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Immigration Challenges and Opportunities in a Post-Transition Cuba

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Immigration Challenges and Opportunities in a Post-Transition Cuba

By
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I.

INTRODUCTION

A. *Overview*

Upon the loss of its main trading partners when socialism collapsed in Eastern Europe in the late 1980's and early 1990's, Cuba was forced to implement a set of limited economic measures to counteract the most serious effects of the crisis on the economy.¹ The changes made do not, however, amount to true reforms and have left the country in a state of stagnation, with the country's economy operating at a very low level of capacity.² Those who study the Cuban economy are essentially unanimous in predicting that a transition to a free-market economy is the only way in which the island is going to recover from its current crisis.³

When a transition to a free-market economy does take place in Cuba, policy makers in both the United States and Cuba will have to address immigration

1. For a recent article describing the status of Cuba's limited economic changes, see Jorge Perez-Lopez, *The Cuban Economy in Mid-1997*, in 1997 CUBA IN TRANSITION — PAPERS AND PROCEEDINGS OF THE SEVENTH ANNUAL MEETING OF THE ASSOCIATION FOR THE STUDY OF THE CUBAN ECONOMY 1.

2. *Id.* at 7.

3. See, e.g., Gerardo Gonzales, *Remarks on the Current Cuban Economic Situation*, in 1996 CUBA IN TRANSITION — PAPERS AND PROCEEDINGS OF THE SIXTH ANNUAL MEETING OF THE ASSOCIATION FOR THE STUDY OF THE CUBAN ECONOMY 14.

issues early on in the transition. Recent history suggests that countries that have made successful free-market transitions have been helped along by the inflow of foreign investment, the privatization of state-owned enterprises and, in general, by the free flow of goods and people across national borders. In order for Cuba to follow this model, it will need to design and implement an open and efficient immigration policy. Although such a policy must take into account numerous political, social, and economic issues, it is of primary importance that, whatever immigration policy is set in place during the transition, it allow workers, investors and visitors to move with relative freedom in and out of Cuba. Indeed, as a practical matter, "moving goods and services in international commerce also involves moving the people who trade in those goods and services."⁴ Accordingly, Cuba must develop an immigration policy that opens the country's doors to those who can make a positive contribution to its economic recovery.

Given the large Cuban population in the United States and the close proximity of Cuba to U.S. borders, the United States also has a significant interest in Cuban immigration issues. On the one hand, a strong and free Cuba will provide new opportunities to investors, offer U.S. businesses new markets, and be a potential source of skilled workers. On the other hand, there is a significant risk of a mass exodus of Cubans to the United States if economic conditions take a turn for the worse: this is a common occurrence in countries during the early phases of their free-market transitions. U.S. immigration policy towards Cuba should therefore be designed to allow Cubans meeting certain criteria to work temporarily in the United States, while controlling the entry of legal and illegal permanent immigrants. Thus, in addition to lifting the trade embargo currently in place⁵ and developing new economic relationships with Cuba, the United States will also have to craft a new immigration policy towards Cuba that implements these potentially conflicting objectives.

This paper seeks to suggest what the respective immigration policies of the United States and Cuba should be during Cuba's free-market transition. The programs suggested here are offered in the hope that current immigration policies will be changed as soon as practicable once the transition gets under way, so that the existing confrontational approach can swiftly give way to cooperation in achieving both countries' common objectives in this important area.

B. Cuba-U.S. Immigration Trends Before The Cuban Revolution

In the first half of the twentieth century, the United States developed a comprehensive system to deal with the concerns raised by the growing immigra-

4. Gene McNary, *Moving Goods and People in International Commerce: Remarks of the Honorable Gene McNary*, 2 DUKE J. COMP. & INT'L L. 247 (1992).

5. The United States has had in place since 1962 a strict embargo on trade with, and on economic assistance to, Cuba. Proclamation No. 3447, 27 Fed. Reg. 1085, 3 C.F.R., 1059-63 Comp., p. 157 (1962). Pursuant to this embargo, it is virtually impossible for all but a narrow category of enterprises and individuals to do business with Cuba. See generally Matias Travieso-Díaz, *Actions Needed for Lifting the U.S. Trade Embargo Against Cuba*, 3 U. MIAMI Y.B. INT'L L. (1995). Clearly, the embargo prohibitions will need to be lifted before Cuba's transition to a free-market economy can be successfully accomplished.

tion pressures on the country. Controlling the influx of undocumented aliens, unskilled workers, and persons likely to become public charges became the prime objective of U.S. immigration policies between the late 1800s and World War II.⁶ When the Cold War began, the U.S. expanded its immigration policy to admit refugees, especially those emigrating from communist countries.⁷

Throughout the first half century of Cuba's independence (1902-1959), there was no separate U.S. immigration policy towards Cuba. Cuban immigration was part of the overall U.S. immigration apparatus. From the immigration standpoint of the United States, Cuba was not a problem country because the flow of Cubans to the United States was relatively small and there was little illegal immigration.⁸ Thus, it was not until after the Cuban Revolution in 1959 that the United States had the need and the incentive to establish a distinct immigration policy towards Cuba.

Likewise, the relatively small number of Cubans seeking to leave the island for the United States did not warrant Cuba's formulation of a policy towards those of its citizens who migrated. The only important limitation was that, under the 1940 Constitution, a Cuban national that adopted the citizenship of a foreign nation lost his Cuban citizenship.⁹ Even then, a Cuban who lost his

6. The U.S. federal government first established immigration restrictions in 1875, by not allowing Asian nationals to immigrate into the United States without government consent. Immigration Act of 1875, 18 Stat. 477, ch. 141 (1875). In 1917, Congress passed the Immigration Act of 1917, which codified the immigration restrictions that had developed over the years and established a literacy requirement by excluding any adult who could not read the English language. 39 Stat. 874 (1917). This Act also established entry barriers against those individuals deemed likely to become a public charge. In 1921, Congress further restricted immigration through enactment of the Quota Act, which created a quota system that capped immigration from a foreign country to 3 percent of foreign-born persons of the same nationality already residing in the United States (as determined by the 1910 Census). Act of May 19, 1921, ch. 8, 42 Stat. 5 (1921). Thus, three main limitations in U.S. immigration policy had already been established by 1921: exclusion of specific types of immigrants; barriers to immigration, such as literacy or economic self-sufficiency requirements; and the regulation of immigration through quotas based on natural origin or other factors. Kathryn M. Bockley, *A Historical Overview of Refugee Legislation: The Deception of Foreign Policy in the Land of Promise*, 21 N.C. J. INT'L L. & COM. REG. 253, 258 (1995) [hereinafter Bockley].

