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Volume 122  
Issue 2 *Dickinson Law Review*


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Winter 2018

# The End of Special Treatment for Cubans in the U.S. Immigration System: Consequences and Solutions for Cubans with Final Orders of Removal

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## Recommended Citation

Lindsay Daniels, *The End of Special Treatment for Cubans in the U.S. Immigration System: Consequences and Solutions for Cubans with Final Orders of Removal*, 122 *DICK. L. REV.* 707 (2018).  
Available at: <https://ideas.dickinsonlaw.psu.edu/dlr/vol122/iss2/8>

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# The End of Special Treatment for Cubans in the U.S. Immigration System: Consequences and Solutions for Cubans with Final Orders of Removal

Lindsay Daniels\*

## ABSTRACT

In January 2016, former President Obama announced the end of the “Wet-Foot, Dry-Foot” Policy, which granted special immigration benefits to Cuban migrants. As part of the agreement to end this policy, the Cuban government agreed to take back its citizens with final orders of removal for criminal convictions, an action that it had refused to take for decades. This Comment will begin by exploring past and present immigration policies between the United States and Cuba, including recent developments like the normalization of relations and the impact of President Trump’s immigration policies.

This Comment will then explore possible avenues of relief for the over 34,000 Cubans who have final orders of removal for convictions that are often minor or decades old, but who are suddenly at risk for deportation. First, this Comment will argue that the Department of Homeland Security should exercise discretion in deportation priorities in a humanitarian fashion through a weighing of positive and negative factors and by filing joint motions to reopen when appropriate. Next, this Comment will discuss the possibility for some Cubans to argue ineffective assistance of counsel under a *Padilla v. Kentucky* analysis, due to the potential confusion about Cuba-specific immigration law by non-immigration attorneys handling criminal cases. Finally, this Comment will discuss the possible fear-based claims that a Cuban might successfully make based upon Cuba’s poor human rights record and political turmoil.

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I. INTRODUCTION

On January 12, 2017, then-President Obama announced that in addition to ending the United States’ “Wet-Foot, Dry-Foot” Policy<sup>1</sup> toward Cuba, Cuba would begin accepting back its deportable citizens from the United States on a “case-by-case” basis.<sup>2</sup> This announcement made uncertain the fate of the more than 34,000 Cuban nationals living in the United States with final orders of removal,<sup>3</sup> but whom Cuba had thus far refused to take back.<sup>4</sup> While most people would agree that the dangerous criminals<sup>5</sup> should be deported,<sup>6</sup> the agreement also puts at risk a more sympathetic class of Cubans who were convicted of non-violent crimes years or decades ago and who have since created productive lives in the United States.<sup>7</sup>

The purpose of this Comment is to evaluate the options that sympathetic Cuban immigrants with final orders of removal have in

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1. *See infra* Part II.E.1.

2. Joint Statement, DEP’T OF HOMELAND SEC. (Jan. 12, 2017), <http://bit.ly/2m8BVXX>. The Deputy Director of the U.S. Section of the Cuban Foreign Ministry said that as a result of the joint statement with the United States, the Cuban government will consider whether its citizens have “broken law” and “can no longer remain” in the United States in determining who to take back. Jay Weaver & Mimi Whitefield, *Some Cuban Felons, Including 2,000 Murderers, Could Face Deportation Under New Policy*, MIAMI HERALD (Jan. 13, 2017), <http://hrl.d.us/2lCuMBt>.

3. Lizette Alvarez & Kristin Hussey, *Cubans Convicted in the U.S. Face New Fears of Deportation*, N.Y. TIMES (Jan. 18, 2015), <http://nyti.ms/1J0A9M9>. A deportation order is considered “final” when the Board of Immigration Appeals (BIA) affirms the order or the time period expires “in which the alien is permitted to seek review” of the order. 8 U.S.C. § (47)(B) (2012).

4. Alvarez & Hussey, *supra* note 3.

5. About 2,000 Cuban nationals live in the United States who have been convicted of murder, although it is unclear how many of them have been issued final orders of removal. *See* Weaver & Whitefield, *supra* note 2.

6. 19 percent of Americans believe that the United States should deport all undocumented immigrants regardless of criminal background, 22 percent believe that the United States should deport only those who have committed any crime, and 53 percent believe the United States should deport only those who have committed serious crimes. Tim Malloy, *Republics out of Step with U.S. Voters on Key Issues, Quinnipiac University National Poll Finds*, QUINNIPIAC U. POLL (Feb. 23, 2017), <http://bit.ly/2lJG1lh>. Only three percent believe that no immigrants should be deported. *Id.*

7. Alvarez & Hussey, *supra* note 3.

delaying or halting deportation under the new policy.<sup>8</sup> This Comment will also argue that the Department of Homeland Security (DHS) should exercise its newfound ability to deport Cubans in a humanitarian manner by keeping families together and prioritizing the deportation of criminals that pose a clear danger to the United States over other Cubans convicted of minor offenses.<sup>9</sup>

Part II of the Comment will explore the often tumultuous history of foreign relations between the United States and Cuba, particularly with respect to immigration policies, and discuss the mass migration of Cuban immigrants to the United States that occurred in the last half-century.<sup>10</sup> Part III will begin by exploring the DHS's ability to exercise discretion based upon a weighing of positive and negative factors on a case-by-case basis.<sup>11</sup> Part III will then analyze the likelihood of a Cuban succeeding with a motion to reopen<sup>12</sup> his or her case under various circumstances, including ineffective assistance of counsel.<sup>13</sup> Finally, Part III will analyze the ability of a Cuban with a final order of removal to file a successful application for fear-based relief to serve as a defense to removal.<sup>14</sup>

## II. BACKGROUND

### A. *Collapse of Relations Between the United States and Cuba*

In January 1959, Fidel Castro and his rebel army overthrew the regime of American-friendly Fulgencio Batista and declared Cuba to be a communist nation.<sup>15</sup> Relations between the United States and Cuba quickly deteriorated, and the United States imposed an economic embargo against the neighboring island nation.<sup>16</sup> The embargo endured through the 1961 Bay of Pigs invasion, the 1962 Cuban Missile Crisis, and the Cold War.<sup>17</sup>

Fidel Castro's commu-

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8. See *infra* Part III.

9. See *infra* Parts III.A–B.

10. See *infra* Part II.

11. See *infra* Part III.A.

12. 8 U.S.C. § 1229a(c)(7) (2012); see *infra* Part III.B.

13. See *infra* Part III.B.

14. Fear-based relief includes asylum, Withholding of Removal, and protection under the Convention Against Torture. See *infra* Part III.C.

15. Damien Cave & Russell Goldman, *The Last Thaw: U.S.-Cuban Relations in Pictures*, N.Y. TIMES (Mar. 21, 2016), <http://nyti.ms/25y8Jh6>.

16. Foreign Assistance Act of 1961, Pub. L. No. 87-195 § 620, 75 Stat. 424, 445 (1961). The economic embargo originated with the United States' desire to restrict sugar trade. See Act to Amend the Sugar Act of 1948, Pub. L. No. 86-592 § 3, 74 Stat. 330, 331 (1960); see also Albert R. Coli, *Harming Human Rights in the Name of Promoting Them: The Case of the Cuban Embargo*, 12 UCLA J. INT'L L. & FOR. AFF. 199, 202–03 (2007).

17. Cave & Goldman, *supra* note 15.

nist regime survived the collapse of the Soviet Union in 1989 and tenuously persists today, after Fidel's death,<sup>18</sup> led by his brother, Raul.<sup>19</sup> Raul Castro maintains a one-party political system, but has implemented limited economic reforms and reduced the restrictions on international travel for Cubans.<sup>20</sup>

### B. *Mass Migration from Cuba to the United States*

The first mass exodus of Cubans to the United States, largely to South Florida, occurred between 1950 and 1960.<sup>21</sup> During that decade, the population of Cuban-born individuals in the United States more than doubled in anticipation of and in response to Batista's fall from power.<sup>22</sup> In 1965, the United States and Cuba brokered an agreement that allowed Cubans to take chartered "freedom flights" from Havana to Miami.<sup>23</sup> Approximately 300,000 Cubans arrived via freedom flights in the following decade.<sup>24</sup> In 1980, more than 125,000 Cubans arrived in the United States by boat during the Mariel Boatlift,<sup>25</sup> and boat migration increased again in the mid-1990s with thousands of Cuban arrivals.<sup>26</sup>

### C. *Reasons for Mass Migration*

The reasons that Cubans fled their country varied by the individual.<sup>27</sup> Many left to join family, to improve their economic situations, or to flee persecution from the communist regime.<sup>28</sup>

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18. Fidel Castro passed away on November 26, 2016. Anthony DePalma, *Fidel Castro, Cuban Revolutionary Who Defied U.S., Dies at 90*, N.Y. TIMES (Nov. 26, 2016), <http://nyti.ms/2mO1BcW>.

19. Raul Castro became president on December 2, 2008 due to Fidel's poor health, but Fidel still maintained a voice in government. See James C. McKinley Jr., *Raul Castro Becomes Cuban President*, N.Y. TIMES (Dec. 4, 2008), <http://nyti.ms/2ggYeqY>.

20. Mimi Whitefield & Alfonso Chardy, *Raul Castro Follows his Own Path*, MIAMI HERALD (Nov. 26, 2016), <http://hrlld.us/2jIv3C9>.

21. Sylvia Rusin et al., *Cuban Immigrants in the United States*, MIGRATION POL'Y INST. (Apr. 7, 2015), <http://www.migrationpolicy.org/article/cuban-immigrants-united-states>.

22. *Id.*

23. Juan O. Tamayo, *Chronology of the Cuban Revolution*, MIAMI HERALD (Feb. 1, 2016), <http://hrlld.us/2g4Mto5>.

24. Rusin et al., *supra* note 21.

25. See *infra* Part II.F.1.

26. See *infra* Part II.F.1.

27. Silvia Pedraza, *Cuba's Revolution and Exodus*, 5 J. INT'L INST., n. 2 (1998), <http://bit.ly/2jhJoCv>.

28. *Id.*

### 1. *Batista Sympathizers*

Initially, after Castro took power in 1959, his government persecuted any person aligned with the overthrown president, Batista, especially high-ranking government officials.<sup>29</sup> Castro ordered widespread trials that were widely recognized as flouting due process and which often resulted in firing squad executions.<sup>30</sup>

### 2. *Persecution of “Undesirable” Groups*

The government-run hospitals in Cuba subjected mental health patients to inhumane conditions.<sup>31</sup> Although Cuba’s healthcare system is now one of the most highly regarded in Latin America,<sup>32</sup> it utilized electroshock therapy, failed to make proper diagnoses, and neglected mentally ill patients.<sup>33</sup>

Another major reason why Cubans migrated to the United States was because the Cuban government utilized forced labor camps.<sup>34</sup> From November 1965 to July 1968, the Cuban government operated Military United to Aid Production, a program where the Cuban government forced homosexual men, political dissidents, and members of certain religious sects to perform farm labor.<sup>35</sup> The program housed an undocumented number of people who were subjected to little food, brutal work days, poor sanitary conditions, and sometimes torture.<sup>36</sup>

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29. *Cuba to Resume Summary Trials*, N.Y. TIMES (Jan. 25, 1959), <http://nyti.ms/2gC8Cxu>; see also R. Hart Phillips, *Castro Declares Trials Will Go On*, N.Y. TIMES (Jan. 13, 1959), <http://nyti.ms/2g4W9ig>.

