IMMIGRATION **JUSTICE** CAMPAIGN

American Immigration Council | AILA AMERICAN IMMIGRATION LAWYERS ASSOCIATION | AIRP American Immigrant Representation Project

Cuban Adjustment Act Practice Advisory[1]

I. Introduction

This Practice Advisory provides detailed information about the Cuban Adjustment Act – who is eligible, how it works, and how to apply for Cuban Adjustment.

II. Background

The Cuban Adjustment Act allows many Cubans and their spouses and children to adjust their status in the United States. "Adjustment of status" refers to the process by which a non-citizen becomes a lawful permanent resident (LPR) of the United States; this is often referred to as getting a "green card." There are several legal pathways to adjusting status to become an LPR; the most widely available are based on close family relationships to U.S. citizens or LPRs, and on sponsorship by an employer. Asylees and refugees also have a special pathway to adjustment of status. Among the other pathways to adjustment of status is a special provision for citizens and nationals of Cuba, along with their spouses and children – the Cuban Adjustment Act.

The Cuban Adjustment Act ("CAA") was passed in 1966. Enacted during the Cold War, its animating idea was that all Cubans who made it to the U.S. were per se refugees and so need not apply for refugee status. The CAA created a special adjustment of status pathway for Cubans, with its own special eligibility requirements that do not pertain to any other adjustment applicants. And although the philosophy underpinning the CAA is that Cubans who arrive on U.S. shores should be treated as per se refugees, as a practical matter Cuban adjustment is unrelated to asylum or refugee law. Rather, the CAA provides an independent ground of eligibility for adjustment of status, with eligibility hinging on nationality/citizenship, and manner of entry into the United States.

Unlike most immigration statutes, the CAA was never incorporated into the Immigration and Nationality Act ("INA"), nor were implementing regulations ever promulgated. Over the years, DHS has issued policy guidance on implementation of the CAA. That guidance, along with the statute itself and some limited case law, forms the basis for adjudication of Cuban Adjustment cases.

III. Overview of Cuban Adjustment

[1] The Justice Campaign is grateful to Adonia Simpson of the American Bar Associate and Randy McGrorty of Catholic Legal Services for their important contributions to this Practice Advisory.

There are a few factors unique to Cuban Adjustment to be aware of:

1. No Affidavit of Support is required.
2. Rollback provision. When Cuban Adjustment is approved, the permanent resident card is backdated either 30 months before filing, or to last date of admission to U.S., whichever is later. This is a benefit for anyone who wants to apply for naturalization, as it shortens the length of time before a Cuban would be eligible for naturalization.

IV. General eligibility requirements

To be eligible for Cuban adjustment as a principal applicant, a noncitizen must:

- Be a native or citizen of Cuba,
- Have been inspected and either admitted or paroled into the U.S.,
- Have a total of one year of physical presence in the U.S., and
- Be admissible to the U.S. under INA 212(a).

Sections A, B, C, and D below walk through each of these requirements in detail.

A. Native or citizen of Cuba

Most CAA applicants were born in Cuba and are still Cuban citizens. There are some other permutations of Cuban citizenship and nationality that will also make a person eligible for CAA. Applicants who are naturalized citizens of Cuba; were born at Guantánamo Bay; were born in Cuba and then became a citizen of another country, or became stateless; or were born outside Cuba and acquired Cuban citizenship through a Cuban parent under Cuban law, are also eligible. Additionally, the Cuban Adjustment Act allows the spouse and children (unmarried, under 21) of a qualifying Cuban to adjust as well, even if they are not Cuban themselves and would not otherwise qualify for Cuban adjustment.

USCIS issued a policy memo in August 2019 that details what evidence it will accept as evidence of Cuban citizenship and nationality. It is critical to follow this memo's guidance. Acceptable evidence of Cuban citizenship: an unexpired Cuban passport, a Cuban Citizenship Letter ("Carta de Ciudadania"), and a Certificate of Nationality ("Certificado de Nacionalidad). An expired Cuban passport is evidence of being a native of Cuba. Please note that a Cuban passport, whether expired or not, is considered the best form of evidence.