7. In the wake of World War II in 1945, the Displaced Persons Act was enacted, which attempted to deal with the refugee crisis produced by the war in Europe, but "singled out those fleeing from communist or communist dominated countries as the most deserving for refugee status." Bockley, *supra* note 6, at 262. For the first time, a U.S. refugee admission policy was developed, and was intended to serve as a tool to advance the interests of democracy in the developing conflict between the United States and the Soviet Union. Then, in 1952, Congress passed into law the Immigration Nationality Act of 1952 ("INA"), also known as the McCarran-Walter Act, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 USC §§ 1101-1524 (1998)). The INA consolidated prior immigration laws and removed their discriminatory elements. Dave McCurdy, *The Future of U.S. Immigration Law*, 20 J. LEGIS. 3, 5 (1994) [hereinafter McCurdy]. The legislation also provided for the first time the opportunity for skilled individuals and relatives of legal residents and citizens of the United States to be admitted into the United States. Bockley, *supra* note 6, at 264.

8. Of the one million Cubans presently in the United States, fewer than 70,000 immigrated before the Cuban Revolution in 1959. U.S. 1990 Census, *reprinted in* Silvia Pedraza, *Cuba's Refugees: Manifold Migrations*, 1995 CUBA IN TRANSITION — PAPERS AND PROCEEDINGS OF THE FIFTH ANNUAL MEETING OF THE ASSOCIATION FOR THE STUDY OF THE CUBAN ECONOMY 311, 315 [hereinafter Pedraza].

9. Under Cuba's constitutions, both pre- and post-revolution, a Cuban citizen who becomes a citizen of another country loses his Cuban citizenship. CONSTITUCION DE LA REPUBLICA DE CUBA (1940) [Constitution] art. 15 (Cuba), *translated in* 1 CONSTITUTIONS OF NATIONS 610, 612 (Amos J.

Cuban citizenship could petition the Minister of State to reinstate his Cuban citizenship status upon returning to the island.¹⁰ Not until Castro took power did Cuba institute restrictive measures regarding emigration.

II. POST-REVOLUTION IMMIGRATION TRENDS AND POLICIES

A. Introduction

This section provides a brief summary of the dramatic emigration processes that have taken place since the triumph of the Cuban Revolution in 1959. While the Cuban exodus is relatively recent and well documented, it is important to understand how it developed and how it led to the current immigration regime between Cuba and the United States. This understanding is important because some variation of the present framework is likely to be in place as the free-market transition begins in Cuba.¹¹

Shortly after the new revolutionary regime came to power, Cuban nationals started to leave the island at a growing pace. The driving forces behind the exodus were sometimes political and sometimes economic, although in many cases both factors were present. The vast majority of the Cuban émigrés came to the United States.

The first stages of the migration saw Cubans being driven out of their country by the radical policies of the revolutionary regime.¹² Since 1980, however, economic necessity has become the predominant factor motivating Cubans to emigrate. Faced with an ever-deteriorating standard of living and little chance of social mobility, Cubans sought to come to the United States in hope of a better life.¹³

The social composition of the immigrants also changed over time. In the early stages, many of those who immigrated to the United States were either members of the economic and intellectual elite, or members of the middle class who were discontent with or fearful of the new regime.¹⁴ By comparison, the Cubans who have come to the United States in the post-1980 stages of the exodus typically belong to the lower social and economic classes, although such terms have relatively little meaning in Cuba's current society.¹⁵

The evolution of U.S. immigration policy towards Cuban nationals parallels, to some degree, the shift in the socio-economic makeup of the Cuban immi-

Peaslee ed., 2d ed. 1956); see CONSTITUCION DE LA REPUBLICA DE CUBA (1992) art. 32 (Cuba), in *Gaceta Oficial* (Aug. 1, 1992). See also REGLAMENTO DE CIUDADANIA ("Citizenship Regulations"), *Gaceta Oficial* (Mar. 3, 1944), art. 33 [hereinafter REGLAMENTO].

10. See, e.g., REGLAMENTO, *supra* note 9, art. 35.

11. The discussion in this section is largely based on the paper by Pedraza, *supra* note 8, and on Miguel González-Pando, *Development Stages of the Cuban Exile Country*, in 1997 CUBA IN TRANSITION — PAPERS AND PROCEEDINGS OF THE SEVENTH ANNUAL MEETING OF THE ASSOCIATION FOR THE STUDY OF THE CUBAN ECONOMY 50 [hereinafter González-Pando].

12. Pedraza, *supra* note 8, at 312-13.

13. *Id.*

14. González-Pando, *supra* note 11, at 51.

15. Pedraza, *supra* note 8, at 312-13.

grants and their motivation for coming to the United States. The United States encouraged the influx of Cuban immigrants for over three decades when to do so was consistent with the country's international political objectives. Since the end of the Cold War, there has been less of a need for an open door policy towards refugees from Communism, as well as increased public opposition to allowing foreigners to burden the national and local economies.¹⁶ Accordingly, following the disintegration of the Soviet Bloc and the trend towards economic-driven immigration from Cuba, the United States has erected new barriers against large-scale Cuban immigration.

B. U.S. Policies From 1959 To 1994

It was the policy of the United States from 1959 to 1994 to allow relatively free entry of Cuban nationals into the country, regardless of whether the individuals seeking entry would qualify for admission under existing immigration standards. Once the two nations severed diplomatic relations in 1961, Cubans were permitted to come to the United States on a parole basis, without the need to obtain visas, and were admitted as refugees even if they came illegally. No attempts were made by the U.S. Coast Guard to intercept or turn back to Cuba those traveling from Cuba in rafts or small vessels.¹⁷

Once in the United States, arriving Cubans did not experience some of the hardships suffered by other immigrant groups. They were given financial assistance under a special program approved by Congress for their benefit.¹⁸ In addition, the many Cubans who entered the country as parolees were given preferential treatment in attaining legal immigrant status: In 1966, Congress passed the Cuban Refugee Adjustment Act, which allowed Cubans to adjust their status to that of permanent U.S. residents two years after arriving in the United States, without leaving the country.¹⁹ Unlike other asylum seekers, Cubans could adjust their status to that of permanent residents without showing a well-founded fear of persecution on account of race, religion, nationality, membership in particular social group, or political opinion.²⁰ This preferential treatment eased the integration of the Cuban exile population into the United States.²¹

16. These issues are further discussed in Section II-D, *infra*.

17. Bockley, *supra* note 6, at 269.

18. Migration and Refugee Assistance Act of 1962, Pub. L. No. 87-510, 76 Stat. 121 (1962).

19. Cuban Refugee Adjustment Act, Pub. L. No. 89-732, 80 Stat. 1161 (1966).

20. The Cuban Refugee Adjustment Act eliminated the need to individually screen Cubans, many of whom entered the United States illegally by boat, to determine whether they feared persecution if they were returned to Cuba. Congress in effect decided that because Cuba under Castro was Communist, in general no Cuban should be deported. The nationals of no other country had at the time the same screening exemptions. *The U.S. Humanitarian Entry Program Lacks Coherence: Hearings before the Subcomm. on Int'l. Operations and Human Rights of the House Comm. on Int'l Relations*, 105th Cong., (1998) (statement of Don Stein, Executive Director, Federation for American Immigration Reform).