30. See *supra* note 29.

31. Don A. Schanche, *Cuban Rights Crackdown, Psychiatric Abuses Told*, L.A. TIMES (Jan. 12, 1989), <http://lat.ms/2fpFMvn>.

32. Gail Reed, *Cuba’s Primary Health Care Revolution: 30 Years On*, 86 BULL. OF THE WORLD HEALTH ORG. 321, 327 (2008), <http://www.who.int/bulletin/volumes/86/5/08-030508.pdf?ua=1>.

33. See generally *Jerez v. Cuba*, 775 F.3d 418 (D.C. Cir. 2014). In *Jerez*, the appellant sued the Cuban government for punitive and compensatory damages after being subjected to electroshock therapy in a Cuban psychiatric hospital. *Id.* at 421. The D.C. Circuit Court upheld the lower court’s grant of the motion to dismiss because of a lack of jurisdiction; however, the court found the allegations of torture to be consistent with previous accounts. *Id.* The court compared appellant’s suffering to that of dissident Cuban writer Armando Valladares, who was persecuted by the Castro regime. *Id.*

34. See Justin Halatyn, *From Persecution to Acceptance? The History of LGBT Rights in Cuba*, COUNCIL FOR HEMISPHERIC AFF. (Oct. 24, 2012), <http://www.coha.org/from-persecution-to-acceptance-history-of-lgbt-in-cuba>; see also Michael Z. Wise, *In Totalitarian Cuba, Ice Cream and Understanding*, N.Y. TIMES (Jan. 22, 1995), <http://nyti.ms/2fpOFF0>.

35. See *supra* note 34.

36. See *supra* note 34.

### 3. *Property Seizure*

The communist Cuban government seized many homes and virtually all private businesses and industries.<sup>37</sup> When a Cuban fled to the United States or elsewhere, all of his property was redistributed as the government saw fit.<sup>38</sup> Therefore, many Cuban-born United States citizens seek to reclaim property or businesses as normalization occurs.<sup>39</sup> Although the United States Department of State considers handling such Cubans' property claims as a priority in diplomatic negotiations, there have been no clear victories for those seeking property thus far.<sup>40</sup> Although Congress enacted the Cuban Liberty and Democratic Solidarity Act of 1996,<sup>41</sup> which prohibits foreign companies from profiting from the confiscated property of U.S. citizens, including those born in Cuba,<sup>42</sup> it has rarely been enforced.<sup>43</sup>

### 4. *Poverty and the Special Period*

In the 1990s, many Cubans fled to the United States because of the so-called "Special Period," approximately four years of severe economic hardship due to the collapse of Cuba's principal trading partner, the Soviet Union.<sup>44</sup> The Special Period featured widespread famine and lack of imported resources, particularly petroleum.<sup>45</sup> Today, although Cuba has superior healthcare compared with other developing countries, a large number of its citizens live in poverty.<sup>46</sup>

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37. Frances Robles, *In Talks Over Seized U.S. Property, Havana Counters With Own Claim*, N.Y. TIMES (Dec. 13, 2015), <http://nyti.ms/2fpXoHA>.

38. *Id.*

39. *Id.*

40. *Id.*

41. Cuban Liberty and Democratic Solidarity (Helms-Burton) Act, 22 U.S.C. §§ 6021–6091 (1996).

42. *Id.*

43. The Helms-Burton Act received enormous international criticism, in part because of its extraterritorial reach, especially among the European Union. See George Chifor, *Caveat Emptor: Developing International Disciplines for Detering Third Party Investment in Unlawfully Expropriated Property*, 33 LAW & POL'Y INT'L BUS. 179, 207–36 (2002). Therefore, the United States has avoided actually litigating such conflicts. *Id.*

44. See Richard Shiffman, *How Cuban's Health Improved When the Economy Collapsed*, THE ATLANTIC (Apr. 18, 2013), <http://www.theatlantic.com/health/archive/2013/04/how-cubans-health-improved-when-their-economy-collapsed/275080> (discussing widespread famine and lack of imported resources during the Special Period).

45. *Id.*

46. See Margot Sanger-Katz, *Can Cuba Escape Poverty but Stay Healthy?*, N.Y. TIMES (Dec. 18, 2014), <http://nyti.ms/2kijAKk>.



Furthermore, past United States policy, like the Cuban Medical Professional Parole Program (CMPP), contributed to the drain of highly educated workers from Cuba.<sup>47</sup> The United States government created the CMPP in 2006 to allow certain Cuban medical professionals to apply for parole<sup>48</sup> at the United States embassy in a third country.<sup>49</sup> Although Cuba's doctors are among the best trained in Latin America, they earn only the equivalent of approximately 70 U.S. dollars per month.<sup>50</sup> The Cuban government rents the doctors' services to foreign countries, especially those in Latin America, in exchange for money, oil, and diplomatic clout.<sup>51</sup> Cuban doctors often take advantage of the CMPP to defect from Cuba while serving in their foreign posts.<sup>52</sup>

Recently, increased American tourism has helped Cubans fortunate enough to obtain jobs in the tourism industry.<sup>53</sup> However, the tourism industry does not require skilled workers, like doctors, and the tourists' food consumption has crippled the country's already sparse food supply.<sup>54</sup>

#### D. *Human Rights in Cuba Today*

Today, under the leadership of Raul Castro, the Cuban government continues to commit human rights abuses, albeit fewer than during the Cold War.<sup>55</sup> Prison guards physically assault politically dissident inmates, and prison conditions are poor.<sup>56</sup> Police harass, and sometimes physically assault, peaceful protestors, particularly the well-established *Damas de Blanco* (Ladies in White) and the Patriotic Union of Cuba.<sup>57</sup> Freedom of speech is heavily restricted,

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47. See Statement by the President on Cuban Immigration Policy, 2017 DAILY COMP. PRES. DOC. 11 (Jan. 12, 2017).

48. "A parolee is an alien, appearing to be inadmissible to the inspecting officer, allowed into the United States for urgent humanitarian reasons or when that alien's entry is determined to be for significant public benefit." Definition of Terms, DEP'T OF HOMELAND SEC. (Nov. 3, 2016), <http://bit.ly/2IElcvN>.

49. Cuban Medical Professional Parole (CMPP) Program, U.S. CITIZENSHIP AND IMMIGR. SERV. (Jan. 19, 2017), <http://bit.ly/2ISbGbd>.

50. See Victoria Burnett & Frances Robles, *U.S. and Cuba at Odds Over Exodus of the Island's Doctors*, N.Y. TIMES (Dec. 19, 2015), <http://nyti.ms/2mRTImU>.

51. *Id.*

52. *Id.*

53. See Azam Ahmed, *Cuba's Surge in Tourism Keeps Food Off Residents' Plates*, N.Y. TIMES (Dec. 8, 2016), <http://nyti.ms/2jePTZ8>.

54. *Id.*

55. See U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, H. R. AND LAB., CUBA 2015 HUMAN RIGHTS REPORT 1-2 (2015)[hereinafter *Cuba 2015 Human Rights Report*].

56. *Id.*

57. *Cuba 2015 Human Rights Report*, *supra* note 55, at 2. The Ladies in White are a group of political dissidents in Cuba formed by the wives and family mem-

especially when the speech is critical of the government.<sup>58</sup> The Cuban government allows the free practice of many religions, especially Catholicism, but at times monitors, harasses, and confiscates property from members of other Christian denominations.<sup>59</sup> The Cuban government officially decriminalized homosexual activity in 1979<sup>60</sup> and encourages the inclusion of citizens with all sexual orientations;<sup>61</sup> however, the government does not recognize gay marriages.<sup>62</sup> Furthermore, Cuban society does not generally support gay rights.<sup>63</sup> In 2015, civilians stoned a transsexual Cuban to death and the suspects were investigated and arrested by the police.<sup>64</sup> Additionally, in Cuba, a homophobic stigma pervades against HIV/AIDS-positive people.<sup>65</sup> The Cuban government provides very limited medication for HIV/AIDS and criminalizes having the disease as “propagating an epidemic.”<sup>66</sup>

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bers of incarcerated political prisoners who regularly protest against the Castro government and its repression of speech both in Cuba and abroad in exile. See Alan Gomez, *Cuba Arrests Dozens of Human Rights Protesters Before Obama's Arrival*, USA TODAY (Mar. 20, 2016), <http://usat.ly/1PkTZ6W>; see also Nora Gamez Torres, *Exiled Ladies in White Members Demand Leader's Resignation After YouTube Video*, MIAMI HERALD (Feb. 18, 2015), <http://hrlld.us/2jIyKHM>. The Patriotic Union of Cuba is a dissident political party, unrecognized as such by the government, which promotes free press and information, economic, social welfare policy, and electoral reforms. See Nona Gamez Torres, *José Daniel Ferrer, The Man Behind Cuba's Largest Opposition Group*, MIAMI HERALD (May 27, 2016), <http://hrlld.us/1OSqhaS>.

58. *Cuba 2015 Human Rights Report*, *supra* note 55, at 12.

59. U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, H.R. AND LAB., CUBA INTERNATIONAL RELIGIOUS FREEDOM REPORT, 1–8 (2015).

60. *From Persecution to Acceptance? The History of LGBT Rights in Cuba*, COUNCIL FOR HEMISPHERIC AFF. (Oct. 24, 2012), <http://bit.ly/2mwB2I9>.

61. Fidel Castro's daughter, Mariela Castro, is very outspoken in promoting gay rights and heads Cuba's Sexual Health Institute; however, legal unions for same-sex couples are not yet recognized under Cuban law. See *Cuba Gay Pride Calls for Same-Sex Marriage to Become Legal*, BBC NEWS (May 10, 2015), <http://bbc.in/1Irg0Dj>.

62. *Cuba Reciprocity Schedule: Marriage, Divorce Certificates*, DEP'T OF STATE, <http://bit.ly/2ITdocb> (last visited Feb. 23, 2017).

63. *Cuba 2015 Human Rights Report*, *supra* note 55, at 25.

64. *Cuba 2015 Human Rights Report*, *supra* note 55, at 25; Courtney O'Donnell, *Transgender Day of Remembrance 2015*, HUFFINGTON POST (Nov. 3, 2016), <http://huff.to/2j4Bw9G>.

