



# Immigration Law Advisor

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## The Cuban Adjustment Act of 1966: An Introduction and History

by Alanna T. Duong

### Introduction

On November 2, 1966, just over half a century ago, the Cuban Adjustment Act of 1966 ("CAA") was signed into law.<sup>1</sup> While some normalization of the relationship between the governments of the United States and Cuba has occurred in recent years, Congress conditioned the CAA's repeal only upon a determination by the U.S. President that a "democratically elected government in Cuba [be] in power."<sup>2</sup> Meanwhile, Cuba remains a communist-dominated country.<sup>3</sup>

The CAA is significant because of the benefits Cubans are afforded in seeking lawful permanent residence ("LPR") under the law. For example, in contrast to applicants for adjustment of status under section 245 of the Immigration and Nationality Act ("the Act"), 8 U.S.C. § 1255(a), the inadmissibility grounds for entering without inspection do not apply to Cubans applying for adjustment of status under the CAA.<sup>4</sup>

This article will examine the CAA's enactment in 1966 and explore its development since that time, including a brief history of the Cuban revolution, the migration of Cubans to the United States, and the subsequent enactment of the CAA. The article will also briefly discuss the 1994–2017 "Wet-Foot/Dry-Foot" policy, which provided that Cubans who reached U.S. soil were able to request parole into the United States, whereas those Cubans who were intercepted at sea were repatriated to Cuba.<sup>5</sup> The article will then discuss eligibility requirements for Cuban nationals and their spouses or children to adjust their status under the CAA and compare the differences between adjustment of status under the CAA and section 245(a) of the Act. Finally, the article will discuss which agency has jurisdiction to consider applications for adjustment under the CAA.

## 2017 Federal Court Cases: A Top 10

The following are ten significant Federal court decisions that shaped the field of immigration law in 2017, in no particular order of importance. This is a good time to re-familiarize yourself with the consequential changes, distinctions, or clarifications they made in immigration law:

1. *Barajas-Romero v. Lynch*, 846 F.3d 351 (9th Cir. 2017)

**Withholding of Removal Standard and “Rogue Officials.”** In a significant departure from the Board’s interpretation in *Matter of C-T-L-*, 25 I&N Dec. 341 (2010), the Ninth Circuit held that the “a reason” nexus standard for withholding of removal is a different and less demanding standard than the “one central reason” nexus standard for asylum. The Ninth Circuit separately held that there is no “rogue official” exception when analyzing relief under the Convention Against Torture.

2. *Garcia-Hernandez v. Boente*, 847 F.3d 869 (7th Cir. 2017)

**Protective Orders and the Categorical Approach.** The Seventh Circuit held that the categorical approach does not apply when determining whether a respondent is removable for violating a protection order under section 237(a)(2)(E)(ii) of the Act. By foregoing use of the categorical approach, adjudicators are able to review any available evidence and make a determination about the actual conduct of the respondent.

3. *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051 (9th Cir. 2017) (en banc)

**“Unable or Unwilling” Standard.** The Ninth Circuit clarified that, when determining whether a government is “unable or unwilling” to control private persecutors, there is no heightened evidentiary burden or evidence “gap” if a respondent did not report past harm to the authorities.

## History of U.S.-Cuban Relations Since 1959

Early in 1959, after the Cuban revolution, Prime Minister Fidel Castro’s government began to transform the country into a communist nation.<sup>6</sup> The government enacted laws confiscating private property and other legislation limiting the rights of the people.<sup>7</sup> Relations between the United States and Cuba steadily declined.<sup>8</sup> Meanwhile, Cubans began seeking asylum in the United States in ever-increasing numbers.<sup>9</sup> In early 1960, after Prime Minister Castro agreed to a trade treaty with the Soviet Union, the Eisenhower administration began financing and training a group of Cuban exiles to overthrow the Cuban leader. Prime Minister Castro responded by increasing the nationalization of foreign property and companies. In return, the United States began implementing cutbacks in trade with Cuba before breaking diplomatic relations with the country on January 3, 1961.<sup>10</sup>

In 1965, the Communist Party of Cuba officially began governing the country. On September 28, 1965, and then again on September 30, 1965, Prime Minister Castro announced that Cuban nationals would face no penalty or consequence for leaving the island for the United States.<sup>11</sup> By August 1, 1966, there were approximately 165,000 Cuban refugees without LPR status in the United States.<sup>12</sup> Approximately 81,000 were in parole status, 47,000 were in extended voluntary departure status, and 36,000 more had arrived since the resumption of the Cuban airlift and boatlift on December 1, 1965, with 4,000 more arriving each month. Most of these Cubans could have entered the United States as immigrants if normal diplomatic relations between the United States and Cuba had existed.<sup>13</sup>

On November 2, 1966, Congress and President Lyndon B. Johnson authorized the CAA to alleviate the legal barrier to permanent residence that existed under U.S. immigration law for Cubans who had fled to the United States.<sup>14</sup> The CAA effectively altered immigration practice and procedure for Cubans, whereas aliens from other countries entering without inspection and admission or parole by an immigration officer would typically face removal proceedings (under prior law, the alien would have been placed in exclusion or deportation proceedings).<sup>15</sup>

On August 8, 1994, President Castro announced that the Cuban government would no longer prevent emigration from Cuba by boat.<sup>16</sup> The new policy, which was reminiscent of the Mariel boatlift of 1980, encouraged thousands of Cubans to head for the shores of the United States in makeshift watercrafts. In an effort to quell this influx of migrants, on August 19, 1994, the Clinton administration ordered the U.S. Coast Guard to intercept watercrafts carrying persons fleeing from Cuba who were bound for the United States’ border and to transport those persons to the American naval base at Guantanamo Bay, Cuba.<sup>17</sup> However, Cubans who reached U.S. soil could still invoke their rights under the CAA.<sup>18</sup> Thus, under the Clinton administration’s new policy, adjustment of status under the CAA was attainable only by Cubans who reached U.S. soil (those with “dry feet”), while Cubans who were interdicted at sea (those with “wet feet”) were repatriated to Cuba. This policy was known as the

4. *Harbin v. Sessions*, 860 F.3d 58 (2d Cir. 2017)

**Drugs as Elements or Means.** The Second Circuit held that New York Penal Code § 220.31, criminal sale of a controlled substance in the fifth degree, is not an aggravated felony drug trafficking offense because the statute is overbroad and not divisible under the categorical approach. Specifically, the court held that the actual drug at issue was not an element of the offense. It is an open question for many state drug statutes as to whether the actual drug is an element of the offense or merely a means of committing the offense.