21. Pedraza, *supra* note 8, at 323.

C. Cuba-To-U.S. Immigration Trends From 1959 To 1994

There are over one million Cubans in the United States, of whom over 750,000 are first-generation immigrants.²² The flow of these Cuban immigrants was intermittent, varying in response to changes in Cuba's willingness to allow those discontent with political and economic conditions in the country to emigrate. The Cuban migration during this period falls into five distinct stages.

1. First Stage

In the first stage of the exodus, occurring between 1959 and 1964, nearly 200,000 Cuban nationals fled their country and came to the United States.²³ Those that fled in the months immediately after the Revolution tended to be Batista supporters, political opponents of Castro, and members of the non-political elite.²⁴ With time, the exile categories grew to include middle class professionals, merchants and other business people, and skilled workers.²⁵ Many Cubans fleeing to the United States during this early phase believed that their exile would be temporary and were certain that the United States would take measures to depose Castro due to the "geopolitical interest Americans had historically shown in its Cuban neighbors."²⁶ As expected, the United States took great interest in ousting Castro, especially after diplomatic relations between the United States and Cuba were severed in early 1961.²⁷

U.S.-Cuba relations became dangerously strained in the fall of 1962 during what became known as the Cuban Missile Crisis. Upon discovering Soviet missile installations in Cuba, the United States imposed a naval blockade to interdict further Soviet arms shipments to the island. The crisis dissipated when the Soviets agreed to remove the nuclear weapons and the United States made several promises, including not to invade Cuba.²⁸

The Cuban Missile Crisis took a significant toll on Cuban immigration to the United States. At the outset of the crisis, all direct commercial flights between the United States and Cuba came to a halt and were not subsequently resumed. From that point on, Cubans seeking to migrate to the United States had to go through an intermediate country, or make a perilous boat trip to Florida. These barriers slowed the Cuban exodus until the mid-1960's.

22. 1990 U.S. Census, reprinted in Pedraza, *supra* note 8, at 317.

23. *Id.*

24. Gonzalez-Pando, *supra* note 11, at 51.

25. Pedraza, *supra* note 8, at 313-14.

26. Gonzalez-Pando, *supra* note 11, at 52.

27. The United States did not break diplomatic ties with Cuba until January of 1961, when Castro gave the United States two days to reduce the staff of its embassy in Havana to only eleven people. The day after Castro made this demand, the Eisenhower administration severed diplomatic and consular relations between the United States and Cuba. GILLIAN GUNN, CUBA IN TRANSITION — OPTIONS FOR U.S. POLICY 14 (1993).

28. *Id.*

2. Second Stage

In the fall of 1965, Castro opened the port of Camarioca to Cubans with relatives in the United States.²⁹ Through Camarioca, these Cubans were free to travel to the United States; Cuban-American exiles could return to Cuba to retrieve their family members at Camarioca. About 5,000 Cubans fled in a few weeks, after which the United States put an end to the Camarioca boat lifts.³⁰ However, shortly after the end of the Camarioca boat lifts, the United States and Cuban governments agreed on a "Memorandum of Understanding," which allowed Cuban nationals to leave the island for the United States.³¹ Preference was given to immediate relatives of Cuban exiles wishing to reunite with their families.³² Additionally, the U.S. and Cuban governments agreed on the establishment of the *Vuelos de la Libertad*, an airlift that took Cuban nationals from Varadero to Miami. More than 260,000 Cuban nationals arrived in United States before Castro officially terminated the airlift in April of 1973.³³

3. Third Stage

By terminating the airlifts in 1973, Castro again imposed a virtual suspension on Cuban immigration to the United States. From 1975 to 1979, only about 33,000 Cuban nationals were able to reach American soil.³⁴

4. Fourth Stage

After holding a meeting with a group of Cuban-American exiles in November 1978, Castro agreed to lift restrictions on visits to Cuba by émigrés. As a result, Cuban exiles were able to return to their country of birth for the first time since immigrating to the United States. The Cuban-Americans who visited Cuba left a lasting impression of prosperity with their countrymen, which would fuel the interest of many in migrating to the United States for years to come.³⁵ At a time when there was social stagnation in Cuba, the return of the Cuban exiles showing outward signs of financial success persuaded many on the island, particularly the young, that they should come to the United States.³⁶

29. See generally, Gonzalez-Pando, *supra* note 11, at 55; Pedraza, *supra* note 8, at 315. By that time, Cuba had instituted strict immigration controls under which exit visas were granted only to elderly people. See AMNESTY INTERNATIONAL, UNITED STATES/CUBA: CUBAN "RAFTERS" - PAWNS OF TWO GOVERNMENTS, AI Doc. No. AMR 51/86/94 (1994) [hereinafter "AMNESTY"]. The mass migration that started in 1965, like the one that occurred in 1980 (see *infra*) were *ad hoc* exceptions to the Cuban government's enforcement of its immigration control policies.

30. Gonzalez-Pando, *supra* note 12, at 55.

31. Pedraza, *supra* note 8, at 319.

32. *Id.*

33. Gonzalez-Pando, *supra* note 11, at 56.

34. 1990 U.S. Census, reprinted in Pedraza, *supra* note 8, at 319.

35. The impact of the visitors — and their gifts to family and friends — shocked the communist regime to its ideological core. The exiles, whom Castro had repeatedly called *gusanos* (worms), were now welcomed as beneficent *mariposas* (butterflies) by their countrymen. Gonzalez-Pando, *supra* note 11, at 61.