65. Rebecca Sananes, *Love, Loss, and Beauty Pageants: Inside a Cuban HIV Sanitarium*, NAT'L PUB. RADIO (Mar. 26, 2016), <http://n.pr/1odr5zA>. During the 1990's, the Cuban government forcibly housed HIV-positive patients in “sanitariums” in an effort to control the spread of HIV/AIDS. *Id.* At least one sanitarium still exists. *Id.*

66. *Cuba 2015 Human Rights Report*, *supra* note 55, at 26.

*E. Evolving Immigration Benefits for Cuban Citizens Post-Normalization of Relations*

On December 17, 2014, then-President Obama announced his intent to normalize relations between the United States and Cuba.<sup>67</sup> In 2015, Cuban migration to the United States increased 78 percent following the former president's announcement.<sup>68</sup> On June 16, 2017, President Trump announced that he was "canceling the last administration's completely one-sided deal with Cuba."<sup>69</sup> However, the announcement did not completely reverse the Obama-era policies toward Cuba; the countries maintain diplomatic relations and travel is still permitted, although with more limits.<sup>70</sup>

*1. End of the Wet-Foot, Dry-Foot Policy*

As one of the final moves of his presidency, Barack Obama reached an agreement to end the Wet-Foot, Dry-Foot Policy with Cuba.<sup>71</sup> The Wet-Foot, Dry-Foot Policy sprung from an agreement between the United States and Cuba in 1995 to streamline the countries' migration policies in a humanitarian way.<sup>72</sup> The essence of the policy was that Cubans intercepted at sea by the United States government were sent back to Cuba, while Cubans who reached dry land were permitted to remain legally in the United States.<sup>73</sup> The Coast Guard was largely responsible for implementing the policy, as outlined by the DHS.<sup>74</sup> President Trump declined

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67. Peter Baker, *U.S. to Restore Full Relations with Cuba, Erasing a Last Trace of Cold War Hostility*, N.Y. TIMES (Dec. 17, 2014), <http://nyti.ms/2jIVUxM>.

68. Jens Manuel Krogstad, *Surge in Cuban Immigration to U.S. Continues into 2016*, PEW RES. CTR. (Jan. 13, 2017), <http://www.pewresearch.org/fact-tank/2016/08/05/cuban-immigration-to-u-s-surges-as-relations-warm/>.

69. Julie Hirschfeld Davis, *Trump Reverses Pieces of Obama-Era Engagement with Cuba*, N.Y. TIMES (June 16, 2017), <http://nyti.ms/2sIaL0t>.

70. The most substantive changes in United States policy toward Cuba as a result of this announcement were increasing restrictions on commercial travelers and prohibiting business transactions between American entities and individuals and companies owned by the Cuban military. *Id.*

71. Joint Statement, *supra* note 2.

72. Joint Statement on Normalization of Migration, Building on the Agreement of September 9, 1994, May 2, 1995, Cuba-U.S., 35 I.L.M. 327, (discussing the "common interest in preventing unsafe departures from Cuba which risk loss to human life").

73. *Id.* at 328; *see also*, *Movimiento Democracia, Inc. v. Johnson*, Case No. 16-cv-21868-CV-GAYLES, 2019 WL 4704940, at \*7, \*22 (S.D. Fla. June 28, 2016) (holding that where Cuban migrants landed on a lighthouse seven miles off the coast of Florida, the U.S. Coast Guard did not act unreasonably in determining that it should process the migrants as if they were encountered at sea rather than dry land).

74. Coast Guard's Maritime Law Enforcement Manual, COMDTINST M16247.1F, ECF No. 12-1 at 29-32.

to reinstate the Wet-Foot, Dry-Foot Policy in his June 16, 2017 policy shift.<sup>75</sup>

## 2. *Easing of Travel Restrictions*

Prior to the repeal of the Wet-Foot, Dry-Foot Policy, the number of Cuban immigrants to the United States had been increasing.<sup>76</sup> One cause for the increased migration was that the Cuban government eased its harsh travel restrictions in 2012 with *Ley 302* (Law 302), legislation that allows its citizens to leave the country without risking their citizenship and permits permanent defectors to return to the island for 90-day periods without persecution.<sup>77</sup>

## 3. *The Cuban Adjustment Act*

The Cuban Adjustment Act (CAA) of 1966<sup>78</sup> treats Cubans as a privileged class of immigrants with expedited pathways to permanent residency and to citizenship.<sup>79</sup> The CAA requires physical presence in the United States for one year before a Cuban is eligible to apply for Legal Permanent Resident (LPR)<sup>80</sup> status and receive a “green card.”<sup>81</sup>

The CAA would take an act of Congress to repeal; thus, it remains in effect despite the end of the Wet-Foot, Dry-Foot Policy.<sup>82</sup> However, as a practical matter, the end of the Wet-Foot, Dry-Foot Policy greatly weakens the CAA’s special treatment to potential Cuban immigrants.<sup>83</sup> As a result of the repeal of the policy, Cubans

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75. *Update on U.S. Policy Toward Cuba*, DEP’T OF HOMELAND SEC. (June 16, 2017), <http://bit.ly/2uhsvkA>.

76. Krogstad, *supra* note 68.

77. Ley 302, Gaceta Oficial 16-10-2012 (Cub.) (*translated by author*).

78. Cuban Adjustment Act of 1966, Pub. L. No. 8972, 80 Stat. 1161 (as amended) (reproduced as historical note to 8 U.S.C. § 1255) (2012)).

79. *Id.*

80. The Immigration and Nationality Act defines an LPR as, “the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed.” 8 U.S.C. § 1101(a)(20) (2012).

81. A “green card” is the documentary proof of one’s LPR status. *See* Green Card for a Cuban Native or Citizen, U.S. CITIZENSHIP AND IMMIGR. SERVS., <http://bit.ly/2fGNbHJ> (last visited Nov. 23, 2016).

82. *See* Nora Gamez Torres, *U.S. Updates Some Answers to Lingering Questions on New Immigration Policy For Cubans*, MIAMI HERALD (Jan. 18, 2017), <http://hrlld.us/2lStHGn>.

83. *See* Hannah Berkeley Cohen, Azam Ahmed, & Frances Robles, *Cubans Planning to Leave for U.S. Face a Bleak New Reality*, N.Y. TIMES (Jan. 13, 2016), <http://nyti.ms/2jGstJC> (discussing the adverse effect repealing Wet-Foot, Dry-Foot had on Cuban immigrants in transit from Cuba to the United States via the Mexican border). *See also* Sarah Marsh & Nelson Acosta, *Cuba Says United States has*

are no longer automatically paroled<sup>84</sup> into the United States as they had been previously.<sup>85</sup> Rather, they are treated as any other immigrant arriving at a border and undergo expedited removal<sup>86</sup> if they do not have documentation to enter.<sup>87</sup> However, if a Cuban is admitted or paroled in the United States on any visa, he may still enjoy the benefits of the CAA by adjusting his status to that of an LPR after one year of presence.<sup>88</sup> Cuban citizens may still apply for a visa to travel or move to the United States, and the United States has committed to providing 20,000 visas per year to Cubans.<sup>89</sup> Importantly, like any other would-be immigrant, a Cuban may still apply for asylum and any other relief based upon a claim of fear.<sup>90</sup>

#### F. Cubans with Final Orders of Removal

Cuban immigrants previously enjoyed de facto immunity from removal to Cuba.<sup>91</sup> There are at least 34,000 Cubans with final orders of removal in the United States, due in large part to criminal convictions.<sup>92</sup> The United States had been unable to enforce the orders of removal until its 2017 agreement with Cuba.<sup>93</sup> President Trump's administration continues to deport both Cubans who attempt to cross the border into the United States without proper documentation and Cubans with final orders of removal.<sup>94</sup> Before the 2017 agreement, the Cuban government refused to issue travel documents for would-be deportees, in large part because of the breakdown in diplomatic relations.<sup>95</sup> At the same time, the United

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*Deported 117 Cuban Migrants Since Policy Shift*, N.Y. TIMES (Feb. 18, 2017), <http://nyti.ms/2IEeIgx>.

84. Definition of Terms, *supra* note 48.

85. Gamez Torres, *supra* note 82.

86. Expedited removal is a streamlined process of deportation without a formal hearing used when border officials determine that an immigrant is inadmissible and does not have a credible claim of fear of returning to his home country. 8 U.S.C. § 1225 (2012).

87. Gamez Torres, *supra* note 82.

88. *Id.*

89. Joint Statement, *supra* note 2.

90. Gamez Torres, *supra* note 82; *see also infra* Part III.C.

91. Alvarez & Hussey, *supra* note 3.

92. *Id.*

93. Joint Statement, *supra* note 2; *see, e.g.*, Kate Morrissey, *Chula Vista Man is Getting Deported to Cuba now that Channels are Open*, SAN DIEGO UNION-TRIBUNE (June 16 2017), <http://bit.ly/2vvChj1>.

94. Morrissey, *supra* note 93.

95. Alvarez & Hussey, *supra* note 3. Cuba is not the only country that has refused to take back some or all criminal deportees; the United States government considers 23 countries to be "uncooperative" in taking back deportees, including Haiti, Guyana, China, India, and Sierra Leone. *See* Ron Nixon, *Nations Hinder*

States is not permitted to incarcerate criminal deportees for an unreasonable time after they have finished serving their criminal sentences, so many would-be criminal deportees are not detained.<sup>96</sup>

### 1. *The Mariel Boatlift*

One major historical exception to the United States' previous inability to deport criminal Cubans was the Mariel Boatlift. Between April 15 and October 31, 1980, the Castro regime permitted any of its citizens who wished to leave Cuba to do so from the Mariel Port, after over 10,000 Cubans requested asylum by occupying South American embassies in Havana.<sup>97</sup> The United States soon discovered that among the 125,000 refugees<sup>98</sup> were thousands of criminal prisoners and mental health patients from institutions that the Cuban government released to be transported to Florida from the port.<sup>99</sup> Accordingly, in 1984, the United States and Cuba brokered an agreement that Cuba would take back 2,746 of the prisoners and mental health patients.<sup>100</sup> Of those, approximately 2,200 so-called "Mariel Cubans" have been deported back to Cuba to date.<sup>101</sup> As part of Obama's January 12, 2017 agreement with Cuba ending the Wet-Foot, Dry-Foot Policy, Cuba agreed to take back up to 500 more Mariel Cubans.<sup>102</sup>

### 2. *Department of Homeland Security Processes*

In addition to the more than 34,000<sup>103</sup> Cubans with outstanding deportation orders, the DHS has the ability to initiate proceedings against Cubans who committed crimes decades ago and have not

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*U.S. Effort to Deport Immigrants Convicted of Crime*, N.Y. TIMES (July 1, 2016), <http://nyti.ms/2iLZNmc>.

