U.S. Immigration Policy Towards Cuba: Is Change "Afoot"?

By Susan J. Cohen ‘85*

One feature of the complicated relationship that the U.S. has had with Cuba is that U.S. immigration law and policy treats Cuban citizens more favorably than citizens of any other country. A Cuban citizen is allowed into the United States by merely setting foot on United States soil and, having done so, can apply for permanent (green card) status one year later. No other country’s citizens enjoy this “dry foot” privilege.

This special treatment, which began with the 1966 Cuban Adjustment Act, was a response to massive emigration of Cubans to the U.S. in the aftermath of the revolution. Reminiscent of today’s debate on comprehensive immigration reform, this Act addressed a practical problem, the lack of a proper immigration status for the hundreds of thousands of Cubans who fled their country for the U.S. following Fidel Castro’s revolution.

But just as the 1966 Act was a product of its era, the amendment of the act in 1996 was a response to challenges at that time. In 1994, 35,000 desperate Cubans set sail for U.S. shores in crudely crafted rafts. This mass flotilla of "balseros" ("rafters") prompted the U.S. to change its policy, with the repatriation of any Cubans interdicted by the Coast Guard at sea (those who only had “wet feet” rather than “dry feet”). An exception was made for those who could establish a well-founded fear of persecution and, accordingly, could qualify for political asylum in the U.S.

The historical special status of Cuban immigrants raises many questions that are especially pertinent now that there are moves to regularize the relations between Cuba and the United States. In light of current events, does the rationale for the Cuban Adjustment Act still hold? With more normalized relations, should this Act be revisited? If so, what type of special treatment, if any, should be afforded Cuban citizens in U.S. immigration law and policy?

The CAA was a reasonable response to the political and practical challenges of its time. Following the revolution, a large number of Cuban emigres were indeed political refugees. While normally political migrants would apply individually for political asylum, presumably the U.S. immigration authorities did not have sufficient manpower resources to handle hundreds of thousands of asylum applications within a concentrated period of time. Furthermore, the U.S. viewed the revolution as illegal and viewed the Castro regime as an enemy state. Consequently, those fleeing the enemy state were viewed extremely sympathetically. For all these reasons, with the CAA, the U.S. effectively rolled out a welcome mat for Cubans fleeing the regime. In a sense, through this law, political persecution was presumed. By 1996 when the law was amended to disqualify “wet foot” arrivals, the relations between the U.S. and Cuba had not changed much and the "political persecution" presumption would have held.

Fast forward to today. Are most people who leave Cuba today opposed to the (now Raul) Castro regime or are they seeking a better economic future for themselves and their family members? It seems to me that the answer to that question lies at the heart of whether or not the CAA is likely to remain in place. And even if a significant percentage of Cubans leaving Cuba still come to the U.S. because they would prefer to live in a democracy, if the U.S. normalizes relations with Cuba, should Cubans be entitled to continued preferential treatment under U.S. immigration law? Would that be fair to migrants arriving from other non-democratic countries? Indeed, has the CAA ever been "fair" vis-a-vis migrants fleeing to the U.S. from dictatorial regimes around the world?
The U.S. and Cuba's rapprochment is accelerating and it is likely we will further normalize relations, including the de-listing of Cuba from the states deemed as sponsors of terrorism. If I were to wager a guess, I would bet that there will come a point in our lifetimes, when the U.S. administration will dismantle the CAA as an anachronism that is no longer needed. At the same time, I would expect a gentle easing of policy and regulations to allow for a period of adjustment, and a grandfathering of applicants.

*Susan J. Cohen is a Member of Mintz Levin Cohen Ferris Glovsky and Popeo and is the Founder of the firm’s Immigration practice. She is actively involved in the American Immigration Lawyers Association (AILA) and has chaired and co-chaired a wide range of national AILA committees, including the National Planning Committee for AILA’s Annual Immigration Law Conference. Susan was involved in contributing to the US Citizenship and Immigration Services (USCIS) regulations implementing the Immigration Act of 1990, the Department of Labor regulations implementing changes to the H-1B visa category as a result of the American Competitiveness and Workforce Improvement Act of 1998, and the Department of Labor PERM labor certification regulations issued in 2004.