Note that USCIS does not consider a birth certificate issued by the Civil Registry in Cuba nor a Cuban consular certificate documenting an individual's birth outside of Cuba to at least one Cuban parent as sufficient evidence of Cuban citizenship.

B. Inspected, and admitted or paroled (INA 212(d)(5))

To be eligible for Cuban adjustment, a Cuban must have been inspected and then either admitted or paroled into the U.S. "Inspected" means that a DHS officer, either from Customs and Border Protection (CBP) or Immigration and Customs Enforcement (ICE) interviewed her or him and made a determination to allow her to enter and/or remain in the U.S., through either "admission" or "parole."

Where/how inspection happens. Non-citizens who come to an official U.S. port of entry – either at a land border or an airport – will be stopped and questioned by a CBP officer. That questioning, along with review of any travel documents such as a passport, is the "inspection."

"Admission" vs "parole." If after the inspection the CBP officer determines that the non-citizen is eligible to enter the U.S. in a specific immigration category, such as a tourist, a student, a business traveler, or a worker, the officer will "admit" the non-citizen in that category. The non-citizen then has a lawful immigration status in the U.S. for a certain period of time.

CBP can also choose to allow in a non-citizen who is not eligible in any of those categories in a separate category called "parole." Parole authority is found at INA 212(d)(5), which allows DHS to "parole" anyone not otherwise admissible in a specific immigration category "temporarily. . .on a case by case basis for urgent humanitarian reasons or significant public benefit."[2]

Evidence of parole. In most cases, when CBP admits or paroles a person into the U.S., they create a form called an I-94 that indicates the person's name, date of entry, and type of admission or parole. In the past, CBP gave people a physical I-94 paper card. Currently, they issue I-94s electronically. You can find your client's I-94 here: https://i94.cbp.dhs.gov/I94/#/recent-search. The I-94 will specify "class of admission." CBP uses a variety of codes on I-94s to indicate class of admission. If your client's I-94 says "DT," this code means that your client was paroled.

In some cases, though, an I-94 is not available – either because it cannot be located or because CBP never issued one. In those cases it is often possible to establish parole by other means (a letter granting an application for parole or notation on another document). And, at the time of writing, some advocates are arguing that DHS decisions to release an individual who has been designated an arriving alien or who entered the United States without inspection from custody constitutes a grant of parole even when the agency does not issue an I-94 or other explicit parole document or use the word "parole" in its decision. *See Rabelo-Rodriguez v. Mayorkas*, Case No. 21-cv-23213 (S.D.F.L.) (2021). And on February 23, 2022 USCIS issued guidance to natives or citizens of Cuba who meet the definition of an arriving alien at 8 C.F.R. §1.2 but who were not issued formal parole documents on procedures for applying for adjustment of status or reopening applications which had been previously denied for a lack of evidence of parole.

C. One year's worth of physical presence in U.S.

[2] There is an argument that other types of releases from detention may constitute "parole" for purposes of the Cuban Adjustment Act. If you are working on a case through the Immigration Justice Campaign, we urge you to consult your mentor about making an argument that your client may have been paroled for purposes of the Act.

Cuban adjustment applicants must have spent a total of one year physically present in the U.S. For most applicants who are coming to the U.S. for the first time, this means that they are eligible to apply one year after entering the country. Physical presence for the CAA does not have to be continuous. Applicants who were previously in the U.S. then left and returned may count prior periods of presence toward this one year.

Physical presence is *not* tied to admission, parole, or any other immigration status. A CAA applicant may enter the U.S. without inspection and spend a year here without admission, parole, or any other immigration status – and will still accrue physical presence for purposes of this requirement.