96. *Zadvydas v. Davis*, 533 U.S. 678, 682 (2001) (holding that after one has served his criminal sentence, with limited exception, one may not be held for an unreasonable period past the 90-day limit if the U.S. government fails to execute his removal order).

97. See Andrew Glass, *Castro Launches Mariel Boatlift*, POLITICO (Apr. 20, 2009), <http://politi.co/2g6fzDo>; see also Maria Sacchetti, *Cuba Deal Brings Deportation Questions*, BOS. GLOBE (Dec. 26, 2014), <http://bit.ly/2gjeues>.

98. Alfonso Chardy, *How Fidel Castro and the Mariel Boatlift Changed Lives and Changed Miami*, MIAMI HERALD (Nov. 26, 2016), <http://hrld.us/2kX5yi9>.

99. Glass, *supra* note 97.

100. *Id.*

101. *Id.*

102. Joint Statement, *supra* note 2. See also Francis Robles, *'Marielitos' Face Long-Delayed Reckoning: Expulsion to Cuba*, N.Y. TIMES (Jan. 14, 2017), <http://nyti.ms/2mfMPif>.

103. Alvarez & Hussey, *supra* note 3.

yet undergone immigration proceedings.<sup>104</sup> Thus, the number of Cubans that the DHS seeks to deport may extend beyond those that have already gone through immigration proceedings.<sup>105</sup>

When the DHS seeks to deport an immigrant, it initiates either an expedited removal process<sup>106</sup> or a removal proceeding before an Immigration Judge (IJ) to determine the immigrant's deportability.<sup>107</sup>

However, because the DHS may exercise prosecutorial discretion,<sup>108</sup> and there is a backlog of over 533,000 cases in the immigration courts,<sup>109</sup> it seems unlikely that the DHS would prioritize Cuban individuals who it has not previously initiated proceedings against.<sup>110</sup> The DHS has likely already prosecuted the most dangerous criminals, considering its stated priority to do so under the previous administration.<sup>111</sup>

### III. ANALYSIS

The remainder of this Comment will explore possible avenues of relief for Cubans with final orders of removal now that Cuba has agreed to issue travel documents to deportees.<sup>112</sup> Few Americans likely oppose deporting dangerous criminals who have committed serious crimes.<sup>113</sup> For that reason, this Comment will focus on the

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104. *Biggs v. INS*, 55 F.3d 1398, 1401 (9th Cir. 1995) (holding that there is no statute of limitations for immigration proceedings); *see also* *Matter of S*, 9 I. & N. Dec. 548, 553 (B.I.A. 1962).

105. *See Biggs*, 55 F.3d at 1401.

106. 8 U.S.C. § 1225 (2012); *see supra* note 86.

107. 8 U.S.C. § 1129a. An IJ is “an attorney whom the Attorney General appoints as an administrative judge within the Executive Office of Immigration Review, qualified to conduct specified classes of proceedings, including a hearing under section 240.” 8 U.S.C. § 1101(4).

108. Alan D. Bersin et al., *Policies for the Apprehension, Detention, and Removal of Undocumented Immigrants*, DEP'T OF HOMELAND SEC. (Nov. 20, 2014), [https://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_prosecutorial\\_discretion.pdf](https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf) [hereinafter *2014 DHS Memo*] (discussing the allocation of resources for different categories of immigrants under the Obama administration).

109. *Immigration Court Backlog Continues to Grow*, HUMAN RIGHTS FIRST (Jan. 18, 2017), <http://bit.ly/2iM4wEo>.

110. On the other hand, DHS under the Trump administration has drastically reduced its use of prosecutorial discretion. *See Implementing the President's Border Security and Immigration Enforcement Improvement Policies*, DEP'T OF HOMELAND SEC. (Feb. 20, 2017), <http://bit.ly/2lrcCRg>; Kevin McAleenan et al., *Enforcement of Immigration Laws to Serve the National Interest*, DEP'T OF HOMELAND SEC. (Feb. 20, 2017), <http://bit.ly/2miirQd>.

111. *2014 DHS Memo*, *supra* note 108.

112. Patricia Zengerle, *Obama Administration Ends Special Immigration Policy for Cubans*, REUTERS (Jan. 13, 2017), <http://reut.rs/2jJWdt9>.

113. Malloy, *supra* note 6.

more sympathetic class of Cubans with final orders of removal, including those who were convicted of non-violent crimes years or decades ago and have not reoffended, those who have become productive members of society, and those who would suffer persecution if they were removed to Cuba. This Comment will also recommend that the DHS conduct the removal process in the most humanitarian manner possible, including exercising discretion in how it prioritizes removals<sup>114</sup> and filing joint motions to reopen<sup>115</sup> for sympathetic Cubans with removal orders.<sup>116</sup>

#### A. *Prosecutorial Discretion*

The least labor-intensive avenue of relief for a Cuban with a final order of removal is prosecutorial discretion because if granted favorably, prosecutorial discretion does not involve litigation.<sup>117</sup> While the DHS has the power to exercise prosecutorial discretion in normal immigration proceedings, whether the DHS will apply discretion to the enforcement of existing removal orders remains to be seen.<sup>118</sup>

##### 1. *Costs of Mass Deportation*

The DHS should apply discretion to not enforce some existing removal orders for sympathetic Cubans, in part because it would cost the government a great deal<sup>119</sup> to deport all 34,000 with Cubans with final orders. The government must pay an enormous cost to remove immigrants, including compensating Immigration and Customs Enforcement (ICE)<sup>120</sup> agents to locate and apprehend individuals and purchasing transportation back to an individual's country of origin.<sup>121</sup> On average, the government must spend an estimated \$10,070 to deport a single person when arrest, detention,

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114. See *infra* Part III.A.

115. See *infra* Part III.B.

116. See *infra* Part III.B.

117. See *Practice Pointer: Escalating Requests for Prosecutorial Discretion Before ICE ERO and ICE-OCC*, AM. IMMIGR. LAW ASS'N, <http://www.aila.org/infonet/ice-escalating-requests-prosecutorial-discretion> (last updated Dec. 30, 2015) (describing the process of contacting the DHS to request or argue for prosecutorial discretion).

118. 2014 DHS Memo, *supra* note 108, at 10.

119. See Phillip E. Wogin, *What Would It Cost to Deport All 5 Million Beneficiaries of Executive Action on Immigration*, CTR. FOR AM. PROGRESS (Feb. 23, 2015), <http://ampr.gs/1zazMJm>.

120. ICE is the department of the DHS in charge of enforcing immigration statutes and preventing terrorism and cross-border crime. See *What We Do*, IMMIGR. & CUSTOMS ENF'T, <https://www.ice.gov/overview> (last visited Nov. 20, 2016).

121. *The Costs of Mass Deportation*, WALL ST. J. (Mar. 21, 2016), <http://on.wsj.com/21AbxD7> (estimating that the United States is able to deport only



legal costs, and transportation are considered.<sup>122</sup> At this point, no regular commercial boat travel to Cuba exists other than cruises, so the United States government must either charter flights or buy seats from airlines for deportees.<sup>123</sup>

The DHS should also apply discretion in choosing which final orders of removal to enforce because deportation adversely affects families, both emotionally and financially.<sup>124</sup> Children who have a parent at risk of deportation, or in deportation proceedings, show increased psychological trauma and behavior issues.<sup>125</sup> Additionally, by removing someone who might be the breadwinner of his or her family, or the caretaker of children, that family would suffer financially and likely need to seek government assistance.<sup>126</sup> Thus, the DHS should consider both the economic and social costs of deportation when exercising discretion.

## 2. *Previously Identified Discretionary Priorities*

Under the Trump administration, the DHS has drastically decreased its use of prosecutorial discretion when determining against whom to initiate removal proceedings.<sup>127</sup> Former DHS Secretary John Kelly issued two memoranda on February 20, 2017, making clear that while the Trump administration seeks to remove dangerous criminals, the DHS would also initiate proceedings against any person with a final order of removal or without a valid visa.<sup>128</sup> However, due to the extreme backlog in the immigration courts and the above-discussed economic and human costs of deportation, the Trump administration should strongly consider taking into account discretionary factors, like those utilized by the Obama administration, to ensure that resources are efficiently spent in a manner con-

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400,000 immigrants per year given its current budget and outlining the enormous costs associated with mass deportations).

122. Wogin, *supra* note 119.

123. Douglas Hanks, *Port Miami Preparing for Daily Service to Cuba*, MIAMI HERALD (Feb. 1, 2016), <http://hrl.d.us/1RWBPjF> (noting that commercial ferries from Miami to Havana are still in development and in the process of being approved, although cruise ships have started to make the trips).

124. Randy Capps et al., *Implications of Immigration Enforcement Activities for the Well-Being of Children in Immigrant Families*, MIGRATION POL'Y INST. (Sept. 2015), <http://bit.ly/1ivbrNi>.

125. *Id.*

126. While there are no studies determining the effect of a deported parent on the family's income, the incarceration of an immigrant parent can decrease a family's income by as much as 70 percent within six months. *Id.*

127. *Implementing the President's Border Security and Immigration Enforcement Improvement Policies*, *supra* note 110; McAleenan, *supra* note 110.

128. *See supra* note 127.

sistent with public safety.<sup>129</sup> Furthermore, the Trump administration's recent statements strongly condemning the Castro regime's human rights violations are inconsistent with indiscriminate deportations of Cubans, because deportation puts Cubans at risk of suffering at the hands of the Cuban government.<sup>130</sup>

The DHS should take into account discretionary factors when determining if it should execute a Cuban's final order of removal, similar to those used under the Obama administration. The Obama administration issued a memo (the "2014 DHS Memo") which prioritized certain classes of individuals for removal proceedings in 2014 after many Cubans with outstanding deportation orders were convicted of their original crimes.<sup>131</sup> The individuals prioritized included individuals involved in criminal street gangs, aggravated felons,<sup>132</sup> terrorists, and individuals apprehended while entering the United States illegally.<sup>133</sup> However, because Cubans received special status under the Wet-Foot, Dry-Foot Policy, the likelihood is small that a Cuban would have entered the United States unlawfully.<sup>134</sup> The DHS should prioritize an individual's removal if the underlying criminal offense falls under one of the previously outlined priorities over an individual whose criminal offense does not fit into one of the categories.<sup>135</sup>

The 2014 DHS Memo suggests that the DHS has the power to elect to use similar discretion in deporting individuals with final removal orders.<sup>136</sup> The 2014 DHS Memo states that immigrants issued a final order of removal after January 1, 2014, are to be regarded as "Priority 3 aliens" with "the third and lowest priority for apprehension and removal."<sup>137</sup> The 2014 DHS Memo stipulates

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129. Scott Martelle, *Trump's Immigration Enforcement has just Made a Bad Situation Worse*, L.A. TIMES (July 18, 2017), <http://lat.ms/2tZeXFr> (arguing that by failing to prioritize dangerous criminals through the exercise of discretion, the Trump administration makes the United States less safe, because the criminals are more likely to remain at large).