36. Pedraza, *supra* note 8, at 318-20.

In 1980, the Cuban Government lifted its exit restrictions and opened the port of Mariel to those Cubans desiring to depart.³⁷ The Cuban-Americans responded by mobilizing boats to pick up their relatives. However, along with relatives being retrieved, Cuban officials put some of the country's *persona non grata*, such as criminals and mental patients, on the boats headed to the United States. An estimated 125,000 "*Marielitos*" made their way to the United States before the outflow was again halted by the Castro regime.³⁸

Many of the *Marielitos* did not resemble the Cuban immigrants that had previously arrived in the United States. In prior stages of the exodus, the majority of the immigrants were white and had been, prior to the Revolution, members of the Cuban upper and middle classes. The *Marielitos*, on the other hand, included many blue-collar workers and social outcasts and, for the first time, included a high proportion of people of color.³⁹

President Carter did not close the border to this new vintage of Cuban immigrants. Although some of the *Marielitos* had served jail sentences and others were institutionalized for mental illness, President Carter stood fast on maintaining the government's open door policy to Cuban immigrants, even though Congress was at the same time enacting a new statute intended to limit refugee admissions.⁴⁰

Acceptance of the *Marielitos*, however, did not extend to the general public. Within a short time after their arrival, the Greater Miami area suffered a housing shortage and an increase in crime. The *Marielitos* were soon denounced by much of the American press as being the cause of the economic turmoil in the Southern Florida, even though only about two percent of the *Marielitos* were considered to be serious criminals.⁴¹

5. *Fifth Stage*

After the end of the Mariel boat lifts, there was another lull in Cuban emigration. During the period from 1982 to 1990, fewer than 75,000 Cuban nationals arrived in the United States. Cuban emigration remained at low levels until the early 1990's, when communism collapsed in Eastern Europe.

The downfall of communism in the Eastern Bloc had severe consequences for the Cuban economy. Starting in the 1960's, Cuba had become increasingly dependent on trade with, and economic subsidies from, its Eastern Bloc allies,

37. Gonzalez-Pando, *supra* note 11, at 61.

38. *Id.* at 62.

39. Pedraza, *supra* note 8, at 318-19.

40. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C. (1998)).

41. Pedraza, *supra* note 8, at 319.

particularly the U.S.S.R.⁴² With the fall of communism, Cuba was left with an enfeebled economy, resulting in great privations for the Cuban people.⁴³

In 1994, the economic crisis reached its most critical point. As conditions worsened, discontent mounted, and a growing number of people risked their lives and fled from Cuba in boats or rafts. One group seeking to escape hijacked a ferryboat, which was immediately sunk by the Cuban Coast Guard, eliciting international condemnation over the attendant loss of life.⁴⁴ The sinking also provoked anti-government demonstrations in Cuba.⁴⁵ In response to the growing unrest, on August 5, 1994, Fidel Castro announced the end of government efforts to prevent people from leaving the country by sea.⁴⁶

The removal of exit restrictions resulted in an immediate rush of Cubans towards the high seas that "threatened to reach the proportions of the Mariel boat lift."⁴⁷ President Clinton responded to the growing crisis by ending the open-arms policy that had granted automatic asylum to Cubans who arrived in the United States since before the days of the *Vuelos de la Libertad*. On August 19, 1994, Clinton announced that the United States would henceforth bar entry into the United States of Cuban *balseros* (rafters). Instead of allowing them to enter the country, the U.S. Coast Guard was ordered to capture the *balseros* at sea and transport them to the Guantanamo Bay Naval Base or other U.S. refugee camps for eventual repatriation to Cuba.⁴⁸

In the following weeks, the immigration crisis intensified as *balseros* continued to endanger their lives by fleeing Cuba in inadequate rafts through shark-infested waters, despite President Clinton's announcement that all Cubans inter-

42. With the fall of the Soviet Union, "Cuba lost socialist economic aid of more than \$6 billion annually." Carmelo Mesa-Lago, *Cuba's Economic Policies and Strategies for the 1990s*, in *CUBAN COMMUNISM 1959-1995*, 187 (Irving Louis Horowitz ed., 1995).

43. See generally, Carmelo Mesa-Lago, *The Economic Effects on Cuba of the Downfall of Socialism in the USSR and Eastern Europe*, in *CUBA AFTER THE COLD WAR* 133, 133-88 (Carmelo Mesa-Lago ed., 1993). Concomitant with the weakening of its economy, Cuba started to reduce incrementally the age limit for those allowed to emigrate legally. Since 1992, all Cubans over 20 years old have been eligible to apply for exit visas. AMNESTY, *supra* note 29.

44. The Cuban government claimed that the sinking of the ferryboat was accidental. However, survivors claim that the boat was pummeled by the water cannons from three of the government's tugs and then rammed by one of the vessels. The boat sank, and 37 of its passengers drowned. In the three weeks following this incident, three other passenger ferries were hijacked, along with an airplane and a military vessel. Geoffrey W. Hymans, *Outlawing the Use of Refugees as Tools of Foreign Policy*, 3 ILSA J. INT'L & COMP. L. 149, 152 (1996) [hereinafter Hymans].

45. On August 5, 1994, rumors that a ferryboat was going to be hijacked to Florida drew more than 500 people to Havana docks, and the most serious anti-government riot since Castro assumed power occurred. *Id.* at 153.

46. "Castro answered the riot by declaring, through the government news agency Prensa Latina, that 'we will stop blocking the departure of those who want to leave the country' and that 'we cannot continue to guard the coasts of the United States.'" *Id.*

47. Sonia Mikolic-Torreira, *The Cuban Migration Agreement: Implications of the Clinton-Castro Immigration Policy*, 8 GEO. IMMIGR. L.J. 667 (1994) [hereinafter Mikolic-Torreira].