Evidence of one year of physical presence. In order to demonstrate one year of continuous physical presence, you will need to submit evidence. This may include pay stubs, a lease or rental agreement, school records, or evidence of medical appointments.

D. Not Subject to Certain Grounds of Inadmissibility

Applicants for adjustment of status must demonstrate that they are "admissible" to the United States – which means that they do not fall into any of the categories of "inadmissibility" outlined at INA 212(a). If an adjustment applicant is found to be inadmissible, he or she will not be able to adjust status.

The inadmissibility categories include crimes; past violations of certain immigration laws; entering the U.S. without valid travel documents; being a "public charge" (relying in the future on public benefits); needing a labor certification for people seeking to adjust through employment; terrorism and security related issues. Cuban Adjustment applicants are specifically exempted from three categories: public charge, labor certification, and lacking proper entry documentation. Because they are not subject to the public charge ground of inadmissibility, CAA applicants are not required to present an Affidavit of Support along with their adjustment applications.

1. Common inadmissibility issue for Cubans: Communist Party membership

There is also a ground of inadmissibility related to membership in the Communist party. INA 212(a)3(D) makes inadmissible anyone who is or was a member of, or affiliated with, the Communist or other totalitarian party. Given the extensive reach of the Communist party in Cuba, this ground of inadmissibility comes up with some regularity for Cubans. Fortunately, the statute provides two types of exceptions to this ground of inadmissibility: an exception for involuntary membership, and an exception for past membership.

2. Exception for involuntary membership

An applicant can meet this exception in several ways:

- Applicant can show that her membership was "involuntary"

OR

- That she was only a member when under the age of 16

OR

· That she was only a member "by operation of law"

OR

• That she was only a member in order to obtain the necessities of living: to obtain "employment, food rations, or other essentials of living"

3. Exception for past membership

An applicant can meet this exception if she can show that her Communist party membership ended at least 5 years before the date of her adjustment application, and that she is a not a threat to the security of the United States.

4. How to apply for an exception to the Communist Party membership bar

If your client is or was a member of the Communist party, you will need to submit a request for an exemption along with your client's adjustment of status application. USCIS's own internal guidance to adjudicators tells adjudicators to look for "a detailed sworn statement on 1) the organization joined; (2) the date and place of joining; (3) an explanation of why the applicant joined; (4) the nature of the organization; (5) the duties and responsibilities of the applicant within the organization; (6) whether the applicant held an official title or office or was simply a member; and (7) if the applicant has terminated his or her membership, when and in what manner, this termination took place." You should make sure that your client's sworn statement addresses these points, along with any other relevant facts that pertain to the specific exception he or she is seeking.

Practice Pointer: some of the most common inadmissibility issues to watch out for if you are not very familiar with the grounds of inadmissibility.

1. **Criminal history.** If your client has any criminal history, it will be **very important** to seek the advice of an experienced immigration practitioner. There are many criminal-related inadmissibility bars, which can include a broad range of crimes and sentences. Criminal inadmissibility can be triggered by things that would not count as convictions under state or federal law.

   It is also important to remind your client that they need to be entirely honest about their criminal history in Cuba as well as the United States. The U.S. government may be able to obtain records from Cuba. It is much better for you to know about such records up front.

   Even when someone's criminal history does not make him or her inadmissible, it could be a bar to adjustment because Cuban Adjustment is discretionary. For the vast majority of cases, USCIS will exercise its discretion favorably, but a criminal history even if it does not lead to inadmissibility could lead USCIS to deny adjustment in the exercise of discretion.

2. **Trips in and out of the United States.** Many CAA applicants have only entered the U.S. once. But for those who have been to the U.S. before and left, there are inadmissibility grounds that could potentially bar them from adjustment. Anyone who either entered the U.S. without permission, or who overstayed a lawful admission, and then in either case left the U.S. may have triggered a ground of inadmissibility. If your client has previously spent time in the U.S. and then left, it is important to seek the advice of an experienced immigration practitioner.