130. When President Trump announced the shift in policy toward Cuba, he strongly denounced the Castro regime, stating, "To the Cuban government I say: Put an end to the abuse of dissidents. Release the political prisoners. Stop jailing innocent people. . . . We will never, ever be blind to it. We remember what happened." Davis, *supra* note 69.

131. 2014 DHS Memo, *supra* note 108.

132. The INA enumerates specific convictions that it considers to be aggravated felonies. 8 U.S.C. § 1101(43) (2012).

133. 2014 DHS Memo, *supra* note 108.

134. Cuban Adjustment Act of 1966, Pub. L. No. 8972, 80 Stat. 1161 (as amended) (reproduced as historical note to 8 U.S.C. § 1255 (2012)).

135. 2014 DHS Memo, *supra* note 108.

136. *See id.*

137. *Id.*

that “resources should be dedicated accordingly” and that Priority 3 aliens:

should generally be removed unless they qualify for asylum or another form of relief under our laws or, unless, in the judgment of an immigration officer, the alien is not a threat to the integrity of the immigration system or there are factors suggesting the alien should not be an enforcement priority.<sup>138</sup>

Despite the DHS’s new ability to deport more than 34,000 Cuban immigrants upon normalization of relations between the United States and Cuba,<sup>139</sup> the DHS should apply the Obama-era enforcement priorities to those immigrants. If the DHS chooses to apply these priorities to Cubans with final orders of removal, the Obama-era, 2014 DHS Memo suggests that a potential deportee may be spared deportation if an immigration officer decides there are enough mitigating circumstances.<sup>140</sup> The 2014 DHS Memo states the following:

ICE will review the cases of individuals scheduled for removal. However, if you have been scheduled for removal and believe that you merit prosecutorial discretion, including if you believe you qualify for DACA or deferred action, you should promptly contact the ERO officer responsible for your case to discuss the matter.<sup>141</sup>

The DHS Memo does not describe mitigating circumstances, but they can be inferred from other areas of discretionary immigration laws.<sup>142</sup> For example, when an IJ weighs a respondent’s equities when deciding whether to grant an INA section 212 waiver<sup>143</sup> for certain crimes, the IJ considers the following to be favorable factors:

[F]amily ties within the United States, residence of long duration in this country, evidence of hardship to the respondent and his family if deportation occurs, service in this country’s Armed Forces, a history of employment, the existence of property or

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138. *Id.*

139. Alvarez & Hussey, *supra* note 3.

140. *Id.*

141. ICE Instructions for Seeking Prosecutorial Discretion Under 2014 Executive Action, AM. IMMIGR. L. ASS’N. (Mar. 27, 2015), <http://www.aila.org/infonet/ice-instructions-seeking-prosecutorial-discretion/>.

142. 8 U.S.C. § 1182(h) (2012) (providing a discretionary waiver of inadmissibility for immigrants with certain low level convictions).

143. The waiver is a one-time option for LPR immigrants who committed some minor crimes to avoid deportation if they can establish that they warrant a positive discretionary determination. 8 U.S.C. § 1182(h).

business ties, evidence of value and service to the community, proof of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character.<sup>144</sup>

As a population, Cubans with removal orders from decades ago may have particularly strong factual arguments for long residence duration in the United States and family ties because Cubans have migrated in large numbers to the United States for more than five decades.<sup>145</sup> The longer a Cuban has lived in the United States, the more likely he or she has become a valuable member of the community and has a stable work history.<sup>146</sup> In the same 212(h) waiver of inadmissibility proceedings, the IJ weighs the above positive factors against the negative factors, which include the nature and underlying facts of the ground for exclusion, violations to United States immigration laws, the criminal record, and any other evidence indicative of an alien's bad character or undesirability as a permanent resident of the United States.<sup>147</sup> Thus, a Cuban who committed a minor crime decades ago, which did not qualify as a prosecutorial priority, would not meet many of the negative factors.<sup>148</sup>

Prosecutorial discretion is a useful tool because advocates may petition the DHS for favorable discretion, expending minimal time and resources without incurring large costs.<sup>149</sup> However, even if the DHS decides not to immediately enforce the order of removal, there is no concrete, legal guarantee that it will refrain from doing so in the future.<sup>150</sup> Furthermore, under the Trump administration, the DHS has greatly decreased its use of discretion in initiating removal proceedings.<sup>151</sup> Nevertheless, Cubans should consider asking the DHS for prosecutorial discretion if they meet most or all of the abovementioned positive factors.

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144. *Matter of Marin*, 16 I. & N. Dec. 581, 584–85 (B.I.A. 1978). *See also* *Tenorio v. Holder*, 603 Fed. Appx. 283, 287 (5th Cir. 2015); *Najib v. I.N.S.*, No. 93-3139, 1994 U.S. App. LEXIS 6407, at \*5 (6th Cir. 1994) (implementing the factor-based test from *Matter of Marin*).

145. *Krogstad*, *supra* note 68; *see supra* Part II.B.

146. *Alvarez & Hussey*, *supra* note 3.

147. *Matter of Marin*, 16 I. & N. at 584.

148. *Id.*

149. *See Practice Pointer*, *supra* note 117.

150. *See generally* *Heckler v. Chaney*, 470 U.S. 821 (1985) (holding that the Administrative Procedure Act did not require judicial review for prosecutorial discretion by the Food and Drug Administration).

151. *Implementing the President's Border Security and Immigration Enforcement Improvement Policies*, *supra* note 110; McAleenan, *supra* note 110.

### 3. *Gubernatorial Pardons*

Due to the current administration's aversion to using prosecutorial discretion,<sup>152</sup> Cubans with final orders of removal, who have extraordinarily compelling personal circumstances, should consider applying for a gubernatorial pardon for the conviction underlying the final order of removal.<sup>153</sup> Although this method will likely only be successful for those living in states with immigrant-friendly governors and who have truly exceptional merit, governors have recently granted similar pardons to help immigrants avoid deportation.<sup>154</sup>

#### B. *Motions to Reopen*

The remaining possible avenues for relief require a motion to reopen the removal proceeding.<sup>155</sup> Motions to reopen must generally be filed within 90 days of the final order of removal.<sup>156</sup> However, there are two notable exceptions to the filing deadline that Cubans with final orders of removal should explore: agreement with the DHS to reopen<sup>157</sup> and changed country conditions.<sup>158</sup>

The first exception requires the immigrant with a final order of removal to file a joint motion to the immigration court with DHS counsel.<sup>159</sup> The DHS is permitted to file a joint motion in cases that do not involve adjustment of status "only under exceptional and compelling circumstances."<sup>160</sup> An IJ may consider the following factors to determine whether the circumstances meet that requirement:

- (1) whether the alien has presented new evidence that is material and was not available and could not reasonably have been discovered or presented at the former hearing;
- (2) whether the alien is eligible for the relief sought;
- (3) whether the alien merits a favorable exercise of discretion;
- (4) the hardship to the alien and/

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152. *See supra* note 151.

153. *See, e.g.*, Sarah Maslin Nir, *To Stave off a Deportation, Cuomo Pardons a 9/11 Volunteer*, N.Y. TIMES (June 21, 2017), <http://nyti.ms/2vEjgL1> (reporting that New York Governor Cuomo pardoned the crimes of a Colombian immigrant with a final order of removal in order to allow his case to be reopened and dismissed because he served as a first responder on 9/11).

154. *Id.*

155. A successful motion to reopen allows an immigrant's final adjudication to be reheard. 8 U.S.C. § 1229a(c)(7) (2012).

156. 8 U.S.C. § 1229a(c)(7)(C)(i).

157. 8 C.F.R. § 1003.2(c)(3)(iii) (2014).

158. 8 C.F.R. § 1003.23(b)(4)(i).

159. 8 C.F.R. § 1003.23(b)(4)(iv).

160. *INS General Counsel Updates Motion to Reopen Policy, Including NA-CARA Motions*, 75 No. 7 *Interpreter Releases*, 259.

or his U.S. citizen or lawful permanent resident family members . . . ; (5) the alien's criminal history, if any; (6) the number and severity of the alien's immigration violations; (7) whether the alien has cooperated with . . . investigation . . . ; and (8) whether the alien's removal is consistent with INS objectives.<sup>161</sup>

As previously discussed, Cuban immigrants with careers and families may garner more sympathy, which may increase the likelihood of a favorable exercise of prosecutorial discretion.<sup>162</sup> Similarly, if the crime that prompted the immigrant's final order of removal was nonviolent and occurred decades ago without a re-offense, the lack of a subsequent criminal history may be a positive factor.<sup>163</sup> A Cuban would be unlikely to have violated any immigration policy because of the favorable status given to Cubans under the former Wet-Foot, Dry-Foot Policy.<sup>164</sup> The availability of 34,000<sup>165</sup> people with finalized orders of removal to deport is unprecedented and, therefore, the DHS should consider a Cuban immigrant with the abovementioned characteristics to constitute an "exceptional" circumstance that warrants relief from final removal orders.<sup>166</sup>

The second exception to the 90-day deadline, making a motion to reopen, applies to applications for asylum,<sup>167</sup> Withholding of Removal,<sup>168</sup> and protection under the Convention Against Torture (CAT) and is discussed in more detail below.<sup>169</sup>

### 1. *Ineffective Assistance of Counsel During Immigration Proceedings*

The Immigration and Nationality Act (INA)<sup>170</sup> provides that immigrants in removal proceedings have a right to counsel, but they are not entitled to court-appointed representation during any stage of the process.<sup>171</sup> However, in some cases, immigrants may still make a motion to reopen for ineffective assistance of counsel dur-

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161. *Id.* at 259–60.

162. *See* *Matter of Marin*, 16 I. & N. Dec. 581, 584 (B.I.A. 1978).

163. *Id.*

164. Cuban Adjustment Act of 1966, Pub. L. No. 8972, 80 Stat. 1161 (as amended) (reproduced as historical note to 8 U.S.C. § 1255 (2012)).

165. Alvarez & Hussey, *supra* note 3.

166. *INS General Counsel Updates Motion to Reopen Policy, Including NA-CARA Motions*, *supra* note 160.

167. 8 U.S.C. § 1229a(c)(7)(C)(ii) (2012).

168. 8 U.S.C. § 1231(b)(3) (2006).

169. 8 C.F.R. § 208.16(c)(4) (2014).

