSI), and Temporary Assistance for Needy Families (TANF).

³³ §212(a)(4) of INA specifies, "in determining whether an alien is excludable under this paragraph, the consular officer or the Attorney General shall at a minimum consider the (continued...)"

Service (INS) proposed a regulation that defined “public charge” to mean an individual who has become or who is likely to become “primarily dependent on the government for subsistence, as demonstrated by either the receipt of public cash assistance for income maintenance or institutionalization for long-term care at government expense.”³⁴

At that same time, the INS also issued field guidance to alleviate “considerable public confusion about the relationship between the receipt of federal, state, and local public benefits” and “public charge” determinations in immigration law.³⁵ Among other policy pronouncements, this 1999 guidance addresses the following concerns:

- use of non-cash benefits by an immigrant (other than institutionalization for long-term care at government expense) may not be considered during public charge determinations, nor may cash benefits be considered unless they are for purposes of income maintenance;
- use of cash benefits for income maintenance by an immigrant's family members is not attributed to the immigrant when determining if the immigrant is likely to become a public charge unless the family relies on the benefits as its sole means of support; and
- an immigrant's use of cash public assistance for income maintenance or institutionalization for long-term care at government expense may be considered during public charge determinations.³⁶

Final regulations on this matter have not been promulgated.

Relief from Removal

At various times in the past, the Attorney General has provided, under certain conditions, discretionary relief from deportation so that aliens who have not been legally admitted to the United States or whose temporary visa has expired nonetheless may remain in this country temporarily. The statutory authority cited for these discretionary procedures has generally been that portion of immigration law that confers on the Attorney General the authority for general enforcement and the section of the law covering the authority for voluntary departure.³⁷

³³ (...continued)

alien's (I) age; (II) health; (III) family status; (IV) assets, resources, and financial status; and (V) education and skills." 8 U.S.C. §1182.

³⁴ *Federal Register*, vol. 64, "Inadmissibility and Deportability on Public Charge Grounds," pp. 28675–88, May 26, 1999.

³⁵ *Federal Register*, vol. 64, "Field Guidance on Deportability and Inadmissibility on Public Charge Grounds," May 26, 1999.

³⁶ Linton Joaquin and Braden Cancilla, "Protecting Immigrants and the Community: A New Approach to Public Charge Determinations," *Interpreter Releases*, vol. 76, June 7, 1999.

³⁷ INA §240; 8 U.S.C. §1229a; INA §240B; 8 U.S.C. §1229c.

The Attorney General has provided blanket relief by means of the suspension of enforcement of the immigration laws against a particular group of individuals. In addition to Temporary Protected Status (TPS) which may be provided by the Secretary of DHS,³⁸ the two most common discretionary procedures to provide relief from deportation have been deferred departure or deferred enforced departure (DED) and extended voluntary departure (EVD). Unlike TPS, aliens who benefit from EVD or DED do not necessarily register for the status with USCIS, but they trigger the protection when they are identified for deportation. If, however, they wish to be employed in the United States, they must apply for a work authorization from USCIS.

In 1992, the Administration of George H.W. Bush granted DED to about 80,000 Chinese following the June 1989 Tiananmen Square massacre, and the Chinese retained DED through January 1994. The George H.W. Bush Administration also granted DED to what was then an estimated 190,000 Salvadorans through December 1994. On December 23, 1997, President William Clinton instructed the Attorney General to grant DED to the Haitians for one year.³⁹

Following the September 11, 2001 terrorist attacks, INS issued a press release announcing that family members of victims of the terrorist attacks whose own immigration status was dependent on the victim's immigration status should not be concerned about facing immediate removal from the United States. The then-Commissioner James Ziglar stated: "The INS will exercise its discretion in a compassionate way toward families of victims during this time of mourning and readjustment. On September 19, we began to advise our offices to exercise compassionate discretion in these circumstances."⁴⁰

Meanwhile, it appears that some foreign nationals who were adversely affected by Hurricane Katrina are beginning to depart the United States voluntarily. Mexican consular officials in the United States, for example, are reportedly helping to repatriate Mexicans when the person who has been displaced by the hurricane

³⁸ TPS is blanket relief from removal to aliens from a foreign state that may be granted under the following conditions: there is ongoing armed conflict posing serious threat to personal safety; a foreign state requests TPS because it temporarily cannot handle the return of nationals due to environmental disaster; or there are extraordinary and temporary conditions in a foreign state that prevent aliens from returning, provided that granting TPS is consistent with U.S. national interests. §244 of INA (8 U.S.C. §1254a). Under the Homeland Security Act of 2002 (P.L. 107-296), the INS was transferred to DHS. As a part of this transfer, the responsibility for administering the TPS program was transferred from the Attorney General to the Secretary of the DHS.

³⁹ In prior years, various other Administrations have given EVD status to Poles (July 1984 to Mar. 1989), Nicaraguans (July 1979 to Sept. 1980), Iranians (Apr. to Dec. 1979), and Ugandans (June 1978 to Sept. 1986). Lebanese had been handled sympathetically as a group, getting EVD on a case-by-case basis since 1976, prior to receiving TPS from 1991 to 1993. Other countries whose nationals have benefitted in the past from a status similar to EVD include Cambodia, Cuba, Chile, Czechoslovakia, Dominican Republic, Hungary, Laos, Rumania, and Vietnam.

⁴⁰ U.S. Department of Justice, Immigration and Naturalization Service, "Families of Victims of Terrorist Attacks," News Release, Oct. 10, 2001.

requests it.⁴¹ It is not known whether ICE will initiate forcible repatriations targeting unauthorized aliens who were victims of Hurricane Katrina.⁴²

⁴¹ E. Eduardo Castillo, "Illegal Immigrants Afraid to Get Storm Aid," the Associated Press, Sept. 9, 2005.

⁴² Suzanne Gamboa, "Feds Stop Short in Assurances for Illegal Immigrants," the Associated Press, Sept. 8, 2005.