3. **Prior removal orders.** Re-entering the U.S. after departing while under a removal order can also trigger a ground of inadmissibility. For clients who were in the U.S. previously, it is important to know if they were ever in immigration court proceedings, and if so, whether or not they were ordered removed. If you are not sure, it is important to seek the advice of an experienced immigration practitioner. If your client has a prior removal order, the best practice is to reopen proceedings and seek dismissal after adjustment of status has been granted by USCIS.

V. Derivatives: Cuban Adjustment for the Non-Cuban Spouse and Children of a Qualifying Cuban

The Cuban Adjustment Act allows the spouse and children (unmarried, under 21) of a qualifying Cuban to adjust as well, even if they are not Cuban themselves and would not otherwise qualify for Cuban adjustment. In order to qualify, the spouse and children must:

i. Have been inspected, and admitted or paroled;
ii. Have one year of physical presence in the U.S.
iii. Reside with the qualifying Cuban applicant[3]
iv. Be the spouse or child (unmarried, under 21) of Cuban
    1. Marriage or birth may have happened before <u>or after</u> adjustment of qualifying Cuban
    2. Adjustment must happen at the same time, or after, adjustment of the qualifying Cuban

The qualifying Cuban does not need to adjust through the Cuban Adjustment Act in order for the spouse or child to be eligible for the Cuban Adjustment Act. However, if the qualifying Cuban has become a U.S. citizen, their spouse and children can no longer adjust through the Cuban Adjustment Act. Instead, they need to adjust through the I-130 process.

There is also an adjustment provision for the spouse and child of a qualifying Cuban who was subject to battery or extreme cruelty by that qualifying Cuban. Such a spouse or child is not required to currently reside with the qualifying Cuban, but must have resided with the qualifying Cuban in the past. For a spouse, that means at some point during the marriage; for a child, at any point in the past.

[3] This means that they must physically be in the same household.

In order to demonstrate that he or she was subject to battery or extreme cruelty by the qualifying Cuban, a spouse or child may submit any credible evidence – the same type of evidence that would be used to support a VAWA self-petition. The VAWA unit at the Vermont Service Center adjudicates CAA adjustment applications under this provision, and will refer applicants to a field office for an interview. Note that USCIS issued a policy memorandum on July 16, 2017 on this provision.

VI. Applicable law and policy

a. Cuban Adjustment Act, as amended in 1976 and
b. USCIS Adjudicator's Field Manual Chapter 23.11
c. USCIS Policy Memo, "VAWA Amendments to the Cuban Adjustment Act; Continued Eligibility for Abused Spouses and Children," July 29, 2016
d. USCIS Policy Memo, "Updated Guidance for Cuban Adjustment Act Cases," August 13, 2019

VII. Applying for adjustment of status

Application and supporting documentation: Like any other application for adjustment of status, an application under the CAA is filed with the requisite fee on Form I-485. The USCIS website has links to the form, a fee calculator, form instructions, and a list of required supporting documentation. The supporting documentation must establish all elements of CAA eligibility: Cuban nationality or citizenship, one year's physical presence in the United States pursuant to inspection and either admission or parole, and admissibility.

Application process: The process of filing for adjustment of status under the CAA will vary depending upon whether the immigration court or USCIS has jurisdiction over the case. For applicants who are not in removal proceedings, USCIS has jurisdiction. For applicants who are in removal proceedings, the immigration court has jurisdiction unless the applicant is designated an "arriving alien" on the Notice to Appear (check the first page of the NTA, directly below the client's name and address). USCIS retains jurisdiction over adjustment applications for arriving aliens, even if they are in removal proceedings. In those cases, the client's immigration case proceeds on two parallel tracks, with the removal proceedings ongoing while USCIS adjudicates the adjustment application.