48. See generally, CUBA - U.S. RESPONSE TO 1994 CUBAN MIGRATION CRISIS, GAO/NSIAD 95-211 (Sep. 1995); David Gavilan, *¿Y Qué Pasó? ('And then what Happened?'): The Plight of Cuban Detainees at Guantanamo Bay*, 4 CARDOZO J. INT'L & COMP. L. 451 (1996) [hereinafter Gavilan].

cepted at sea would be sent to refugee camps indefinitely.⁴⁹ Meanwhile, U.S. and Cuban representatives met to discuss an agreement that would curb the flow of *balseros* while admitting an increased number of Cubans into the United States legally.⁵⁰

The crisis was not resolved until September 9, 1994, when the United States and Cuba entered into the Cuban Migration Agreement. In what both countries publicized as an agreement aimed at saving human lives, Cuba and the United States agreed upon measures to encourage legal immigration.⁵¹ The United States promised to admit at least 20,000 Cuban immigrants annually.⁵² In exchange, Cuba agreed to take effective measures to deter unsafe departures. With Cuba clamping down on departures by sea, the number of *balseros* declined dramatically and the exodus came to an end by December of 1994.⁵³

D. Changes In U.S. Immigration Policy After The "Balsero" Crisis

The stated basis for the end of the U.S. open door policy towards Cuban illegal immigration was a desire to avoid the loss of human lives.⁵⁴ However, there were other reasons for the United States' reversal of its Cuban immigration policy. For instance, allowing Cubans to immigrate to the United States ceased to have major foreign policy implications after the fall of the Soviet Union.⁵⁵

49. By August 24, 1994, rafters were departing from the Havana *Malecon* (waterfront) "in full view of government office buildings and large crowds of onlookers." Hymans, *supra* note 44, at 153. Indeed, the departures appeared to be occurring with the cooperation of the Cuban authorities. Robert Suro, *Havana Giving Tacit Approval to Rising Tide of Rafters*, WASH. POST, Aug. 24, 1994, at A24.

50. Cuba may have had as its agenda to force discussion of the U.S. embargo. As one observer noted:

Castro [used] the exodus in the way that the Kim dynasty in North Korea used its program to build atom bombs as a lever to prod the United States to open wide-ranging talks. But U.S. negotiators have refused to discuss Cuba's loudest demand — easing of the American trade embargo.

Daniel Williams, *Cuban Response to U.S. Immigration Offer Outlandish*, WASH. POST, Sept. 5, 1994, at A14. However, ultimately, the United States succeeded in limiting the discussion in that and subsequent meetings (of which there have been nine rounds since 1994) to the terms of the immigration accord and their implementation. U.S. DEP'T ST. PRESS RELEASES, June 25, 1998; Nicole Winfield, *U.S., Cuba Talk Migration Issues*, ASSOCIATED PRESS, June 29, 1998.

51. For a discussion of the terms of the Immigration Agreement, see Mikolic-Torreira, *supra* note 47; Joint Communique on Migration, Sept. 9, 1994, U.S.-Cuba, 5 U.S. Dep't State Dispatch 37 (1994).

52. This promise to establish a 20,000 visa floor was a broadening of the previously-existing immigration agreement between the United States and Cuba, under which there was a *ceiling* of 20,000 visas to be issued to Cuban nationals. Joint Communique Between the United States of America and Cuba, Dec. 14, 1984, U.S. - Cuba, T.I.A.S. No. 11,057. While that ceiling was increased in 1990 to 27,845, in reality, the neither figure was ever reached; in 1993/1994, prior to the crisis, only 2,700 visas were granted to Cubans. AMNESTY, *supra* note 29; Patrick Costello, *Cuba: Reforms, Migration and International Reforms*, WRITENET COUNTRY PAPERS, Nov. 1995, Section 3.4 (no page citations available).

53. David Hancock, *Influx of Cuban Rafters Ends; Zero in December*, MIAMI HERALD, Jan. 9, 1995, at 1B. In all, approximately 32,000 Cubans were picked up at sea by the U.S. Coast Guard during the crisis and confined in the Guantanamo Bay Naval Base and a U.S. military base in Panama. Gavilan, *supra* note 48, at 452-53.

54. Mikolic-Torreira, *supra* note 47, at 668.

55. As an analyst put it:

During the Cold War, granting political asylum to a person fleeing a communist country served to highlight the negative aspects of Socialism and underscore the advantages of the American way of life. However, with the fall of the Soviet Union, the incentive to grant political asylum to Cubans disappeared.

In addition, the Clinton Administration apparently saw the stemming of the immigration tide as a way to force Cubans on the island to work towards bringing about a democratic transition. In a June 1995 speech, the President defended his policies as follows:

We simply cannot admit all Cubans who seek to come here. We cannot let people risk their lives on open seas in unseaworthy rafts . . . Regularizing Cuba migration also helps our efforts to promote a peaceful transition to democracy on the island. For too long, Castro has used the threat of uncontrolled migration to distract us from this fundamental objective. With the steps we've taken, we will be able to devote ourselves fully to our real long-term goal.⁵⁶

Another important factor in the equation was the growing anti-immigrant bias that developed in the United States at about the same time the *balseo* crisis was unfolding. California led the way in the anti-immigrant sentiment, as reflected by the 1994 passage of Proposition 187, which barred undocumented immigrants from public education, social services and non-emergency health care.⁵⁷ Governor Pete Wilson and other proponents of the measure sought to "send a message" to the federal government, and presumably to the immigrant community, about immigration.⁵⁸ Wilson's message was loud and clear: Cali-

Immigration and particularly asylum policy were viewed as part of the overall foreign policy efforts against the Soviet Union and its sphere of influence. Emigration on one side and granting political asylum was encouraged. Indeed, the arrival of each political refugee from the Soviet Bloc was viewed as reaffirmation of the validity of our own system. Similarly, the Freedom Flotilla was viewed as a blight on the Cuban revolution and a validation of our foreign policy. In addition, for the Cuban refugees, their journey was a logical extension of their unhappiness with the revolution.

Boswell, Richard, *Throwing Away the Key: Limits on the Plenary Power?*, 18 MICH. J. INT'L L. 689, 695-96 (1997).

56. Clinton Defends Cuba Policy, ASSOCIATED PRESS, Jun. 27, 1995. See also, John Lantigua, *Clinton Defends Policy*, MIAMI HERALD, Jun. 28, 1995, at 1B.

57. See Tanya Broder and Clara Luz Navarro, *A Street Without an Exit: Excerpts from the Lives of Latinas in Post-187 California*, 7 HASTINGS WOMEN'S L.J. 275, 277 (1996) [hereinafter *Street*]. Sponsors of Proposition 187 knew that certain provisions would probably be deemed unconstitutional, such as denying elementary and secondary education to undocumented children. Such a denial appeared to be inconsistent with the U.S. Supreme Court's decision in *Plyer v. Doe*, 457 U.S. 202 (1982), which required that K-12 education be available to all children, notwithstanding their immigration status. *Id.* Similarly, Proposition 187 appeared to violate the Omnibus Reconciliation Act of 1986, which mandated that undocumented immigrants be given "emergency health care, including pregnancy services, under the Medicaid program." Jonathan C. Dunlap, *The Absent Federal Partner*, SPECTRUM, January 1, 1994 at 6 [hereinafter Dunlap].