5. *Padilla-Ramirez v. Bible*, 862 F.3d 881 (9th Cir. 2017)

**Bond in Withholding-Only Proceedings.** The Ninth Circuit held that a reinstated removal order is administratively final for detention purposes, even if the respondent is in withholding-only proceedings. Thus, respondents with a reinstated removal order in withholding-only proceedings are properly categorized as being detained under section 241(a) of the Act.

6. *Marinelarena v. Sessions*, 869 F.3d 780 (9th Cir. 2017)

**Burden of Proof and an Inconclusive Conviction Record.** Where a conviction may be a statutory bar to relief, the Ninth Circuit re-affirmed that a respondent has not met his or her burden to establish relief eligibility under the modified categorical approach if the criminal statute is divisible and an inconclusive record of conviction does not show whether the respondent was or was not convicted of a disqualifying offense.

7. *Uddin v. Att’y Gen. of U.S.*, 870 F.3d 282 (3d Cir. 2017)

**Terrorism Bar and Tier III Terrorist Organizations.** The Third Circuit held that a group cannot be a Tier III terrorist organization unless the group’s leaders authorize terrorist activity committed by its members. The court therefore remanded for further consideration of

“Wet-Foot/Dry-Foot” policy.<sup>19</sup> The Wet-Foot/Dry-Foot policy has its foundation in a bilateral migration agreement signed in 1994 between the United States and Cuba, often called the “Joint Communiqué.”<sup>20</sup>

Notably, the policy applies to Cubans regardless of whether they entered the United States at a U.S. designated port-of-entry. Specifically, the legacy INS Commissioner explained: “[T]he inadmissibility ground that is based on an alien’s having arrived at a place other than a port of entry *does not* apply to CAA applicants.”<sup>21</sup> By implementing this policy, the Commissioner in essence adopted reasoning similar to that of the Board of Immigration Appeals in *Matter of Mesa*, 12 I&N Dec. 432 (Deputy Assoc. Comm’r 1967), following the principle that the admissibility requirement of the CAA should be construed generously in order to effectuate the legislation’s purpose and Congressional intent. Consequently, the Commissioner directed INS officers: “So long as the applicant meets all other CAA eligibility requirements, it is contrary to this policy to find the alien ineligible for CAA adjustment on the basis of the alien’s having arrived in the United States at a place other than a designated port of entry.”<sup>22</sup>

In 1996, thirty years after the implementation of the CAA, Congress legislated requirements for the repeal of that act. The Conditional Repeal of the Cuban Adjustment Act repeals the CAA only upon a determination by the U.S. President that a democratically elected government in Cuba is in power.<sup>23</sup> For those individuals who might have applications pending at the time of such a determination, Congress added that the repeal of the CAA’s provisions “shall not apply to aliens for whom an application for adjustment of status is pending on such effective date.”<sup>24</sup>

On January 12, 2017, as part of developing relations with Cuba and for greater consistency to U.S. immigration policy, the Obama administration ended the Wet-Foot/Dry-Foot policy. The administration provided that “[e]ffective immediately, Cuban nationals who attempt to enter the United States illegally and do not qualify for humanitarian relief will be subject to removal, consistent with U.S. law and enforcement priorities.”<sup>25</sup> It also provided that the Cuban government had agreed to accept the return of Cuban nationals who had been ordered removed from the United States, which was consistent with the Cuban government’s policy of accepting the return of migrants interdicted at sea.

Notably, the Joint Statement issued by the U.S. and Cuban governments stated that the United States shall “apply to all Cuban nationals, consistent with its laws and international norms, the same migration procedures and standards that are applicable to nationals of other countries.”<sup>26</sup> Accordingly, the Cuban government “shall receive back all Cuban nationals who after the signing of this Joint Statement are found by the competent authorities of the United States to have tried to irregularly enter or remain . . . in violation of United States law.”<sup>27</sup> The most recent numbers available indicate that in Fiscal Year 2016, the U.S. Coast Guard interdicted 5,228 Cuban nationals at sea.<sup>28</sup> Also in Fiscal Year 2016, 44,553 Cuban migrants



whether the Bangladesh National Party can be properly considered to be such an organization.

8. *Hernandez v. Sessions*, 872 F.3d 976 (9th Cir. 2017)

**Ability to Pay in Bond Determinations.**

The Ninth Circuit affirmed the granting of a preliminary injunction requiring the DHS and Immigration Judges to consider financial circumstances or alternative conditions of release when determining bond amounts. Thus, the bond applicant's ability to post the bond amount is a necessary consideration in the Ninth Circuit.

9. *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017)

**Statutory Rape Aggravated Felonies.**

The Supreme Court held that, for a statutory rape offense focused solely on the age of participants to categorically be a "sexual abuse of a minor" aggravated felony, the age of the victim must be less than 16 years old. The Court was careful to note that their holding does not extend to statutory rape statutes that involve a special relationship of trust between the perpetrator and victim.

10. *Ramirez v. Brown*, 852 F.3d 954 (9th Cir. 2017)

**TPS and Adjustment.** The Ninth Circuit held that a grant of Temporary Protected Status counts as an admission for adjustment of status purposes. Thus, the term "admission," which has been the subject of extensive litigation, may contain circuit-specific exceptions to the statutory definition.

## REGULATORY UPDATE

**82 Fed. Reg. 57,336 (Dec. 5, 2017)**  
8 C.F.R. § 1240.21(c)

Immigration Judges may now issue denials of cancellation of removal applications under section 240A(b) of the Act for nonpermanent residents without reserving the case due to the annual cap.

presented themselves at land border ports-of-entry throughout the United States.<sup>29</sup>

## General Requirements for Adjustment of Status under the CAA

Section 1 of the CAA, as amended and in pertinent part, provides:

That, notwithstanding the provisions of section 245(c) of the Immigration and Nationality Act, the status of any alien who is a native or citizen of Cuba and who has been inspected and admitted or paroled into the United States subsequent to January 1, 1959, and has been physically present in the United States for at least one year, may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if the alien makes an application for such adjustment, and the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence. . . . The provisions of this Act shall be applicable to the spouse and child of any alien described in this subsection, regardless of their citizenship and place of birth, who are residing with such alien in the United States.