Filing with USCIS: If USCIS has jurisdiction, mail the application with a check or money order and supporting documentation to the appropriate USCIS Service Center. Use the fee calculator to determine the dollar amount of the filing fee, and the USCIS Direct Filing page to determine which Service Center to use. USCIS will generate a receipt and, usually soon thereafter, a notice for the applicant to appear at a USCIS Application Support Center (ASC) for biometrics capturing. Once captured, the ASC sends the biometric data to various national and international law enforcement agencies to run background and security checks. If the applicant does not appear for biometrics capturing USCIS will deem the application abandoned.

Once the application is filed, you can track its status online here. Some applications are adjudicated on the papers, others are sent to local field offices for interviews with USCIS Adjudications Officers. In either case, you might receive a Request for Evidence (RFE) if the

agency determines that the documentation submitted with the application is insufficient to establish eligibility. If you do not respond to the RFE within the time allotted, USCIS will deem the application abandoned.

Fee Waivers: Applicants who are unable to pay the filing fee can apply for a fee waiver on Form I-912.

Medical Exams: Because CAA applicants are subject to the public health ground of inadmissibility, they are required to submit the results of a medical exam conducted by a USCIS-approved Civil Surgeon on Form I-693. Links to the form, form instructions, and a Civil Surgeon search tool is on the USCIS website here. Note that the I-693 must be completed and signed by the Civil Surgeon no earlier than 60 days before filing the application for adjustment of status. And if USCIS does not adjudicate the adjustment application within four years[4] from the date of filing, the medical exam will expire and the applicant will need to submit a new one. Although many applications are adjudicated within four years, there is no way to ensure that one will be. To minimize the likelihood of the medical exam expiring before adjudication, many practitioners submit the adjustment application without the medical and wait until USCIS issues an RFE for one.

> ***The Civil Surgeon will give your client the medical exam results in a sealed envelope, with his or her signature across the sealed flap. Do not open it!!! Rather, submit it to USCIS in its sealed envelope, with the physician's signature intact. If the envelope is opened by anyone other than the adjudicator its results are invalidated.***

It is good practice for your client to ask the civil surgeon to give him or her a copy of the exam results so that you can review them before submitting the original exam in its sealed envelope to the court.

Filing with the immigration court: If the immigration court has jurisdiction (that is, the applicant is in removal proceedings and is not an arriving alien), you will need to file the I-485 and supporting documentation to the court but pay the filing fee to USCIS. The judge should give you written instructions on how to pay the filing fee (a process often referred to as "feeing in" the application), either by mailing a check or money order to USCIS with a copy of the application, or by paying the fee by credit card in person at a kiosk. A copy of the fee-in instructions is also online here.

Fee Waivers: When the immigration court has jurisdiction, requests for fee waivers are adjudicated by immigration judges, not USCIS. The Executive Office for Immigration Review (EOIR), the executive agency which houses the immigration courts and the Board of Immigration Appeals, has a fee waiver application form, but many individual judges require that the request be filed in the form of a motion, with a proposed order and sworn statement in addition to the form and additional supporting documentation. It is important to check with practitioners familiar with your particular IJ on the relevant local practice.

[4] USCIS temporarily extended the I-693 validity date from two to four years on August 12, 2021.

Note that the fee-in procedure is also the mechanism by which USCIS schedules biometrics appointments, so even if an Immigration Judge grants a fee waiver you will need to go through the same process of mailing in the application with the fee-in instruction sheet that you would if you were paying the fee. When the IJ has granted a fee waiver, however, include a copy of the judge's order in lieu of the filing fee.

Medical Exam: Because immigration court proceedings can take years to resolve, and because medical exams expire two years from the date of filing, it is generally not good practice to file the I-693 with the adjustment application. Some IJs prefer to have the medical presented in open court during the individual hearing (that is, not submitted in advance); others prefer that it be submitted within 30 or 60 days of the individual hearing. As with USCIS, the I-693 must be submitted to the court in its original, sealed envelope, with the Civil Surgeon's signature across the sealed flap.