



Interoffice Memorandum

To: REGIONAL DIRECTORS
SERVICE CENTER DIRECTORS
DISTRICT DIRECTORS
OFFICERS IN CHARGE

CC: OFFICE OF INTERNATIONAL OPERATIONS
OFFICE OF COMMUNICATIONS

From: Michael Aytes /S/
Acting Associate Director, Domestic Operations

Date: October 5, 2005

Re: Remedial Measures Made Necessary by Hurricanes Katrina and Rita

Purpose and Background

This memorandum discusses remedial measures made necessary by the destruction caused by Hurricane Katrina (Katrina) and Hurricane Rita (Rita). While this memorandum discusses specific measures that can be taken, USCIS employees should not view the subjects discussed in the memo as the exclusive measures that can be taken. In general, USCIS employees should take a generous approach to addressing issues brought about by the hurricanes and should use whatever proper means are available to them to remedy hurricane-related immigration situations. This approach is consistent with the approach taken by USCIS and Legacy INS in response to other disasters that have caused immigration-related complications, such as the December 26, 2004 Tsunami. This guidance is meant to be ongoing and not exhaustive except where specifically provided, such that in the future when an adverse immigration-related consequence of Katrina or Rita is discovered, USCIS should attempt to remedy that consequence.

Scope

This guidance covers individuals or entities who can establish that they resided, worked, or operated their professional business or other entity in an affected area of Louisiana, Mississippi, or Alabama at the time of Hurricane Katrina (on or about August 29, 2005), or an affected area of Texas or Louisiana at the time of Hurricane Rita (on or about September 23, 2005), regardless of where those individuals or entities may be currently located. While not meant to be exhaustive for the purposes of this memorandum, USCIS has published a list of affected zip codes as an attachment to its fee waiver guidance of September 19, 2005. That

list may serve as a resource for adjudicators. Where relevant, this guidance only applies to aliens who were in valid status at the time of the onset of Katrina or Rita, as applicable. This guidance is not meant to remedy status violations or other immigration-related issues not caused by Katrina or Rita.

At the present time Congress is considering remedial legislation that would address a number of hurricane related immigration topics that, if enacted, could affect some of this memorandum. Additional guidance will be forthcoming should such legislation be enacted.

Standards of Proof

The remedial provisions addressed in this memo are directed towards individuals and entities affected by Katrina or Rita. Since documentation will be difficult to provide in many situations, USCIS employees should perform any systems or other checks that are available to verify that an individual resided or worked in or whether an entity was located in an affected area. In general USCIS will take a generous approach to such claims. Where possible, USCIS employees should give the benefit of the doubt as to the issue of whether the entity or individual was directly affected by Katrina or Rita.

Disruptions of Nonimmigrant Status Caused by Katrina or Rita

As a result of Katrina or Rita aliens may experience disruptions in nonimmigrant status brought about by the inability to continue to engage in the authorized activity that forms the basis for that status. This could be the case for any nonimmigrant in any classification. For example, an H-1B nonimmigrant may be unable to work for some period of time due to physical injury, or because the workplace is destroyed, or he or she evacuated to another region and could not return to the workplace for some period of time.

Traditionally, an alien is no longer considered to be in status in the event that the alien ceases his or her authorized nonimmigrant activity.¹ USCIS recognizes that aliens directly affected by Katrina may innocently, through no fault of their own, have fallen out of status and may remain out of status for some indefinite time. Adjudicators should exercise their discretion, to the extent authorized by applicable law, to forgive a lapse in status in connection with an extension of status or change of status application if the person is otherwise eligible for such extension or change of status. Adjudicators should be liberal in allowing aliens who are no longer in status as the direct result of Katrina or Rita to extend or change their status, regardless of when such application is filed, provided it is filed no later than one year after the date of Katrina or Rita, as applicable. Adjudicators will excuse such untimely filings under the authority contained in 8 CFR 214.1(c)(4) (extension of status applications) and 8 CFR 248.1(b)(1) (change of status applications) to excuse the failure to timely file if "extraordinary circumstances beyond the control of the applicant or petitioner"