CAA § 1, *as amended by* Refugee Act of 1980, Pub. L. No. 96-212, § 203(i), 94 Stat. 102, 108.

### *Eligibility Requirements for a Cuban National*

An alien described in section 1 of the CAA is eligible to adjust his or her status under the CAA if the alien establishes that the alien is a native or citizen of Cuba who was inspected and admitted or paroled into the United States after January 1, 1959; who has been physically present in the United States for at least one year; and who is eligible to receive an immigrant visa and is admissible for permanent residence. CAA § 1, *as amended by* Refugee Act of 1980. The alien must also file an application for adjustment of status. *Id.*

### Native or Citizen of Cuba

First, the alien must establish that he or she is a native or citizen of Cuba. *See id.*; *see also Matter of Bellido*, 12 I&N Dec. 369, 370 (Reg'l Comm'r 1967) (noting that the CAA "clearly restricts its benefits to aliens who are natives or citizens of Cuba and to their spouses and children who are residing with them in the United States"). The alien may meet this requirement through birth in Cuba or as a naturalized citizen of Cuba.<sup>30</sup> Interestingly, an alien born on the U.S. Naval Station Guantanamo Bay, Cuba, also meets this requirement, regardless of whether this person is or ever was considered a Cuban citizen and regardless of any claims to other

nationalities the alien might have through his or her parents—the alien is a native of Cuba simply by being born there.<sup>31</sup> This scenario arose with pregnant women who fled Haiti in the 1990s and were then intercepted at sea by the U.S. Coast Guard before being transported to the naval station at Guantanamo Bay where they gave birth while awaiting immigration processing.<sup>32</sup>

An alien need not demonstrate that he or she is a “refugee” as defined by section 101(a)(42) of the Act, 8 U.S.C. § 1101(a)(42), to have his or her status adjusted under the CAA. *See Matter of Masson*, 12 I&N Dec. 699, 700 (BIA 1968). In interpreting the plain language of the Cuban Adjustment Act, the Board found that the legislation is clear regarding this requirement:

[T]he exact wording of the Act is specific, clear and unambiguous in stating that the status of any alien who is a native or citizen of Cuba and who has been inspected and admitted, etc., is entitled to the benefits of the Act. Nowhere in the Act itself is the word “refugee” used.

*Id.*

#### Inspection and Admission or Parole into the United States

Second, the alien must have been inspected and admitted or paroled into the United States subsequent to January 1, 1959. *See* CAA § 1; 8 C.F.R. § 1245.2(a)(2)(ii). The Board found that a Cuban national had not been “inspected and admitted or paroled” into the United States as required by the CAA when he last entered this country by fording the Rio Grande River because he did not, at that time, present himself for inspection to an immigration officer. *See Matter of Alvarez-Riera*, 12 I&N Dec. 112 (BIA 1967). However, between 1994 and 2017, under the Wet-Foot/Dry-Foot policy, although not binding on Immigration Courts, *see Matter of Castillo-Padilla*, 25 I&N Dec. 257, 263 (BIA 2010), Cuban nationals who arrived “at a place other than a port of entry” were eligible for adjustment of status under the CAA. *See* Memorandum from Doris Meissner, Comm’r, Immigration & Naturalization Serv., Eligibility for Permanent Residence Under the Cuban Adjustment Act Despite Having Arrived at a Place Other than a Designated Port-of-Entry (Apr. 19, 1999) (hereinafter “Meissner Memorandum”). Specifically, “if the Service release[d] from custody an alien who [wa]s an applicant for admission because the alien [wa]s present in the United States without having been admitted,” the Service would treat the alien as having been paroled into the United States. *Id.* The previous Wet-Foot/Dry-Foot policy effectively allowed the majority of Cubans entering the United States to satisfy this requirement for CAA eligibility regardless of the alien’s actual manner of entry. *See id.*

#### Physical Presence in the United States for at Least One Year

Third, the alien must have at least one year of aggregate physical presence in the United States before applying for adjustment of status. *See* CAA § 1, *as amended by* Refugee Act of 1980; 8 C.F.R. § 1245.2(a)(2)(ii); U.S. Citizenship & Immigration Servs., U.S. Dep’t of Homeland Sec., Adjudicator’s Field Manual, § 23.11 Cuban Adjustment Act Cases, <https://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-8624/0-0-0-10170.html> (hereinafter “USCIS Field Manual”). If the alien was admitted or paroled and later departed from the United States temporarily with no intention of abandoning residence and was later readmitted or re-paroled upon return, the temporary departure is disregarded for purposes of the alien’s “last arrival” in the United States. *See Matter of Riva*, 12 I&N Dec. 56 (Reg’l Comm’r 1967); 8 C.F.R. § 1245.2(a)(4)(iii). Factors to consider when determining whether a trip abroad reflects an intent to abandon permanent resident status include the duration of the trip abroad; the purpose of the trip; the length of the alien’s stay in the United States before departure; and the alien’s family, employment, and property ties in the United States. *See Matter of Huang*, 19 I&N Dec. 749, 753 (BIA 1988); *Matter of Kane*, 15 I&N Dec. 258, 262–64 (BIA 1975); USCIS Field Manual § 23.11(b)(3).

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# FEDERAL COURT ACTIVITY

## CIRCUIT COURT DECISIONS FOR SEPTEMBER - NOVEMBER 2017

by John Guendelsberger

The United States courts of appeals issued 461 decisions during the period of September through November 2017 in cases appealed from the Board. The courts affirmed the Board in 415 cases and reversed or remanded in 46, for an overall reversal rate of 10.0%. Last year's reversal rate for this same period (September through November 2016) was also 10%, with 319 total cases and 32 reversals or remands. There were no reversals from the Fourth and Eighth Circuits and only one reversal each in the First, Fifth, Sixth, and Tenth Circuits during this 3-month time period.