58. *Street*, *supra* note 57, at 277 and n.8. Governor Wilson, enraged with the cost imposed by illegal immigration on his state and the failure of the federal government to take effective measures, described Proposition 187 as "the two-by-four we need to make them take notice in Washington." Roberto Suro, *California's SOS on Immigration*, WASHINGTON POST, Sept. 29, 1994, at A1. Commentators have seen the anti-immigration mood in California and elsewhere as being at least in part racially motivated and directed against Hispanics. *Street*, *supra* note 57, at 278 and n.11; Thomas D. Jones, *A Human Rights Tragedy: The Cuban and Haitian Refugee Crisis Revisited*, 9 GEO. IMMIGR. L.J. 479, 482 (1995).

fornia no longer welcomed immigrants, and was not prepared to help finance the costs of having a growing immigrant population.⁵⁹

The anti-immigrant backlash was also an important campaign issue in Florida, where images of destitute *balseros* arriving on the State's shores prompted concerns about their impact on the local economy.⁶⁰ Florida's incumbent Governor, Lawton Chiles, made opposition of mass immigration from Cuba an issue in his 1994 re-election campaign. When President Clinton announced in November 1994 that he would allow the entry of 10,000 of the Cubans interned at the Guantanamo Bay Naval Base and in Panama on humanitarian grounds, Governor Chiles kept to his campaign promise of erecting barriers to the Cuban exodus.⁶¹ In response to the arrival of the new immigrants, Chiles filed a suit for nearly \$1 billion against the United States, claiming that the federal government should pay the State's cost of admitting illegal immigrants because the federal authorities failed to prevent illegal immigration.⁶² Even though the suit was dismissed, Chiles claimed that the "lawsuit was successful in that it raised awareness of the extraordinary impact of illegal immigration on border states like Florida."⁶³

59. In 1993, the General Accounting Office testified to Congress that for the previous year "the total cost to state and local governments for providing kindergarten through 12th-grade education, emergency Medicaid [and other social services]. . . in California, Texas, Illinois, New York and Florida was estimated at \$2.39 billion." Of these costs, California absorbed about \$1.7 billion. Dunlap, *supra* note 57.

60. A 1996 report by the Center for Immigration Studies appeared to lend support to many of the economic concerns raised by Florida's anti-immigrant forces. Some of the report's findings were summarized in the press as follows:

By the year 2020, Florida's population will jump 57 percent to 22 million. The state's public schools will be crowded with an additional 750,000 students, and its roads clogged with nightmarish traffic.

And a 30 percent growth in foreign immigration will be to blame for much of the problem afflicting the state.

* * *

By 2020, whites will make up 58 percent of Florida's population, down from 73 percent in 1990.

Report: State has Immigrant Problem; the Study says that by the 2020 the Schools will be Jammed and the Roads will be Clogged, ORLANDO SENTINEL, Jan. 19, 1996, at D4. Whether or not the report's findings are given credence, they served to fuel the anti-immigration sentiment in Florida.

61. In response to Clinton's announcement, Ron Sachs, a spokesman for Governor Chiles stated that "if a large number of refugees are allowed into the country, Chiles would demand full reimbursement from Washington for the cost of providing services to the new immigrants and would seek to replace the families outside Florida." David Adams, *U.S. may Allow 10,000 Cubans into Florida*, ST. PETERSBURG TIMES, Nov. 16, 1994, at A1.

62. Florida was one of several states to file suit against the United States. Other states with high immigrant populations, such as California, Arizona, New Jersey, New York and Texas, also sued the federal government separately. One article depicts the suits as governors' courting the anti-immigrant vote in those states:

Accompanied by a blaze of publicity, the states filed separate suits in 1994 arguing they should be reimbursed for the costs of illegal immigrants. At the time, the states' governors were running for re-election and polls showed widespread public resentment of illegal immigration.

Maria Puente, *Court Rejects Florida Case on Illegal Aliens, State Sought Federal Funds*, USA TODAY, May 14, 1996, at 5A.

63. *Id.*

E. Implementation Of The U.S - Cuba Immigration Agreement

The United States ultimately did not make good on its threat to return to Cuba the *balseros* it seized in 1994. Instead, in May 1995, after holding secret meetings with Cuba, the Clinton Administration reversed its Cuban immigration policy by announcing that the United States would admit the 21,000 refugees still being held at the Guantanamo Bay Naval Base, but would in the future send back to Cuba all “illegal immigrants” found at sea.⁶⁴ In so doing, the United States created a remarkable disparity of treatment between the Cubans who are intercepted at sea — who are almost invariably returned to Cuba— and those who manage to touch American soil. In most instances, members of this latter group are given asylum in accordance with the Migration and Refugee Act of 1962, which remains in effect.⁶⁵

The new policy was described as having been prompted by many factors, including the high cost of keeping the refugees detained in Guantanamo, the recurring threat of riots among the detainees, and the sense that the majority of the population supported curbing illegal immigration.⁶⁶ Indeed, while the change in immigration policy was received with indignation by many in the

64. Daniel Williams and Ann Devroy, *Serious Alarm Bells Led to Talks with Cuba*, WASHINGTON POST, May 5, 1995, at A4; The White House, Joint U.S.-Cuba Statement, May 2, 1995; Ann Devroy and Daniel Williams, *In Reversal, U.S. to Accept Cubans Held at Navy Base*, WASHINGTON POST, May 3, 1995, at 1A.

65. Thus, since its May 1995 agreement with Cuba, the United States has returned over one thousand refugees captured at sea to Cuba. *U.S. Returns Over 1,000 Cubans Since 1995*, REUTERS, Jun. 17, 1998. At least some of the returned refugees are reported to have faced harassment upon their return to Cuba. *2 Cubans Report Harassment*, FT. LAUDERDALE SUN SENTINEL, May 27, 1995, at 12A.

By contrast, every year an increasing number (which in 1998 exceeded 800) of Cubans — many of them smuggled by third parties— make it to land in the United States and, in most instances, are granted political asylum. John Nordheimer, *Those Reaching Shore Gain Legal Advantages*, N.Y. TIMES, Aug. 28 1994, at A12; Andres Viglucci, *Loophole Could Limit Reparation: Cubans Who Reach U.S. May Get to Stay*, MIAMI HERALD, May 5, 1995, at A1; Andres Viglucci, *U.S. Eases Up on Refugee Detentions*, MIAMI HERALD, Dec. 11, 1995, at 1B; Manny Garcia, *Cubans Land on Beaches to Open Arms*, MIAMI HERALD, Sept. 24, 1996, at 1A; Deborah Ramirez, *Smuggling Operations on Rise From Cuba*, FT. LAUDERDALE SUN-SENTINEL, June 18, 1998, at 5B; Angus McSwan, *Summer Brings Waves of “Boat People” to Florida*, REUTERS, June 17, 1998; Andres Viglucci, *Smuggling Seen in Refugee Rise 2 Arrested; Boat Seized*, MIAMI HERALD, June 25, 1998, at 1A; Mike Clary, *REFUGEE SURGE THREATENS U.S.-CUBA MIGRATION PACT*, L.A. TIMES, Dec. 31, 1998, at A5; *but see*, Liz Balmaseda, *Rescue Not a Happy Ending*, MIAMI HERALD, June 24, 1998, at 1B.

