RESUMPTION OF DIPLOMATIC RELATIONS WITH CUBA: HOW DOES IT IMPACT U.S. IMMIGRATION LAW?

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Earlier this month, President Obama announced that the United States would soon be re-establishing diplomatic relations with Cuba. The White House website indicates that the President will be "working to re-establish an embassy in Havana in the next coming months." U.S. immigration law currently treats natives and citizens of Cuba differently from people from other countries in a variety of respects. This new development raises the question whether resumption of diplomatic relations with Cuba will have any impact on that different treatment of Cuban nationals.

Perhaps the best-known aspect of U.S. immigration law that provides distinctive treatment to natives and citizens of Cuba is Public Law 89-732 of 1966, generally known as the Cuban Adjustment Act (CAA). (Its official title was "An Act to adjust the status of Cuban refugees to that of lawful permanent residents of the United States, and for other purposes.") Under the CAA, natives or citizens of Cuba who have been admitted or paroled into the United States, and have been physically present for a total of one year (until the Refugee Act of 1980 the requirement was two years) are eligible for adjustment of status to that of a lawful permanent resident. Eligibility for adjustment under the CAA also extends to the spouse and child of a Cuban applicant, even if not themselves Cuban, so long as they reside with the Cuban native or citizen in the United States or qualify as abused spouses and children of a qualkifying Cuban principal under amendments to the Violence Against Women Act.

Applicants for adjustment of status under the CAA must in general be admissible, although they are not subject to the bars to adjustment of status at INA §245(c). Also, according to the 1967 decision of the former INS in Matter of Mesa, the public-charge ground of inadmissibility which is currently at INA 212(a)(4)does not apply to adjustment under the CAA. Adjustment under the CAA is a discretionary benefit, but USCIS has said in its Adjudicator's Field Manual that its officers should, "in weighing the discretionary factors, keep in mind the nature of the CAA and the political situation in [Cuba]."

Unlike applicants for asylum under INA §208 or refugee status under INA §207, applicants under the CAA, which predates both of those provisions, do not need to show a well-founded fear of

persecution on a protected ground or otherwise establish that they meet the definition of a refugee under INA §101(a)(42). One recent proposed amendment to the CAA would have required applicants under the CAA to attest to their status as political refugees and face potential loss of their status if they were to return to Cuba, but current law has no such requirement.

The CAA itself does not depend on the presence or absence of U.S. diplomatic relations with Cuba. Thus, with respect to potential applicants whom DHS chooses to admit or parole into the United States, adjustment under the CAA will remain available. However, there is a related benefit granted to natives and citizens of Cuba under U.S. immigration law, which may determine whether they can seek adjustment under the CAA at all, and which will be affected by the resumption of diplomatic relations.

Under section 235(b)(1) of the INA, most applicants for admission to the United States are subject to an expedited removal process whereby they can face quick removal from the United States unless they establish either a credible fear of persecution or that they were previously admitted as lawful permanent residents or granted refugee status or asylum. (This author has previously discussed how judicial review of an expedited removal order may be available for certain returning nonimmigrants.) However, INA 235(b)(1)(F)states that these provisions "shall not apply to an alien who is a native or citizen of a country in the Western Hemisphere with whose government the United States does not have full diplomatic relations and who arrives by aircraft at a port of entry." This provision appears to have been enacted for the benefit of natives and citizens of Cuba, the only "country in the Western Hemisphere with whose government the United States [did] not have full diplomatic relations" when the modern expedited-removal process was enacted in 1996 by IIRIRA. Under section 235(b)(1)(F), natives and citizens of Cuba who arrive at a U.S. airport cannot be subjected to expedited removal.

At least if one reads section 235(b)(1)(F) literally, however, resumption of diplomatic relations with Cuba will remove Cuban natives and citizens from its coverage, leaving them subject to expedited removal at airports. Perhaps one could argue that the provision refers to a fixed set of countries with which the United States had no diplomatic relations as of the enactment of IIRIRA, but a contrary literal reading is at least possible. Since one who is expeditedly removed after failing to establish a credible fear of persecution generally will not then be paroled or admitted into the United States, greater availability of expedited removal for natives and citizens of Cuba following resumption of diplomatic relations with Cuba would indirectly reduce the availability of adjustment under the CAA.

DHS is not required to place Cuban natives or citizens into expedited removal proceedings simply because they are eligible for such treatment, however. As the BIA clarified in Matter of E-R-M- & L-R-M-, a case involving natives and citizens of Cuba who had applied for admission at a land port of entry rather than an airport and thus were not covered by 235(b)(1)(F), DHS has prosecutorial discretion to place arriving aliens in removal proceedings under INA §240 even if they would otherwise be amenable to expedited removal. DHS also has discretion to parole such arriving aliens under INA §212(d)(5) rather than placing them into any sort of removal proceedings.

For this reason, the resumption of diplomatic relations will not have an effect on the availability of CAA relief unless DHS wishes it to. However, natives and citizens of Cuba who are considering arriving at a U.S. airport in order to seek parole and ultimately adjustment of status under the CAA should keep in mind that, following the resumption of diplomatic relations with Cuba, they will be at greater risk of expedited removal.