Circuit	Total	Affirmed	Reversed	% Reversed
First	2	1	0	50.0
Second	79	75	4	5.1
Third	20	15	5	25.0
Fourth	28	28	0	0.0
Fifth	60	59	1	1.7
Sixth	10	9	1	10.0
Seventh	7	4	3	42.9
Eighth	15	15	0	0.0
Ninth	209	181	28	13.4
Tenth	7	6	1	14.3
Eleventh	24	22	2	8.3
All	461	415	46	10.0

The 461 decisions included 260 direct appeals from denials of asylum, withholding or protection under the Convention Against Torture; 106 direct appeals from denials of other forms of relief from removal or from findings of removal; and 95 appeals from denials of motions to reopen or reconsider. Reversals or remands within each group were as follows:

	Total	Affirmed	Reversed	% Reversed
Asylum	260	237	23	8.8
Other Relief	106	91	15	14.2
Motions	95	87	8	8.4

The 23 reversals or remands in asylum cases involved credibility (6 cases), past persecution (5 cases), withholding of removal, particular social group, nexus, well-founded fear of persecution and the terrorist bar. The 15 reversals or remands in the "other relief" category addressed crime involving moral turpitude, the crime of

violence aggravated felony, adjustment of status, waiver of appeal, divisibility, aggravated felony firearms offense, U-Visas, eligibility for cancellation of removal,<sup>1</sup> whether "use" of marijuana constitutes "possession," the section 237(a)(1)(H) waiver, and Temporary Protected Status. The eight motions cases involved changed country conditions, ineffective assistance of counsel, an in absentia order of removal, the provisional unlawful presence waiver, sua sponte reopening, and particular social group.

The chart below shows the combined numbers for January through November 2017 arranged by circuit from highest to lowest rate of reversal.

Circuit	Total	Affirmed	Reversed	% Reversed
Seventh	37	26	11	29.7
Third	79	61	18	22.8
First	18	15	3	16.7
Ninth	665	573	92	13.8
Second	269	239	30	11.2
Tenth	20	18	2	10.0
Eleventh	80	72	8	10.0
Sixth	43	39	4	9.3
Fourth	105	98	7	6.7
Fifth	160	151	9	5.6
Eighth	67	66	1	1.5
All	1543	1358	185	12.0

Last year's reversal rate at this point (January through November 2016) was 11.2%, with 1,780 total decisions and 200 reversals or remands.

The numbers by type of case on appeal for the first 11 months of 2017 combined are indicated below.

	Total	Affirmed	Reversed	% Reversed
Asylum	809	713	96	11.9
Other Relief	386	333	53	13.7
Motions	348	312	36	10.3

*John Guendelsberger is a Member of the Board of Immigration Appeals.*

1. Five cases addressed eligibility for cancellation of removal, including what constitutes lawful admission, exceptional and extremely unusual hardship, a break in presence, and the "offense under" clause in section 240A(b)(1)(C) of the Act.

## BIA PRECEDENT DECISIONS

In *Matter of Mohamed*, 27 I&N Dec. 92 (BIA 2017), the Board held that entry into a “**pretrial intervention agreement**” under Texas law qualifies as a “**conviction**” for immigration purposes under **section 101(a)(48)(A)** of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(48)(A), where (1) a respondent admits sufficient facts to warrant a finding of guilt at the time of his entry into the agreement, and (2) a judge authorizes an agreement ordering the respondent to participate in a pretrial intervention program, under which he is required to complete community supervision and community service, pay fees and restitution, and comply with a no-contact order. Accordingly, the Board sustained the Department of Homeland Security’s appeal, vacated the Immigration Judge’s decision, and reinstated the removal proceedings.

In *Matter of Delgado*, 27 I&N Dec. 100 (BIA 2017), the Board held that **robbery** under **section 211 of the California Penal Code**, which includes the element of **asportation of property**, is categorically an aggravated felony theft offense under **section 101(a)(43)(G)** of the Act, 8 U.S.C. § 1101(a)(43)(G), regardless of whether a violator merely aided or abetted in the asportation of property stolen by a principal. The Board noted that the only difference between California robbery in section 211 and the aggravated felony theft definition in section 101(a)(43)(G) of the Act is that the former criminalizes a **narrower subset of “takings”** within the broader universe of those encompassed by the generic offense.

In *Matter of D-R*, 27 I&N Dec. 105 (BIA 2017), the Board held that **a misrepresentation becomes material** under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), **when it tends to shut off a line of inquiry that is relevant** to the alien’s admissibility and that would predictably have disclosed other facts relevant to the alien’s eligibility for a visa, other documentation, or admission to the United States. This interpretation of the term “material” differs from prior Ninth Circuit precedent. The Board also found it appropriate to set forth a new standard for determining whether an alien **assisted or otherwise participated in extrajudicial killing**. The Board concluded that an adjudicator should consider (1) the nexus between the alien’s role, acts, or inaction and the extrajudicial killing and (2) his scienter, meaning his prior or contemporaneous knowledge of the killing. Under this test, the respondent’s failure to disclose that he was a Special Police officer during the Bosnian War on his application for refugee status was a misrepresentation of a material fact that tended to shut off a line of inquiry relevant to his eligibility for asylum, thus making him **inadmissible under section 212(a)(6)(C)(i)** of the Act. The Board further determined that the respondent was also **removable under section 237(a)(4)(D)** of the Act, 8 U.S.C. § 1227(a)(4)(D), because he assisted or otherwise participated in extrajudicial killings. The respondent’s appeal was dismissed.

In *Matter of Rehman*, 27 I&N Dec. 124 (BIA 2017), the Board addressed the probative value of a **delayed registration birth certificate** where a petitioner seeks to prove a **familial relationship**. The Board held that where the petitioner submits a birth certificate that was not registered contemporaneously with the birth, an adjudicator must still consider the birth certificate, as well as all the other evidence of record and the circumstances of the case, to determine whether the petitioner has submitted sufficient reliable evidence to demonstrate the claimed relationship by a preponderance of the evidence. With regards to secondary evidence, the Board noted that evidence that was created contemporaneously with the birth will be most persuasive. The Board remanded the record for the Service Center Director to apply the **framework** set forth in its decision and determine whether the beneficiary’s birth certificate, which was registered 2 years after his birth and 52 years before the filing of his visa petition, is sufficient to establish his parentage by a **preponderance of the evidence**.



In *Matter of Pangan-Sis*, 27 I&N Dec. 130 (BIA 2017), the Board held that an alien who is inadmissible as the result of being present without inspection or admission and who is seeking to qualify for **the exception contained in section 212(a)(6)(A)(ii)** of the Act, 8 U.S.C. § 1182(a)(6)(A)(ii) (relating to an individual who has been a victim of domestic violence), **must satisfy all three subclauses** of that section, **including the requirement that the alien be “a VAWA self-petitioner.”** In reaching this conclusion, the Board examined legislative history and agreed with the DHS that Congress enacted the exception to prevent the ground of inadmissibility from being used to disqualify a VAWA self-petitioner from adjusting her status. Since the respondent was not a VAWA self-petitioner, Board sustained DHS’s appeal, vacated the Immigration Judge’s decision, and reinstated the removal proceedings.