170. Immigration and Nationality Act, 8 U.S.C. §§ 1101–1537 (2012).

171. 8 U.S.C. § 1229(a)(E).

ing the immigration proceeding.<sup>172</sup> The Board of Immigration Appeals<sup>173</sup> (BIA) set forth three requirements to do so.<sup>174</sup> First, the applicant must accompany the motion to reopen with the retainer agreement between the applicant and counsel and allegations of what that counsel did and did not do.<sup>175</sup> Second, the accused counsel must receive notice of the claim and opportunity to respond.<sup>176</sup> Finally, the IJ determines “whether a complaint has been filed with appropriate disciplinary authorities regarding such representation.”<sup>177</sup> Some circuits have modified or added to this test. For example, the Ninth Circuit utilizes a two-part test requiring analysis of whether a competent attorney would have acted differently and whether the outcome was affected by the incompetency.<sup>178</sup> Cubans with a final order of removal should review their previous immigration proceedings to determine if their counsel was adequate.

2. *Ineffective Assistance of Counsel During Proceedings that Have Immigration Consequences Under Padilla v. Kentucky*

Immigrants may also make a motion to reopen based upon ineffective assistance of counsel during their criminal proceedings that subsequently gave rise to removal orders.<sup>179</sup> The Supreme Court held in *Padilla v. Kentucky*<sup>180</sup> that defense counsel in a criminal matter must competently advise their clients regarding immigration consequences before the client enters a guilty plea.<sup>181</sup> In criminal cases, to prove a claim of ineffective assistance, one must satisfy the two-pronged test set forth in *Strickland v. Washington*.<sup>182</sup>

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172. *Matter of Lozada*, 19 I. & N. Dec. 637, 639 (B.I.A. 1988) (setting forth high standards in order for a respondent to succeed with a motion to reopen due to ineffective assistance of counsel).

173. The BIA is the highest administrative appeals body for immigration law and is usually subject to judicial review by federal appeals courts. *Board of Immigration Appeals*, DEP'T OF JUSTICE (Mar. 24 2016), <http://bit.ly/2kOSLhe>.

174. *Matter of Lozada*, 19 I. & N. at 639.

175. *Id.*

176. *Id.*

177. *Id.*

178. *Maravilla v. Ashcroft*, 381 F.3d 855, 858 (9th Cir. 2004). *But see* *Habib v. Lynch*, 787 F.3d 826, 831 (7th Cir. 2015) (employing a three-part test including compliance with proper procedure, prejudice, and “showing that the proceeding was so fundamentally unfair that he was prevented from reasonably presenting his case”) (quoting *Solis-Chavez v. Holder*, 662 F.3d 462, 466 (7th Cir. 2011)).

179. *INS General Counsel Updates Motion to Reopen Policy, Including NACARA Motions*, *supra* note 160.

180. *See generally* *Padilla v. Kentucky*, 559 U.S. 356 (2010).

181. *Id.* at 367.

182. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *See also* *State v. Delgado*, No. A-3276-08T4, 2010 WL 4642989, at \*11-12 (N.J. Super. Ct. App. Div.

The plaintiff must show that (1) the defense counsel was deficient and (2) that the counsel caused actual prejudice.<sup>183</sup>

State courts have applied slightly different interpretations of the requirements for a claim of ineffective assistance of counsel under *Padilla*.<sup>184</sup> For example, the Colorado Court of Appeals held that counsel must give “correct advice” to a criminal defendant where the applicable immigration statute is “succinct, clear, and explicit” in establishing deportation consequences.<sup>185</sup> However, where the statute is not “succinct, clear, and explicit . . . a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences.”<sup>186</sup>

An ineffective assistance of counsel claim might be particularly useful to a Cuban with a final order of removal because the CAA is likely not within the average criminal defense attorney’s range of expertise.<sup>187</sup> However, ineffective assistance of counsel claims would not apply to the more sympathetic group of Cubans with decades-old orders of removal because *Padilla* does not apply retroactively;<sup>188</sup> therefore, one can raise a claim under its holding only if the conviction became final after March 31, 2010, when the Supreme Court decided *Padilla*.<sup>189</sup>

If an attorney believed that Cubans could not be deported, but did not have a full understanding of the CAA and immigration law, the attorney may have misinterpreted the law to mean that Cubans were permanently protected from deportation when, in fact, the only “protection” was that the Cuban government previously did

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Nov. 18, 2010) (applying the *Strickland* test to a *Padilla* analysis); George L. Blum, *Construction and Application by State Courts of the Supreme Court’s Ruling in Padilla v. Kentucky, That Defense Counsel Has Obligation to Advise Defendant that Entering Guilty Plea Could Result in Deportation*, 74 A.L.R.6th 373, 4 (2016) (explaining that the *Strickland* test is applied by state courts in a *Padilla* analysis).

183. *Strickland*, 466 U.S. at 687.

184. *Padilla*, 559 U.S. at 369.

185. *People v. Kazadi*, 284 P.3d 70, 73 (Colo. App. 2011) (quoting *Padilla*, 559 U.S. at 369).

186. *Id.* This interpretation seems to align with Justice Alito’s concurrence in *Padilla*, where he reasoned that defense lawyers do not necessarily have the specialized knowledge that immigration law requires; therefore, the criminal defense lawyer should advise simply that, “the client should consult an immigration specialist if the client wants advice on the subject.” *Padilla*, 559 U.S. at 375–88 (Alito, J., concurring).

187. *Padilla*, 559 U.S. 356, 375–88 (Alito, J., concurring).

188. *Chaidez v. United States*, 133 S. Ct. 1103, 1107 (2013) (reasoning that *Padilla* was a new rule and “when we announce a ‘new rule,’ a person whose conviction is already final may not benefit from the decision in habeas or similar proceedings”).

189. *Padilla*, 559 U.S. at 356.



not issue travel documents for its citizens with final orders of removal.<sup>190</sup> Therefore, a criminal defense attorney conceivably may have improperly advised a Cuban client that a particular conviction would not have immigration consequences because of his or her country of origin. Cubans with final orders of removal should review their criminal cases to determine if they have a viable claim of ineffective assistance of counsel under *Padilla*.<sup>191</sup>

*C. Defensive Applications for Asylum, Withholding of Removal, and Protection Under the Convention Against Torture*

To challenge their final order of removal, in some circumstances Cubans may apply for protection in the form of asylum, Withholding of Removal, and protection under the CAT.<sup>192</sup> The United States Citizenship and Immigration Services Form I-589 encompasses each of these grounds for relief, and an IJ will consider each claim during the same proceeding.<sup>193</sup> As this Comment will further discuss, applicants with final orders of removal must first succeed in a motion to reopen<sup>194</sup> their immigration cases and then must satisfy the burdens of proof and elements for each form of relief.

*1. Motion to Reopen for Changed Country Conditions*

When immigrants make a motion to reopen,<sup>195</sup> they must show that there is new evidence that is both material and was previously unavailable.<sup>196</sup> The immigrants also must make a prima facie case that they are eligible for the type of relief sought.<sup>197</sup> When the immigrants have a final order of removal, they may file a motion to reopen only for changed country conditions in their home coun-

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190. Alvarez & Hussey, *supra* note 3 (explaining that the Cuban government generally refuses to issue travel documents to its citizens with final orders of removal).

191. *Padilla*, 559 U.S. at 356.

192. Form I-589 contains the application for asylum, Withholding of Removal, and protection under the CAT. *I-589, Application for Asylum and Withholding of Removal*, DEP'T OF HOMELAND SEC., <https://www.uscis.gov/i-589> (last updated June 28, 2017).

193. The application form I-589 has a box that the applicant checks if he or she would like to be considered for protection under the CAT in addition to Withholding of Removal and asylum. *Id.*

194. 8 U.S.C. § 1229a(c)(7) (2012).

195. *See supra* Part III.B.

196. 8 U.S.C. § 1229a(c)(7)(C)(ii).

197. *Matter of S-Y-G*, 24 I. & N. Dec. 247, 252 (B.I.A. 2007); *see also* *Poradisova v. Gonzalez*, 420 F.3d 70, 78 (2d Cir. 2005).

tries, but not for changed personal conditions.<sup>198</sup> The BIA has broad discretion when dealing with motions to reopen and may discretionarily deny a motion “if the movant fails to sustain the heavy burden of showing eligibility for relief or to proffer material, previously unavailable evidence, or if [it is] convinced that a favorable exercise of discretion on the asylum application is unlikely.”<sup>199</sup>

A change in country conditions unique to each Cuban’s situation is the newfound practical ability to be deported following former President Obama’s announcement.<sup>200</sup> Phrased more broadly, a Cuban could argue that the country conditions have changed due to the restoration of diplomatic ties between the United States and Cuba.<sup>201</sup> No published case law analyzes whether restoration of relations between the United States and another country, or a newfound ability to be deported, qualifies as changed country conditions. However, a court has held that a change in the United States’ law is insufficient to prove a change in country conditions.<sup>202</sup> A Cuban may try to distinguish his case because it was a change in his own country’s policies to not issue travel documents for deportees, rather than any policy or legislation of the United States.<sup>203</sup>

The argument that conditions in Cuba have worsened may prove difficult to argue because although political repression and poverty are widespread, by most accounts freedom has increased.<sup>204</sup> Country conditions that stay poor but do not affirmatively worsen are not sufficient to meet the changed country conditions standard.<sup>205</sup> Furthermore, an IJ may consider an argument that an ability to be deported suffices for changed country conditions to be

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198. *Averianova v. Holder*, 592 F.3d 931, 937 (8th Cir. 2010) (holding that the Due Process and Equal Protection clauses are not violated where an alien filing a motion to reopen is permitted to use only the changed country standards rather than the changed personal circumstances standard); *see also Hui Zheng v. Holder*, 562 F.3d 647, 651-52 (4th Cir. 2009).

199. *Matter of S-Y-G*, 24 I. & N. at 252.

200. *See generally Weaver & Whitefield*, *supra* note 2 (describing the ramifications of President Obama’s agreement with Cuba for Cubans with final orders of removal).

201. *Id.*

202. *Azanor v. Ashcroft*, 364 F.3d 1013, 1022 (9th Cir. 2004) (holding that a change in U.S. asylum law does not count as “changed country conditions”).

203. *Zengerle*, *supra* note 112.

204. *See Cuba 2015 Human Rights Report*, *supra* note 55, at 1–2 (indicating the Cuban government has released a number of political prisoners, did not commit any unlawful killings, and committed no politically motivated disappearances).