66. *See* Steven Greenhouse, *U.S. Will Return Refugees to Cuba in Policy Switch*, N.Y. TIMES, May 3, 1995, at A1; Tom Fiedler and Alfonso Chardy, *Goal of ‘No More Mariels’ Led to Clinton’s Painful Choice*, MIAMI HERALD, May 3, 1995, at 15A. The point was driven by a subtle change in semantics. The Cubans seeking shelter in the United States, who for over thirty years had been described as “exiles,” “refugees,” “freedom seekers,” and other terms with positive connotations, became in official U.S. government parlance “migrants” and “illegal immigrants.” *See, e.g., Cuban Migration Policy: Hearings before the Subcomm. on Western Hemisphere of the House Comm. on Int’l Relations*, 104th Cong. (1995) (statement of Doris Meissner, Commissioner, I.N.S.). These terms had previously been applied to justify the return of undocumented aliens (such as Haitians) seeking to enter the United States by boat to their country of origin, *see* Exec. Order No. 12, 807, 57 Fed. Reg. 23, 133 (1992); Elizabeth Harris, *Economic Refugees: Unprotected in the United States by Virtue of an Inaccurate Label*, 9 AM. U.J. INT’L L. & POL’Y 269, 280 & n.73 (1993). Before 1994, the term had apparently not been applied to Cuban rafters.

Cuban-American community, a poll taken in Miami shortly after the new policy was announced found that “nearly half of Cuban Americans in Dade [County] agree with other county residents that immigration from Cuba should be sharply limited.”⁶⁷

The United States has lived up to the commitments under the immigration agreements it reached with Cuba in 1994 and 1995. Virtually all of the more than 30,000 rafters who were interned in 1994 were eventually admitted into the United States, although the process was not completed until January of 1996.⁶⁸ The United States has also kept its promise under the 1994 Cuban Migration Agreement to admit 20,000 Cuban immigrants annually, in addition to those Cuban nationals admitted as the next of kin to United States citizens through the visa processing system.⁶⁹ Visas are granted to people with close relatives in the United States, people who qualify for political asylum, people qualifying for visas as relatives forming part of the same household as others granted visas, and other immigrants selected by lottery.⁷⁰

The State Department needed to make certain changes in its practices in order to increase the number of Cubans legally entering the United States. These changes include loosened criteria for granting asylum to Cubans, broadened parole powers for the State Department, and an increased number of Cuban immigrant visas selected by lottery.⁷¹

To implement the changes, Attorney General Janet Reno employed her emergency powers to raise the number of Cubans admitted each year beyond the legal ceiling. Immigration law permits the Attorney General to grant parole in cases of emergency or in the public interest. In the past, the Attorney General limited the use of this parole power to situations in which an individual needed the services or protection of the United States, such as a cancer victim needing a bone marrow transplant. Reno, however, expanded the use of this parole power.

The United States also broadened its asylum guidelines. The eligibility requirements for Cubans seeking asylum were loosened to include certain people that did not meet the well-founded fear of persecution required by U.S. immigration law. According to the new guidelines, Cubans were eligible for asylum if they had been human-rights activists, had experienced religious discrimination, had been consigned to work camps in the period from 1965 to 1968, or had

67. John Lantigua and Stephen Doig, *Limit Cuba Immigration? Yes, Most in Survey Agree*, MIAMI HERALD, May 15, 1995, at 1A.

68. John Lantigua, *Guantanamo: Mission Accomplished*, MIAMI HERALD, Jan. 19, 1996, at 1B.

69. *U.S. Fulfills Migration Pact with Cuba*, REUTERS, Aug. 22, 1995; Carol Rosenberg, *New Visa Lottery Will Help Cubans Migrate to U.S.*, MIAMI HERALD, Jun. 6, 1998 [hereinafter Rosenberg].

70. Mimi Whitefield, *New Rules on Cuban Immigration Released*, MIAMI HERALD, Oct. 13, 1994, at 21A. This is not to say, however, that everyone who is granted a visa actually emigrates to the United States. Thousands of the people granted visas are ultimately prevented from leaving the country by the high exit fees charged by the Cuban government (\$500 per adult, \$400 per child, payable in dollars only), the costs of transportation, and other hurdles. Andres Viglucci, *Costly Exit Fees Keep Some Cubans From Using Visas*, MIAMI HERALD, Aug. 9, 1998, at 1A [hereinafter “Fees”].

71. Mikolic-Torreira, *supra* note 47, at 669.

experienced curbing of the exercise of their vocations as a result of their perceived or actual political beliefs.⁷²

Additionally, through the immigration lottery and the increased number of lottery visas granted to Cuban nationals, the United States kept its vow to take an active course in promoting legal Cuban immigration while effectively tackling many concerns that arose from the Mariel boat lift. The increased number of lottery visas allowed many Cubans to legally immigrate to the United States although they may not have otherwise qualified.⁷³ This opened the door to the United States to those in Cuba who lacked an immediate relative with legal status in the United States and did not suffer sufficient persecution to qualify for political asylum. On the other hand, the lottery requirements served as a filter of the Cubans admitted to the United States. The lottery applicants were required to meet two of the following five criteria: completion of high school; minimum of three years work experience; possession of job skills; familial ties in the U.S.; and demonstrated interest in migration to the U.S. before October 1, 1994.⁷⁴ Applicants were also required to pass a medical screening and an interview establishing their ability to support themselves.⁷⁵ By way of these requirements, the United States took precautions to exclude criminals and possible welfare recipients. Although these restrictions limited the pool of Cubans able to qualify for lottery visas, more than enough visa applications were submitted to enable the United States to fulfill its promise of granting more than 20,000 visas annually to Cuban nationals.⁷⁶

F. *Current Status Of Cuba-To-U.S. Immigration*

The U.S. government's handling of the *balsero* crisis sent a clear message that the United States would no longer provide an unlimited safe haven for discontent Cubans. Many, therefore, expected that the U.S. government's policy would become more restrictive with time, and that it would become more difficult for Cubans to enter the United States as well as for those in the United States to adjust their status. The anticipated hardening of the U.S. stance concerning Cuban immigration, however, did not take place. Cubans still enjoy the preferential treatment that began when President Johnson established an open-door policy to Cuban immigrants.⁷⁷ There are sound legal and political reasons

72. *Id.* at 668.