In *Matter of Vella*, 27 I&N Dec. 138 (BIA 2017), the Board found the respondent to be **ineligible** for a **waiver** of inadmissibility under **section 212(h)** of the Act, 8 U.S.C. § 1182(h), **where he had previously lost and regained permanent resident status.** Applying the Second Circuit’s approach found in *Dobrova v. Holder*, 607 F.3d 297 (2d Cir. 2010), the Board examined the plain meaning of the statutory text and concluded that an alien **“has previously been admitted** to the United States as an alien lawfully admitted for permanent residence” within the meaning of section 212(h) of the Act, if he or she was inspected, admitted, and physically entered the country as a lawful permanent resident at any time in the past, even if such admission was not the alien’s most recent acquisition of lawful permanent resident status. Thus, the Board rejected the respondent’s argument that the word “previously” in the statute refers only to the most recent time he obtained lawful permanent residence status. The respondent’s appeal was dismissed.

In *Matter of Tavdidishvili*, 27 I&N Dec. 142 (BIA 2017), the Board held that **criminally negligent homicide** in violation of section 125.10 of the **New York Penal Law** is categorically **not a crime involving moral turpitude**, because it does not require that a perpetrator have a sufficiently culpable mental state. Accordingly, the Board sustained the appeal and terminated the respondent’s removal proceedings.

In *Matter of Keeley*, 27 I&N Dec. 146 (BIA 2017), the Board concluded that the definition of “**rape**” in **section 101(a)(43)(A)** of the Act **encompasses an act of vaginal, anal, or oral intercourse, or digital or mechanical penetration, no matter how slight.** The Board decided not to follow the Fifth Circuit’s approach in *Perez-Gonzalez v. Holder*, 667 F.3d 622 (5th Cir. 2012), where the court found that digital penetration was not commonly considered rape in 1996. The Board further concluded that the term “rape” also requires that the underlying sexual act be committed without consent, which may be shown by a statutory requirement that the victim’s ability to appraise the nature of the conduct was substantially impaired and the offender had a culpable mental state as to such impairment. The Board affirmed the Immigration Judge’s determination that the respondent was removable based on his conviction and dismissed the appeal.

In *Matter of J-A-B- & I-J-V-A-*, 27 I&N Dec. 168 (BIA 2017), the Board concluded that an Immigration Judge does not have authority to **terminate removal proceedings** to give an **arriving alien** an opportunity to present an asylum claim to the DHS in the first instance. The Board noted that once the DHS commences removal proceedings, an Immigration Judge has exclusive authority over any asylum application filed by the alien. Accordingly, the Board sustained the DHS’s appeal, vacated the Immigration Judge’s decision and reinstated removal proceedings against the respondents.



In *Matter of Obshatko*, 27 I&N Dec. 173 (BIA 2017), the Board clarified *Matter of Strydom*, 25 I&N Dec. 507 (BIA 2011), and held that the “**determination**” as to whether a **violation of a protection order** renders an alien removable under section 237(a)(2)(E)(ii) of the Act is **not governed by the categorical approach** because a conviction is not required to establish removability under this section of the Act. Instead, an Immigration Judge should consider the probative and reliable evidence regarding what a State court has determined about the alien’s violation. The Board agreed with the Seventh Circuit in *Garcia-Hernandez v. Boente*, 847 F.3d 869, 872 (7th Cir. 2017), that “[w]hat matters” in analyzing an alien’s removability under this provision “is simply what the state court ‘determined’ about [the alien’s] violation of the protection order.” Accordingly, the Board sustained the DHS’s appeal, vacated the Immigration Judge’s decision, and reinstated the removal proceedings.

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## The Cuban Adjustment Act of 1966 *continued*

### Eligibility for Immigrant Visa and Admissibility for Permanent Residence

Fourth, the alien must be “eligible to receive an immigrant visa and . . . [be] admissible to the United States for permanent residence.” This statement incorporates by reference the grounds of inadmissibility listed in section 212 of the Act, 8 U.S.C. § 1182. See CAA § 1. Although this requirement was once questioned, the Eleventh Circuit recognized that the Board has resolved the matter: “[T]he holding in *Quijada-Coto* therefore settle[d] the question of which Cuban aliens qualify as aliens described in section 1 of the CAA: a section 1 alien *must* be admissible for permanent residence.” *Toro v. Sec’y, U.S. Dep’t of Homeland Sec.*, 707 F.3d 1224, 1229 (11th Cir. 2013) (citing *Matter of Quijada-Coto*, 13 I&N Dec. 740 (BIA 1971)).

However, the Board has also held that aliens who are likely to be, or who are, public charges as provided in section 212(a)(4) of the Act are not precluded from establishing statutory eligibility under the CAA as they may be under section 245 adjustment of status. See *Mesa*, 12 I&N Dec. at 432; see also USCIS Field Manual § 23.11(f) (applying the same policy regarding public charges and citing *Mesa*). The Board reasoned that most of the Cubans were “impoverished by force of circumstances beyond their control and are dependent on Federal assistance” and applying former section 212(a)(15) of the Act “would have the effect of materially defeating the humanitarian purpose for enactment of the [CAA].” *Mesa*, 12 I&N Dec. at 434, 437.

An alien who is otherwise inadmissible under section 212 of the Act must seek a waiver under subsections 212(g), (h), or (i) of the Act to establish eligibility for adjustment of status under the CAA. See 8 C.F.R. § 1245.1(f); USCIS Field Manual § 23.11(l).

### Discretion

Fifth, the alien must warrant relief as a matter of discretion because adjustment of status under the CAA is ultimately a discretionary form of relief.<sup>33</sup> In making discretionary determinations, Immigration Courts “weigh the favorable and adverse factors presented to decide whether[,] on balance, the totality of the evidence . . . indicates that the [applicant] has adequately demonstrated that he [or she] warrants a favorable exercise of discretion.” See *Matter of A-M-*, 25 I&N Dec. 66, 76 (BIA 2009) (quoting *Matter of Sotelo*, 23 I&N Dec. 201, 204 (BIA 2001)).