205. *See Mejia-Ramaja v. Lynch*, 806 F.3d 19, 21–22 (1st Cir. 2015) (reasoning that while conditions in Guatemala are very poor, they have not worsened since the original hearing).

contrary to public policy.<sup>206</sup> A Cuban with a final order of removal may evaluate the strength of a motion to reopen based on changed country conditions in addition to other options because public policy concerns weaken that argument. When making a motion to reopen, an immigrant may also consider trying to reach an agreement with the DHS, citing exceptional circumstances.<sup>207</sup>

## 2. *Standards for Asylum*

Cubans looking to succeed in their motions to reopen for a fear-based claim must make a prima facie case for the relief they seek.<sup>208</sup> To qualify for asylum, an immigrant must meet the definition of “refugee” under the INA,<sup>209</sup> meaning the immigrant is currently present in the United States and has “well-founded fear” of persecution<sup>210</sup> on account of a protected ground, meaning “race, religion, nationality, membership in a particular social group, or political opinion.”<sup>211</sup> The BIA defines persecution as “harm or suffering inflicted upon an individual in order to punish him for possessing a belief or characteristic a persecutor sought to overcome,” and it must be “inflicted either by the government of a country or by persons or an organization that the government was unwilling or unable to control.”<sup>212</sup> The Supreme Court determined that “well-founded fear” of persecution may include having a less than 50 percent chance of the persecution occurring.<sup>213</sup> Furthermore, an IJ’s finding of past persecution creates a presumption of future fear of persecution,<sup>214</sup> rebuttable by the DHS with evidence of changed country circumstances that show the fear is no longer well founded.<sup>215</sup>

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206. *See* *INS v. Doherty*, 502 U.S. 314, 323 (1992) (explaining that “motions for reopening of immigration proceedings are disfavored for the same reasons as are petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. This is especially true in a deportation proceeding . . .”).

207. 8 C.F.R. § 1003.23(b)(4)(ii) (2014); *see supra* Part III.B.

208. *Matter of S-Y-G*, 24 I. & N. Dec. 247, 252 (B.I.A. 2007); *see also* *Poradisova v. Gonzalez*, 420 F.3d 70, 78 (2d Cir. 2005).

209. 8 U.S.C. § 1101(a)(42) (2012).

210. *Id.*

211. *Id.*

212. *Matter of Acosta* 19 I. & N. Dec. 211, 222 (B.I.A. 1985). The BIA noted that Congress intentionally did not statutorily define “persecution” because it was defined by case law. *Id.* at 223. Thus, different circuits may have slightly varied interpretations. *See, e.g.,* *Regalado-Garvia v. INS*, 305 F.3d 784, 787 (8th Cir. 2002) (defining persecution as “infliction of death, torture, or injury to one’s person or freedom on account of” a protected ground).

213. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987).

214. 8 C.F.R. § 208.13(b)(1) (2014).

215. 8 C.F.R. § 208.13(b)(1)(i)(A).

In addition to meeting the above criteria, the IJ must make a favorable judgment of discretion to grant asylum.<sup>216</sup> In doing so, the IJ looks at the “totality of the circumstances”<sup>217</sup> and weighs asylum applicants’ positive factors against their negative factors.<sup>218</sup>

### 3. *Statutory Bars to Asylum*

Finally, asylum applicants must contend with the statutory bars to asylum. These bars include access to a “safe third country,”<sup>219</sup> noncompliance with the one-year filing deadline,<sup>220</sup> previous asylum denial,<sup>221</sup> participation in the persecution of others,<sup>222</sup> convictions for “particularly serious crimes,”<sup>223</sup> “serious nonpolitical crimes” committed outside of the United States,<sup>224</sup> “danger to the security of the United States,”<sup>225</sup> and “firm resettlement” in a third country.<sup>226</sup>

The one-year filing deadline has two exceptions.<sup>227</sup> The first exception is the existence of “changed circumstances” materially affecting the applicant’s eligibility for asylum.<sup>228</sup> The second exception is “extraordinary circumstances” not intentionally created by the applicant that directly bear on one’s ability to apply.<sup>229</sup> Because Cubans with a final order of removal will have already had to demonstrate changed country conditions to succeed in a motion to reopen,<sup>230</sup> they will have already satisfied the requirements for changed conditions to overcome this bar.

Cubans who were active in the Castros’ government might have to contend with the asylum bar for persecution of others.<sup>231</sup> To be barred on this ground, an IJ must find that the asylum applicant persecuted others based upon a protected ground.<sup>232</sup> The asy-

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216. 8 U.S.C. § 1158(b)(1)(B)(iii) (2014).

217. *Id.*

218. *See* *Matter of Pula*, 19 I. & N. Dec. 467, 473 (B.I.A. 1987). *See also* *Kalubi v. Ashcroft*, 364 F.3d 1134, 1138 (9th Cir. 2004).

219. 8 U.S.C. § 1158(a)(2)(A).

220. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, §601, 101 Stat. 3009-546.

221. 8 U.S.C. § 1158(a)(2)(C)–(D) (2012).

222. 8 U.S.C. §§ 1158(b)(2)(A)(i), 1231(b)(3)(B)(i).

223. 8 U.S.C. §§ 1158(b)(2)(A)(ii), 1231(b)(3)(B)(ii).

224. 8 U.S.C. §§ 1158(b)(2)(A)(iii), 1231(b)(3)(B)(iii).

225. 8 U.S.C. § 1158(b)(2)(A)(v).

226. 8 U.S.C. § 1158(b)(2)(A)(vi).

227. 8 C.F.R. § 208.4(a)(4)–(5) (2014); 8 C.F.R. § 1208.4(a)(4)–(5) (2014).

228. 8 C.F.R. §§ 208.4(a)(4), 1208.4(a)(4).

229. 8 C.F.R. §§ 208.4(a)(5), 1208.4(a)(5).

230. *See supra* Part III.B.

231. 8 U.S.C. §§ 1158(b)(2)(A)(i), 1231(b)(3)(B)(i).

232. *See, e.g.,* *Ahmed v. Gonzalez*, 221 F. App’x 595, 596 (9th Cir. 2009).

lum applicant need not have directly participated in the actual persecution; peripheral involvement is sometimes enough to meet the standards for the bar.<sup>233</sup> The Cuban government continues to persecute its citizens, especially for political opinion, so Cuban defectors to the United States, who were high-ranking members of the government, might be barred from asylum as persecutors.<sup>234</sup>

The class of sympathetic Cubans, who committed non-violent crimes decades ago, might also have to contend with the particularly serious crime bar because of the wide scope of crimes the bar includes.<sup>235</sup> If the asylum applicant has a conviction, the IJ will analyze the “nature of the crime and not the likelihood of future serious misconduct.”<sup>236</sup>

An IJ considers an asylum applicant who committed an aggravated felony<sup>237</sup> to have per se committed a particularly serious crime.<sup>238</sup> Furthermore, any conviction involving drug trafficking of a controlled substance<sup>239</sup> is a particularly serious crime.<sup>240</sup> A Cuban with a prior drug trafficking conviction can rebut the presumption that it was a particularly serious crime by meeting six criteria.<sup>241</sup>

- (1) a very small quantity of controlled substance; (2) a very modest amount of money paid for the drugs in the offending transaction; (3) merely peripheral involvement by the alien of the criminal activity, transaction, or conspiracy; (4) the absence of any violence or threat of violence, implicit, or otherwise, associated with the offence; (5) the absence of any organized crime or terrorist organization involvement, direct or indirect, in relation to the offending activity; (6) the absence of any adverse or harmful effect of the activity or transaction on juveniles.<sup>242</sup>

The above standard to rebut the presumption is quite high, but Cubans with non-violent drug offenses from years or decades ago should evaluate whether they meet the criteria<sup>243</sup> and whether evidence still exists to support their claims.

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233. See, e.g., *Matter of A-H-*, 23 I. & N. Dec. 774, 784 (B.I.A. 2005) (finding that an asylum applicant was barred as a persecutor because he used his position of influence, public statements, and ties to government groups to incite persecution).

234. See *Cuba 2015 Human Rights Report*, *supra* note 55, at 1, 5, 9–10.

235. See 8 U.S.C. § 1158(b)(2)(A)(ii).

236. *Matter of N-A-M-*, 24 I. & N. Dec. 336, 342 (B.I.A. 2007).

237. 8 U.S.C. § 1101(43).

238. 8 U.S.C. § 1158(b)(2)(B)(i).

239. 18 U.S.C. § 924(c) (2012).

240. *Matters of Y-L, A-G-, R-S-R*, 23 I. & N. Dec. 270, 274–76 (B.I.A. 2002).

241. *Id.* at 275–76.

242. *Id.*

243. *Id.*

Even crimes that are not aggravated felonies or drug trafficking crimes may be considered particularly serious crimes, including but not limited to reckless endangerment,<sup>244</sup> robbery,<sup>245</sup> mail fraud,<sup>246</sup> and money laundering.<sup>247</sup> Cubans with a conviction for a similar offense will have to argue that the facts and circumstances of the conviction do not rise to the level of being particularly serious.<sup>248</sup> If Cubans with final orders of removal do not meet the high statutory standards for asylum, they should consider if they meet the standards for Withholding of Removal and protection under the CAT.

4. *Standards for Withholding of Removal under 8 U.S.C. § 1231(b)(3)*

Withholding of Removal under 8 U.S.C. § 1231(b)(3)<sup>249</sup> is a form of fear-based relief that prevents immediate removal to one's home country, but with fewer immigration benefits than asylum.<sup>250</sup> An IJ considers the immigrant's eligibility for Withholding of Removal alongside the asylum application.<sup>251</sup> The legal elements for asylum and Withholding of Removal are the same, and an immigrant similarly has to prove persecution on the basis of one of the enumerated protected grounds: race, religion, nationality, political opinion, or particular social group.<sup>252</sup> However, there are significant differences between asylum and Withholding of Removal.<sup>253</sup>

The first major distinction is that immigrants granted Withholding of Removal still have a final order of removal on their records, even though they cannot be deported.<sup>254</sup> Immigrants that were granted Withholding of Removal are also prohibited from traveling out of the United States and are not permitted to apply for citizenship.<sup>255</sup>

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244. *Nethangani v. Mukasey*, 532 F.3d 150, 155 (2d Cir. 2008).

245. *Matter of Carballe*, 19 I. & N. Dec. 357, 361 (B.I.A. 1986).

246. *Arbid v. Holder*, 674 F.3d 1138, 1143–44 (9th Cir. 2012).

247. *Kaplun v. Att'y Gen.*, 602 F.3d 260, 267–68 (3d Cir. 2010).

248. *Matter of N-A-M-*, 24 I. & N. Dec. 336, 337–38 (B.I.A. 2007) (holding that “a particularly serious crime need not be an aggravated felony. . . . [A]ll reliable information may be considered . . . including but not limited to the record of conviction and sentencing information.”).

249. 8 U.S.C. § 1231(b)(3) (2012).

250. *Id.*

251. *I-589, Application for Asylum and Withholding of Removal*, *supra* note 192.

252. *Id.*

253. See DREE K. COLLOPY, AILA'S ASYLUM PRIMER: A PRACTICAL GUIDE TO U.S. ASYLUM LAW AND PROCEDURE 1031 (7th ed. 2015).

254. 8 U.S.C. § 1231(b)(3).