¹ Legacy Immigration and Naturalization Service (INS) and USCIS have consistently stated that H-1B status automatically ends with the termination of H-1B employment, whether the worker quits or is fired. *See, e.g.,* Matter of Lee, 11 I. & N. Dec. 601 (Reg. Comm'r 1966) (termination of an H-1B worker's employment constituted a failure to maintain status); letter from Efrén Hernández, III, Director of INS's Business and Trade Branch, to attorney Wendi Lazar, reproduced in 78 Interpreter Releases 608 (April 2, 2001) (H-1B status ends the moment an employee is terminated from his or her employment, and that no "grace period" exists in such situations); letter from Thomas W. Simmons, Chief, INS Business and Trade Branch, to attorney Harry Joe, File nos. HQ 70/6.2.8, HQ 70/6.2.12 (undated), reproduced in 76 Interpreter Releases 386 (Mar. 8, 1999) (in a reduction in force, H-1B workers are out of status on the date of termination even if they are paid a severance package over a later period of time).

exist. The failure to timely file an application directly resulting from the effects of Katrina or Rita can meet this definition. The other requirements contained in these regulatory provisions continue to apply.

In the case of an application for adjustment of status, the failure to maintain a lawful status normally is a bar to filing. Adjudicators should use the provisions of 8 CFR 245.1(b)(6) and 245.1(d)(2)(iii) to excuse the failure to maintain status, as a Katrina or Rita related disruption in status can meet the requirement that the failure to maintain status be “through no fault” of the alien. This provision should be considered whenever an application for adjustment in which Katrina or Rita disrupted the alien’s lawful status is filed in the future.

Applications and Petitions Denied for Abandonment

Under current USCIS policy and guidance, applications and petitions denied for abandonment are not reopened unless certain limited criteria are met. Because affected aliens and entities may face difficulties in pursuing applications or petitions as a result of Katrina or Rita, USCIS adjudicators are instructed to use their discretion to reopen any abandonment denials in which the motion to reopen demonstrates a direct connection between Katrina or Rita and the failure to pursue the application or petition for a period of one year from the date of the applicable hurricane.

Failures to Timely Respond to Requests for Evidence (RFE).

It is likely that applicants or petitioners from the affected areas, or individuals who must obtain documentation from the affected areas, may be unable to timely respond to an RFE. Moreover, applicants or petitioners may not even receive the RFE because of disruptions to the mail service. USCIS adjudicators should not deny any case in which an RFE has been issued where the petitioner’s, applicant’s, or beneficiary’s address is in an affected area. These cases should be held for a period of 6 months to allow the affected alien or petitioner an opportunity to contact USCIS with his or her whereabouts and to respond to the RFE.

USCIS adjudicators similarly should not deny any case in which the applicant or petitioner is unable to obtain documentation from the affected areas, provided that the applicant or petitioner submits to USCIS an affidavit or unsworn declaration that the requested documents cannot be obtained timely from an affected area. These cases should be held for a period of 6 months to allow the affected alien or petitioner an opportunity to provide USCIS with the required documentation.

Replacement Documents

Many aliens will need to replace a variety of USCIS-issued documents. If Permanent Resident Cards have been lost, an I-90 application should be filed to replace the lost card. The application in most cases should be filed in accordance with current filing instructions. Exceptions to such standard filing instructions, however, include:

I-90 applications are normally filed directly with the Los Angeles lockbox. For the period of the next 6 months, customers displaced by Katrina or Rita can file I-90 applications with the lockbox, or can file them at any USCIS local office. These customers may also request, and shall be granted as appropriate, interim evidence of permanent resident status (I-551 stamp). Form I-90 applications received locally are to be forwarded to the Los Angeles lockbox where normal processing will

resume. In instances where the Form I-90 application has been filed directly with the lockbox, customers may still request interim evidence of permanent resident status (I-551 stamp) at any field office. The average processing time for Form I-90 applications is two weeks to two months.

The application fee, but not the biometrics fee, may be waived per the fee waiver memorandum mentioned below.

It may also be necessary to replace an I-94 by filing an I-102 (Application for Replacement/Initial Nonimmigrant Arrival/Departure Record); a lost EAD card by filing an I-765 (Application for Employment Authorization); or to request action on an approved application or petition by filing an I-824 (Application for Action on an Approved Application or Petition). The issue of replacement documents can span multiple offices and multiple documents, and in order to ensure accountability and accuracy a completed application form is needed to honor the applicant's request. As with the Form I-90, such forms may be received from hurricane victims in a local field office, which should assist the applicant in obtaining the document. Further, though normally filed with the National Benefits Center or a Service Center, I-765 applications filed to replace a lost Employment Authorization Document (EAD) may also be submitted at a USCIS local office and, as appropriate, the EAD issued the same day.