### *Derivative Eligibility for a Spouse or Minor Child*

#### General Eligibility Requirements

The CAA provides for derivative spouse and minor child eligibility, and Congressional statements relating to its enactment suggest that the spousal provision was included to maintain family unity.<sup>34</sup> The CAA is applicable to

the spouse or child of any alien described in section 1 of the CAA, regardless of the citizenship or place of birth of the spouse or child. See CAA § 1. However, the spouse or child must reside with the qualifying Cuban relative. See *Gonzalez v. McNary*, 980 F.2d 1418, 1419, 1421 (11th Cir. 1993) (holding that the spouse and stepchild of a Cuban refugee were statutorily ineligible for adjustment of status because they were no longer residing with him due to his death during the pendency of the application). Significantly, the qualifying relationship may be created before *or after* the qualifying Cuban applicant's adjustment of status under the CAA. See *Matter of Milian*, 13 I&N Dec. 480, 482 (Reg'l Comm'r 1970). The Board has observed that "[t]he statute does not require that the marriage, or the application for adjustment of status, take place prior to, simultaneously with or subsequent to the principal alien's adjustment of status to permanent residence." *Id.* at 482. However, adjustment is not available to the derivative spouse or child where the qualifying Cuban relative has been denied adjustment under the CAA. See *Quijada-Coto*, 13 I&N Dec. at 740–41. Adjustment is also not available to the spouse or child when the qualifying Cuban relative has become a naturalized U.S. citizen because then he or she is no longer an "alien." See section 101(a)(3) of the Act, 8 U.S.C. § 1101(a)(3) (defining "alien" as "any person not a citizen or national of the United States").

A spouse or child is eligible if he or she is the spouse or minor child of the alien described in section 1 of the CAA and resides with the alien in the United States until the application is granted. Moreover, similar to an alien described in section 1 of the CAA, the spouse or child must have been inspected and admitted or paroled into the United States subsequent to January 1, 1959; be physically present in the United States for at least one year; be admissible for permanent residence, or, if inadmissible (excluding section 212(a)(4) of the Act), be eligible for a waiver under section 212 of the Act; and warrant relief as a matter of discretion. See *Matter of Guerrero*, 12 I&N Dec. 247, 248 (BIA 1967); see also *Gonzalez*, 980 F.2d at 1420 n.1.

### Battered Spouses and Children

Under the Victims of Trafficking and Violence Protection Act of 2000, a battered spouse or child or someone subject to extreme cruelty need not reside with the Cuban spouse or parent to adjust status. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 1509, 114 Stat. 1464, 1530. Moreover, the battered spouse may self-petition for two years after termination of the marriage if the spouse demonstrates "a connection between the termination of the marriage and the battering or extreme cruelty by the Cuban alien." Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, § 823(a), 119 Stat. 2960 ("VAWA"). The Violence Against Women Act also added a provision that permits the filing of a self-petition for two years after the Cuban spouse dies as long as the non-Cuban resided with the Cuban spouse at some point during the existence of the underlying relationship. *Id.*; USCIS Field Manual § 23.11(e)(2); but see *Gonzalez*, 980 F.2d at 1419–20 (deciding a case prior to the VAWA amendments and denying adjustment of status to the spouse and child of a Cuban alien because the Cuban alien had passed away four months prior). However, derivative adjustment is not automatic; the spouse or child may not adjust their status, even under the VAWA provisions, unless the alien described in section 1 of the CAA would have qualified for adjustment. See *Toro*, 707 F.3d at 1228.

### Date of Arrival and the Rollback Provision

If an alien described in section 1 of the CAA establishes eligibility for adjustment of status, the effective date of the alien's acquisition of LPR status is deemed to be either 30 months before the application for such adjustment of status was filed or the date of the alien's last arrival in the United States, whichever date is later. See CAA § 1; *Matter of Rivera-Rioseco*, 19 I&N Dec. 833 (BIA 1988); *Matter of Diaz-Chambrot*, 19 I&N Dec. 674 (BIA 1988). Similarly, a non-Cuban spouse of a Cuban whose status has been adjusted under the CAA has a recorded date of lawful permanent residence of 30 months before the application date or the date of the non-Cuban spouse's last arrival into the United States, whichever date is later. See CAA § 1. Interestingly, the Eleventh Circuit has found that the CAA "contains no language stating the non-Cuban must be married to the Cuban as of the non-Cuban's rollback date, nor does it state that the Cuban and non-Cuban spouse must enter the United States simultaneously." *Silva-Hernandez v. U.S. Bureau of Citizenship & Immigration Servs.*, 701 F.3d 356, 363 (11th Cir. 2012).

An alien who has adjusted status to that of an LPR under the CAA has been admitted to the United States and is subject to charges of removability under section 237(a) of the Act, 8 U.S.C. § 1227(a). *See Matter of Espinosa Guillot*, 25 I&N Dec. 653, 655–56 (BIA 2011). In *Matter of Carrillo*, the Board found that an alien’s “admission date” is calculated according to the rollback provision of section 1 of the CAA, rather than the date when adjustment of status was granted. 25 I&N Dec. 99, 101 (BIA 2009). Accordingly, in *Carrillo*, the alien’s date of admission for LPR status was March 4, 1999, which was more than five years before the date he committed his crimes involving moral turpitude. Thus, the LPR Cuban was not removable as charged under section 237(a)(2)(A)(i) of the Act as an alien who had been convicted of a crime involving moral turpitude committed within five years after his “date of admission.”

### *Denial of an Application*

Ordinarily, an alien has no right of appeal from the denial of an application for adjustment of status, but the alien, if he or she is not an arriving alien, “retains the right to renew his or her application in proceedings under 8 [C.F.R. § 1240].” 8 C.F.R. § 1245.2(a)(5)(iii). Also, an alien who is a parolee and meets the two conditions described in 8 C.F.R. § 1245.2(a)(1)—having been inspected and admitted or paroled into the United States subsequent to January 1, 1959, and having been physically present in the United States for one year—may renew a denied application in removal proceedings before an Immigration Judge. *See* 8 C.F.R. § 1245.2(a)(5)(iii). Moreover, as with any other LPR status, an alien described under section 1 of the CAA may have his or her residence rescinded under section 246 of the Act, 8 U.S.C. § 1256, if it is determined within five years of adjustment that he or she was ineligible. The five-year statute of limitation begins to run from the actual date the application for adjustment was approved, not from the retroactive date of permanent residence. *See Matter of Carrillo-Gutierrez*, 16 I&N Dec. 429, 431 (BIA 1977).