255. COLLOPY, *supra* note 253.

Next, the burden of proof is higher for Withholding of Removal compared to asylum; applicants must prove that the requisite harm is a “clear probability”<sup>256</sup> instead of the “well-founded fear” standard for asylum.<sup>257</sup> Although the burden of proof is higher, IJs may not exercise discretion in granting Withholding of Removal as they do in granting asylum; the IJ must mandatorily grant relief if the applicant meets the statutory standard.<sup>258</sup> Finally, three of the statutory bars to asylum do not apply to applicants for Withholding of Removal: the one-year filing bar,<sup>259</sup> a previously denied application for asylum,<sup>260</sup> and the possibility of removal to a “safe third country.”<sup>261</sup> The remaining bars to asylum still apply to Withholding of Removal, including the immigrant’s participation in persecution based upon a protected ground,<sup>262</sup> commitment of a “particularly serious crime”<sup>263</sup> or a “serious nonpolitical crime” in a different country,<sup>264</sup> and participation in terrorist activity.<sup>265</sup>

##### 5. *Possible Solutions for Cubans Under Asylum and Withholding of Removal Standards*

Cuban applicants for asylum or Withholding of Removal are unlikely to succeed on a claim of persecution for race because the Cuban government openly propagates racial equality, even if it has not achieved such equality.<sup>266</sup> Additionally, a claim for persecution on account of nationality is unlikely to succeed because although Cuba is ethnically diverse and discrimination does occur, the government officially condemns such discrimination and does not acquiesce to discriminatory groups.<sup>267</sup> An asylum claim based on persecution for religion is similarly unlikely; although there are in-

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256. 8 C.F.R. § 208.16(c)(4) (2014). Another common phrasing of the “clear probability” standard for Withholding of Removal is that the persecution is “more likely than not.” See, e.g., *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987).

257. 8 U.S.C. § 1101(a)(42).

258. *Cardoza-Fonseca*, 480 U.S. at 429.

259. 8 U.S.C. § 1158(a)(2)(A).

260. 8 U.S.C. § 1158(a)(2)(C)–(D).

261. 8 U.S.C. § 1158(a)(2)(A).

262. 8 U.S.C. §§ 1158(b)(2)(A)(i), 1231(b)(3)(B)(i).

263. 8 U.S.C. §§ 1158(b)(2)(A)(ii), 1231(b)(3)(B)(ii). For Withholding of Removal, the particularly serious crime analysis differs slightly because an aggravated felony is only per se a particularly serious crime if the aggregate sentence imposed was at least five years. 8 U.S.C. § 1231(b)(3)(B) (2012).

264. 8 U.S.C. §§ 1158(b)(2)(A)(iii), 1231(b)(3)(B)(iii).

265. 8 U.S.C. § 1158(b)(2)(A)(v).

266. See Damien Cave, *Cuba Says it has Solved Racism. Obama Isn't so Sure*, N.Y. TIMES (Mar. 23, 2016), <http://nyti.ms/2j2CEYh>.

267. *Id.* The indigenous people of Cuba, the Tainos, were almost eradicated by colonialism. See Hillary Guelly, *Searching for Cuba's Pre-Columbian Roots*, THE SMITHSONIAN (Nov. 1, 2016), <http://bit.ly/2eCsa2B>. Although the government

stances of the Cuban government threatening certain groups, like Evangelical Christians, “there were no reports of significant societal actions affecting religious freedom,” and the Cuban Constitution provides for freedom of religion.<sup>268</sup> However, a Cuban immigrant may have other grounds for a successful asylum or Withholding of Removal claim.

a. Political Opinion

An asylum or Withholding of Removal claim based upon political opinion, however, is likely to be viable on a case-by-case basis for Cubans due to the Cuban government’s past and present treatment of political dissidents.<sup>269</sup> As stated previously, past persecution creates a rebuttable presumption for continued persecution.<sup>270</sup> Therefore, Cubans who were previously incarcerated or tortured due to their support for Batista, their membership in a group like *Damas de Blanco*,<sup>271</sup> or other political dissidence, may establish that rebuttable presumption for persecution.<sup>272</sup> The DHS may try to rebut that presumption, but governmental persecution continues under President Raul Castro, even if it has lessened.<sup>273</sup>

b. Particular Social Group

Next, Cubans may be eligible for asylum or Withholding of Removal on the basis of persecution due to membership in a particular social group.<sup>274</sup> “Particular social group” is not defined in legislation, but the UNHCR handbook offers the following definition:

[A] group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of human rights.<sup>275</sup>

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encourages a post-racial society, it has recently become more accepting to expression of indigenous pride and culture. *Id.*

268. See generally Cuba International Religious Freedom Report, *supra* note 59.

269. See *Cuba 2015 Human Rights Report*, *supra* note 55, at 2, 9–10.

270. 8 C.F.R. § 208.13(b)(1) (2014).

271. See *supra* note 57.

272. 8 C.F.R. § 208.13(b)(1).

273. See *Cuba 2015 Human Rights Report*, *supra* note 55, at 2, 9–10.

274. 8 U.S.C. § 1101(42)(A) (2012).

275. U.N. High Comm’r for Refugees, *Guidelines on International Protection: “Membership of a Particular Social Group” Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, ¶ 11 (May 7, 2002), <http://bit.ly/2khRfEb>.



The BIA clarified that a characteristic of a particular social group “must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences,” and they should share “a common, immutable characteristic.”<sup>276</sup>

Cubans have previously won immigration relief by defining a particular social group with homosexuality.<sup>277</sup> A Cuban using homosexuality as a basis for asylum will have to show that the Cuban government still uses homosexuality as a basis for persecution and will likely have a hard time doing so given recent progress.<sup>278</sup> Another possibility for a particular social group may be HIV positive individuals because Cuba often fails to administer the proper medications to treat HIV and even criminalizes having the disease.<sup>279</sup> In an unpublished decision, an IJ previously recognized HIV status as a particular social group.<sup>280</sup>

Cubans with final orders of removal that have a fear of government persecution upon return to Cuba should particularly consider applying for asylum and Withholding of Removal for political opinion or particular social group, depending on their individual circumstances.

## 6. *Protection Under the Convention Against Torture*

In the same application for asylum, immigrants may apply for protection under the CAT. The CAT provides for two types of protection, withholding of removal<sup>281</sup> and deferral of removal.<sup>282</sup>

Under the CAT, applicants are eligible for protection if they establish that they were intentionally<sup>283</sup> tortured by a government official or with the acquiescence of the government<sup>284</sup> in the offender’s custody or physical control.<sup>285</sup> The legal analysis for pro-

276. *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985).

277. *Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819, 822–23 (B.I.A. 1990) (noting that no challenge was brought to the “immutable” nature of homosexuality).

278. *Cuba’s Gay Rights Revolution*, N.Y. TIMES (Dec. 20, 2014), <http://nyti.ms/2kgc3Ia>.

279. *Cuba 2015 Human Rights Report*, *supra* note 55, at 26.

280. *IJ Grants Asylum to HIV Positive Man*, *General Counsel Issues HIV Instructions*, 73 INTERPRETER RELEASES 901 (July 8, 1996) (granting asylum to an HIV positive man who would face stigma and a de facto death sentence due to unavailability of medication in his home country in an unpublished, non-binding decision).

281. 8 C.F.R. § 208.16(c)(4) (2014).

282. 8 C.F.R. §§ 208.17, 1208.17.

283. 8 C.F.R. §§ 208.18(a)(5), 1208.18(a)(5).

284. 8 C.F.R. §§ 208.19(a)(1), 1208.18(a)(1).

285. 8 C.F.R. §§ 208.16(b), 1208.16(b).

tection under the CAT is distinct from that for asylum and Withholding of Removal because the torture does not have to be done on account of a protected ground.<sup>286</sup> The burden of proof is that the immigrants will “more likely than not” be tortured if they are removed to his country of origin.<sup>287</sup>

Withholding of removal under the CAT is similar in many ways to Withholding of Removal under 8 U.S.C. § 1231(b)(3), including the statutory bars to removal.<sup>288</sup> Additionally, the IJ does not have discretion in granting withholding of removal under the CAT if the applicant meets the criteria,<sup>289</sup> and the applicant receives the same benefits as he would with Withholding of Removal under 8 U.S.C. § 1231(b)(3).<sup>290</sup>

Deferral of removal under the CAT differs in that there are no statutory bars to its protection.<sup>291</sup> It is also a less permanent form of protection because the DHS may initiate proceedings where the recipient of referral of removal must prove again that he meets the requirements of protection under the CAT.<sup>292</sup>

A Cuban immigrant should consider applying for protection under the CAT if he or she is statutorily barred from asylum and Withholding of Removal<sup>293</sup> or if he or she is unable to establish that the persecution occurred on account of a protected ground.<sup>294</sup>

#### IV. CONCLUSION

The DHS’s sudden ability to deport 34,000 foreign nationals with final orders of removal is an unprecedented circumstance.<sup>295</sup> Therefore, the DHS should exercise its discretion with the intention to minimize governmental and human costs, while ensuring that the most dangerous criminals are removed from the United States.<sup>296</sup> The DHS should comply with its previously identified priorities to humanely exercise its discretion.<sup>297</sup> Furthermore, the DHS should

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286. Matter of J-E-, 23 I. & N. Dec. 291, 279–99 (B.I.A. 2002).

287. 8 C.F.R. §§ 208.16(c), 1208.16(c).

288. See *supra* Part III.C.3.

289. 8 C.F.R. §§ 208.16(c)(4), 1208.16(c)(4).

290. See *supra* Part III.C.4.

291. See, e.g., Matter of G-A-, 23 I. & N. Dec. 366, 368 (B.I.A. 2002) (noting that the IJ may not deny protection under the CAT because of any statutory bar, “however serious” the criminal convictions might be).

292. 8 C.F.R. §§ 208.17(d), 1208.17(d).

293. See *supra* Part III.C.3.

294. 8 C.F.R. §§ 208.18(a)(6), 1208.18(a)(6).

295. See Joint Statement, *supra* note 2; see also Alvarez & Hussey, *supra* note 3.

296. See *supra* Part III.A.

297. See *supra* Part III.A.

comply with joint motions to reopen immigration cases where Cubans have non-violent, years-old convictions and consider the situation an exceptional circumstance.<sup>298</sup>

Cubans with final orders of removal and non-violent convictions should carefully weigh their options in challenging the orders. If they meet DHS criteria, they should proactively seek prosecutorial discretion or file a joint motion to reopen from DHS.<sup>299</sup> They should also review their original immigration and criminal proceedings to determine whether their lawyers adequately advised them of the immigration consequences of their crimes.<sup>300</sup> Finally, Cubans with final orders of removal should consider whether they have been persecuted in the past or face future persecution and apply for fear-based protection if applicable.<sup>301</sup>

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298. *See supra* Part III.B.

299. *See supra* Parts III.A–B.

300. *See supra* Part III.B.

301. *See supra* Part III.C.