USCIS is aware that the need for replacement documents and forms will be pressing in some situations. USCIS will not as a class expedite these applications but instead will follow the normal standards for expeditious treatment set forth in previous guidance. Applications will be treated in order of receipt, but discretionary expeditious treatment is authorized when warranted in the adjudicator's discretion.

Address Changes and Updates of Forms G-28

Many of the individuals who fled areas affected by Katrina or Rita either do not plan to return soon or may have relocated permanently. It is thus likely that USCIS will receive an influx of change of address notifications (AR-11's) and form G-28 notices of entry of appearance, as new attorneys or accredited representatives in the new locations are obtained. Also, there may be immigration attorneys who have relocated their practice and need to update the G-28 currently on file. USCIS will, whenever possible and as appropriate, expedite action on such forms.

Fee Waivers

On September 19, 2005, USCIS issued guidance concerning fee waivers for Hurricane Katrina victims. That guidance should also be applied to victims of Hurricane Rita. That guidance advises USCIS officers to be sensitive to the fact that many individuals may have difficulties documenting their inability to pay a fee, beyond submitting an affidavit or unsworn declaration. The memorandum advises officers to be responsive to these requests. As noted above, biometrics fees are not waived.

Appeals

In the event that an appeal is pending and the affected party or attorney is unable to file a brief from the hurricane affected area, the USCIS Administrative Appeals Office (AAO) will accept a late-filed brief from parties in the affected area if it is submitted on or before Thursday, March 23, 2006. The affected party or attorney should submit the brief directly to the AAO, with the clear notation, "Late Brief Due To Hurricane." Although the AAO may not excuse late-filed appeals under the regulations, the AAO encourages USCIS officers to treat late appeals from the affected area as a motion, pursuant to 8

CFR 103.3(a)(1)(v)(B)(2). In addition, USCIS officers may certify a decision to the AAO, pursuant to 8 CFR 103.4, to ensure that an unusually complex or novel issue receives appellate review.

Adoption Issues

Currently, intercountry adoptions require a home study of prospective adoptive parents, which is a process for screening and preparing adoptive parents who are interested in adopting an orphan from another country. This study includes a verification of household conditions and financial resources of the prospective adoptive parents. Following Hurricane Katrina or Rita, this process may be severely disrupted in affected areas, for an indefinite period of time, and some individuals may no longer even have a home. In addition, petitioners who have relocated to a new State after the hurricane may now have to comply with new requirements for a home study in the new State. Pursuant to 8 CFR 204.3(e)(9)(ii), a home study must be amended if there has been a significant change in residence or finances of the prospective adoptive parent(s). Thus, prospective adoptive parents who have been significantly impacted by Hurricane Katrina or Rita will need to amend their home study.

There are also several regulatory deadlines associated with the adoption process, which may prove difficult to meet because of Katrina or Rita-related disruptions. Among these deadlines are:

- Completed home study must be submitted within one year of the filing date of the advanced processing application.
- Completed home study and amendments cannot be more than six months old when submitted to USCIS.
- Once an application for advanced processing is approved, prospective adoptive parents must file an orphan petition and all supporting documents within eighteen months of the date of approval of the advanced petition.

As is the case with all the issues discussed in this memorandum, USCIS intends to be as generous as possible, to the extent consistent with also protecting the interests of the orphans involved, in mitigating the adverse effects of Hurricane Katrina or Rita. Because the nature of adoptions makes it likely that the difficulties in each case will be unique, adjudicators in the field are instructed to contact HQ Field Operations (Leah Torino) through their Region before taking any adverse action regarding regulatory deadlines in an adoption case in which the petitioner's address was, as of the date of the hurricane, in the affected areas, or in which the petitioner asserts that Katrina or Rita had an effect on the ability to meet the adoption requirements.

This memorandum is intended solely for the instruction and guidance of USCIS personnel in performing their duties relative to adjudications. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner. In addition, the instruction and guidance in this memorandum is in no way intended to and does not prohibit enforcement of the immigration laws of the United States.