### **Comparing Adjustment of Status Under the CAA to Section 245(a) of the Act Adjustment**

The CAA is reproduced in publications as a historical note to section 245 of the Act. *See, e.g.,* Bender’s Immigration and Nationality Act Pamphlet 795, 811–13 (2017 ed.). However, the Immigration and Nationality Act does not state whether the CAA is part of that section or a wholly separate statute. The Board has addressed this issue and found that the CAA is not a part of section 245 of the Act. It concluded that the CAA “must . . . be considered separate and apart from adjustment of status under section 245 of the Act.” *Artigas*, 23 I&N Dec. at 104–06 (providing that a prior version of 8 C.F.R. § 245.1(c), which rendered certain aliens ineligible to adjust status under section 245 of the Act, did not bar such aliens from seeking relief under the CAA).

Requirements for adjustment of status under section 245(a) of the Act differ from those under the CAA. *See* 8 C.F.R. § 1245.2. The similarities between the two provisions include the requirements that: the alien have been inspected and admitted or paroled into the United States; be admissible to the United States for permanent residence under section 212(a) of the Act, or if inadmissible, have applied for and received a waiver of the ground of inadmissibility in conjunction with the application for adjustment; and warrant relief as a matter of discretion. *See* section 245(a) of the Act; CAA § 1; 8 C.F.R. § 1245.2. The difference is that under section 245(a) of the Act, the alien must also have an immigrant visa immediately available to him or her at the time the application is filed, meaning that the priority date, if applicable, must be current.<sup>35</sup> *See* 8 C.F.R. § 1245.2(a)(2)(i). In contrast, an alien under the CAA simply submits Form I-485, Application to Register Permanent Residence or Adjust Status, and does not need to file a visa petition or have an immigrant visa immediately available to him or her.

Another notable difference is that the statutory bars enumerated in section 245(c) of the Act are inapplicable to aliens applying for adjustment of status under the CAA. *See* CAA § 1 (providing “[n]otwithstanding the provisions of section 245(c)” of the Act). Consequently, the following types of qualified individuals may seek adjustment under the CAA, but not under section 245(a) of the Act: an alien crewman; any alien admitted in transit without a visa; any alien admitted as a nonimmigrant visitor without a visa; any alien who is a nonimmigrant overstay; any alien who has worked without authorization; and any alien admitted on a fiancé visa. *See* sections 245(c), (d) of the Act; *see*

also *Matter of Costarelli*, 13 I&N Dec. 575 (BIA 1970) (allowing an alien admitted as a crewman to adjust under the CAA); *Matter of Sanabria*, 12 I&N Dec. 396 (Reg'l Comm'r 1967) (same).

## Jurisdiction

Between 2001 and 2006, Immigration Courts had jurisdiction to adjudicate applications for adjustment of status under the CAA in removal proceedings when a Cuban alien had been charged as an arriving alien without a valid visa or entry document. See *Matter of Artigas*, 23 I&N Dec. 99, 104–06 (BIA 2001).<sup>36</sup> However, in 2006, the Attorney General and the Secretary of DHS amended relevant regulations to clarify the departmental component that has jurisdiction to adjudicate adjustment applications for arriving aliens who had been paroled into the United States and placed in removal proceedings. See *Eligibility of Arriving Aliens in Removal Proceedings to Apply for Adjustment of Status and Jurisdiction to Adjudicate Applications for Adjustment of Status*, 71 Fed. Reg. 27,585-01, 27,587 (May 12, 2006) (amending 8 C.F.R. §§ 245.1(c)(8) and 1245.1(c)(8)).

The new regulations at 8 C.F.R. § 245.2(a)(1) provide that U.S. Citizenship and Naturalization Services (“USCIS”) generally has exclusive jurisdiction to adjudicate adjustment applications of arriving aliens, including CAA applicants. The only exception arises when an alien leaves the United States while an adjustment application is pending with USCIS and returns pursuant to a grant of advance parole and is placed in removal proceedings. See 8 C.F.R. § 1245.2(a)(1)(ii)(A)–(D). In such circumstances, Immigration Courts would have jurisdiction to adjudicate the alien’s renewed adjustment application in removal proceedings if USCIS had denied the application. *Id.*; see also 71 Fed. Reg. at 27, 587–88.

In interpreting the amended regulatory scheme, the Board has concluded that the present regulations ensure that arriving aliens eligible for relief under the CAA may file their adjustment applications with USCIS. See *Matter of Martinez-Montalvo*, 24 I&N Dec. 778, 783 (BIA 2009). The Board reasoned that, although adjustment under the CAA is considered “separate and apart from adjustment of status under section 245 of the Act,” the Congressional intent underlying the CAA was still honored by these regulations because arriving aliens may seek adjustment before USCIS, regardless of whether they are in removal proceedings and whether they are under an order of removal. See *id.*

Thus, Immigration Courts lack jurisdiction to adjudicate an application filed by an arriving alien seeking adjustment of status, including under the CAA, with the limited exception of an alien who has been placed in removal proceedings after returning to the United States pursuant to a grant of advance parole to pursue a previously filed application.<sup>37</sup> See 8 C.F.R. §§ 245.2(a)(1), 1245.2(a)(1)(ii). Moreover, the lack of jurisdiction over applications for adjustment under the CAA does not deprive Immigration Courts of jurisdiction over the removal proceedings of arriving Cubans under section 240 of the Act.<sup>38</sup>

## Conclusion

U.S. immigration law and policy affords unique treatment to Cuban nationals who come to the United States. Under the CAA, a native or citizen of Cuba who has been inspected and admitted or paroled into the United States and who has been physically present in the United States for at least one year may apply for permanent residency in the United States. See CAA § 1. Under the former Wet-Foot/Dry-Foot policy, immigration officers allowed Cubans who landed on U.S. soil at a place other than a designated port-of-entry to request parole and, if granted, LPR status under the CAA.<sup>39</sup> This article has sought to illustrate the historical basis for the CAA while providing a practical guide to this interesting area of immigration law.

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1. The Cuban Adjustment Act of 1966, Pub. L. No. 89-732, 80 Stat. 1161, *amended by* Pub. L. No. 94-571, 90 Stat. 2703 (“CAA”).



2. See section 203(c)(3) of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, Pub. L. No. 104-114, 110 Stat. 785; Conditional Repeal of Cuban Adjustment Act, Pub. L. No. 104-208, § 606, 110 Stat. 3009-695 (1996).
3. U.S. Central Intelligence Agency, *The World Factbook: Cuba*, <https://www.cia.gov/library/publications//the-world-factbook/geos/cu.html> (last visited Nov. 16, 2017).
4. See CAA § 1.
5. U.S. Dep't of Homeland Sec., *Fact Sheet: Changes to Parole and Expedited Removal Policies Affecting Cuban Nationals* (Jan. 12, 2017), <https://perma.cc/S45B-RSAS>; *United States v. Dominguez*, 661 F.3d 1051, 1067 (11th Cir. 2011).
6. *Matter of Mesa*, 12 I&N Dec. 432, 435–36 (Deputy Assoc. Comm'r 1967).
7. See *id.* at 435 n.7 (citing H. R. Rep. No. 89-1978 (1966); S. Rep. No. 89-1675 (1966); 112 Cong. Rec. 170, 24453–55 (1966); 112 Cong. Rec. 158, 21986–94 (1966)).
8. *United States Severs Diplomatic Relations with Cuba*, History.com (2009), <https://perma.cc/4PY7-9QSS>.
9. *Id.*
10. See *id.*
11. See Robert B. Semple, Jr., *U.S. to Admit Cubans Castro Frees; Johnson Signs New Immigration Bill*, N.Y. Times, Oct. 4, 1965, at 4.
12. *Matter of Diaz-Chambrot*, 19 I&N Dec. 674, 677 (BIA 1998); see also H.R. Rep. No. 89-1978 (1966), H.R. Rep. No. 89-2334 (1966) (Conf. Rep.), as reprinted in 1966 U.S.C.C.A.N. 3792–93, 3798.
13. *Diaz-Chambrot*, 19 I&N Dec. at 677.
14. See Cuban Adjustment Act of 1966 Brief History, Genco Op. No. 91-85 (INS) (July 24, 1991), 1991 WL1185196.
15. Section 212(a)(6)(A)(i) of the Act, 8 U.S.C. § 1182(a)(6)(A)(i), provides that “[a]n alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible.”
16. *Cuban American Bar Ass’n, Inc. v. Christopher*, 43 F.3d 1412, 1417 (11th Cir. 1995).
17. *Id.*
18. *Dominguez*, 661 F.3d at 1067.
19. *Id.*
20. See *id.* at 1067 n.18 (citing Cuba-United States: Joint Statement on Normalization of Migration, Building on the Agreement of September 9, 1994, 35 I.L.M. 327, 329 (1996) (stating that “migrants rescued at sea attempting to enter the United States will not be permitted to enter the United States, but instead will be taken to safe haven facilities outside the United States”)).
21. Memorandum from Doris Meissner, Comm’r, Immigration & Naturalization Serv., Eligibility for Permanent Residence Under the Cuban Adjustment Act Despite Having Arrived at a Place Other than a Designated Port of Entry (Apr. 19, 1999), <https://perma.cc/4HFE-NN8M> (hereinafter “Meissner Memorandum”).
22. *Id.*
23. Conditional Repeal of Cuban Adjustment Act § 606(a).
24. *Id.* § 606(b).
25. *Statement by the President on Cuban Immigration Policy*, Obama White House (Jan. 12, 2017), <https://perma.cc/R5F3-Q2KQ>.
26. U.S. Dep’t of Homeland Sec., *Joint Statement Between Government of the United States and Cuba* (Jan. 12, 2017), <https://perma.cc/6WGS-XK4T>; see also *Fact Sheet: Changes to Parole and Expedited Removal Policies Affecting Cuban Nationals*, *supra* note 5.

27. *Joint Statement between Government of the United States and Cuba*, *supra* note 26.

28. U.S. Central Intelligence Agency, *supra* note 3.

29. *Id.*

30. See U.S. Citizenship & Immigration Servs., U.S. Dep't of Homeland Sec., Adjudicator's Field Manual § 23.11 Cuban Adjustment Act Cases, <https://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-8624/0-0-0-10170.html>.

31. *Id.*

32. *Id.*

33. See *Perez v. U.S. Bureau of Citizenship & Immigration Servs.*, 774 F.3d 960, 965 (11th Cir. 2014).

34. See *Silva-Hernandez v. U.S. Bureau of Citizenship & Immigration Servs.*, 701 F.3d 356, 363 n.3 (11th Cir. 2012), for a collection of such statements.

35. The alien may establish eligibility to receive an immigrant visa by providing an approved Form I-130, Form I-129F, Form I-140, Form I-360, Form I-526, or diversity visa, and must submit the supporting evidence for the Form I-485. See, e.g., section 245(a) of the Act; 8 C.F.R. § 1245.2(a)(2)(i) (providing that if approval of a visa petition filed for classification under section 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i), section 203(a), 8 U.S.C. § 1153(a), or section 203(b)(1), (2), or (3) of the Act would make a visa immediately available to the alien beneficiary, the alien may file an adjustment application concurrently with the visa petition).

36. The Board's decision in *Artigas* was subsequently superseded by regulation as recognized in *Matter of Martinez-Montalvo*, 24 I&N Dec. 778, 783 (BIA 2009). In *Martinez-Montalvo*, the Board confirmed its conclusion in *Artigas* that adjustment under the CAA is "separate and apart from" adjustment under section 245 of the Act. *Id.*

37. In other words, in the case of an arriving alien who is placed in removal proceedings, an Immigration Judge has jurisdiction to adjudicate any application for adjustment of status, if: (1) the alien properly filed an adjustment application with USCIS while in the United States; (2) the alien departed from and returned to the United States pursuant to a grant of advance parole; (3) USCIS has denied the adjustment application; and (4) DHS has placed the alien in removal proceedings upon return to the United States or after the USCIS denial. 8 C.F.R. § 1245.2(a)(1)(ii); see *Matter of Silitonga*, 25 I&N Dec. 89, 91–92 (BIA 2009) (holding that the limitations on an Immigration Judge's jurisdiction noted in *Martinez-Montalvo* also apply in section 245 of the Act adjustment cases); 8 C.F.R. § 245.2(a)(1); 71 Fed. Reg. at 27,587–27,588.

38. *Matter of E-R-M- & L-R-M-*, 25 I&N Dec. 520, 524 (BIA 2011).

39. See Meissner Memorandum, *supra* note 21; *Fact Sheet: Changes to Parole and Expedited Removal Policies Affecting Cuban Nationals*, *supra* note 5.

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