73. In 1994, the United States granted 8,400 visas to Cuban nationals seeking to immigrate to the United States. Since 1994, nearly 29,000 Cubans were granted U.S. visas under the lottery system. Rosenberg, *supra* note 69. The total number of immigrant visas granted to Cubans since 1994 exceeds 42,000. *Fees, supra* note 70.

74. Andres Viglucci, *Lottery Will Open U.S. Door to Cubans*, MIAMI HERALD, Mar. 12, 1996, at 5B; *INS Announces Details of Special Cuban Migration Program*, PR NEWswire, Nov. 4, 1994.

75. *Id.*

76. 189,000 Cubans applied for the first lottery in 1994, and 435,000 applied for the second one in 1996. Rosenberg, *supra* note 69.

77. In fact, the number of Cuban refugees adjusting their status to permanent U.S. residents nearly doubled the first year the new immigration policy went into effect, from 12,355 in 1995 to 22,542 in 1996. U.S. Immigration and Naturalization Services, *Statistical Yearbook of Immigration and Naturalization Service, 1995*, U.S. Government Printing Office: Washington, D.C. 1997, tbl. 10, p. 51.

why such treatment should continue, at least as long as the current regime retains its repressive policies against those who seek to escape the country.⁷⁸

By contrast, those seeking to immigrate to the United States from other countries have not received a warm reception. In recent years, Congress has attacked illegal immigration through the Anti-Terrorism and Effective Death Penalty Act of 1996 ("Anti-Terrorism Act")⁷⁹ and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA").⁸⁰ The Anti-Terrorism Act tightens admissibility standards by means such as expanding the term "aggravated felony" to include conduct that in the past would not have barred an alien from legally immigrating to the United States. For its part, contrary to previous law, the IIRIRA makes an alien inadmissible if he entered the United States without having been admitted or paroled. Thus, both acts create new obstacles for aliens seeking legal immigrant status in the United States.

Cubans have not been adversely affected by the latest tightening of the U.S. borders to immigrants. Instead, Cubans have had a much different experience than immigrants from other countries. For instance, in April of 1996, when moves were made to repeal the Cuban Refugee Adjustment Act, the Senate voted by a margin of 62-37 to retain the legislation in place until a democratic government is in place in Havana, and legislation to that effect was enacted.⁸¹ This indefinite retention of the Cuban Refugee Adjustment Act preserves the preferential treatment of Cuban nationals in the United States, at least until the end of the communist rule.

Moreover, as part of the District of Columbia Appropriation Act of 1998, Congress passed the Nicaragua Adjustment and Central American Relief Act ("NACARA"),⁸² extending immigration privileges to Cuban nationals. The new law requires a Cuban national seeking to adjust his status to that of a permanent resident to have resided in the United States since December 1, 1995, rather than the former one year requirement set under the Cuban Refugee Adjustment Act. However, applicants for status adjustment under NACARA are not subject to the provisions of section 245(c) of the INA, which bars aliens from adjusting if,

78. Because of well-founded fears of persecution should they return to the island, obtaining political asylum in the United States remains critical for Cuban citizens who leave their native country to escape political persecution. Andrew Bonavia, *United States v. Rodriguez-Roman: Prosecuting the Persecuted*, 22 N.C. J. INT'L L. & COM. REG. 1039, 1040 (1997) [hereinafter Bonavia]. U.S. courts have upheld the Cuban exiles' claim to political asylum based on fear of reprisal for abandoning their country. In a recent court decision, the Ninth Circuit Court of Appeals ruled that asylum should be granted to Cubans who fear persecution for violating their country's exit restrictions, *Rodriguez v. INS*, 98 F.3d 416, 418 (9th Cir. 1996). In the *Rodriguez* case, the asylum seeker had presented evidence of the consequences of being returned to Cuba after fleeing from the island. *Id.* at 419. Such a person could expect "many years in prison for the crimes of looking for freedom and [sic] possibly be shot." *Id.* at 420. In prison, he would be subject to atrocious conditions including abuse amounting to a "moral death," denial of family visits and medical attention, and forced sharing of cells with violent and deranged inmates. *Id.* at 420. The Ninth Circuit Court of Appeals agreed that *Rodriguez* had a considerable fear of persecution based on his departure and held that he and others like him should be granted political asylum in the United States. *Id.* at 429.

79. Pub. L. No. 104-132, 110 Stat. 1214 (1996).

80. Pub. L. No. 104-208, 110 Stat. 3009 (1996).

81. Pub. L. No. 104-208, Title VI, § 606, 110 Stat. 3009-695, 8 USCA § 1255 note (1996).

82. Pub. L. No. 105-100, Title II, § 201, 111 Stat. 2160 (1997).

inter alia, they worked in the United States without authorization or remained in the United States beyond their authorized stay. Also, Cuban nationals who entered illegally are eligible for amnesty under NACARA.⁸³ Such amnesty is not available to nationals of other countries.

III.

THE CHALLENGES AND OPPORTUNITIES OF A POST-TRANSITION IMMIGRATION REGIME BETWEEN CUBA AND THE UNITED STATES

A. Introduction

Although one cannot predict with certainty the reaction of the U.S. government to the start of Cuba's democratic transition, its immigration policy towards Cuba is unlikely to remain the same once the process gets under way. For over three decades, the United States has accepted hundreds of thousands of Cubans, bypassing the standard rules for granting asylum or admitting aliens as permanent residents. This preferential treatment given to Cuban immigrants will almost certainly cease with the end of communism in Cuba, unless the political conditions on the island remain unstable and warrant continuation of some program for the handling of refugees. The Cuban Refugee Adjustment Act, for example, is scheduled to be repealed upon the establishment of a democratic government in Cuba.⁸⁴ Since the immigration policy of this country is to provide uniform treatment to aliens seeking admission, regardless of their country of origin, Cuban nationals may well find themselves facing the same barriers that citizens from other countries presently experience in seeking to migrate to the United States.

Nevertheless, because of the unique relationship between the two countries, special legislation will likely be enacted (together with an eventual treaty) to properly address the interests and concerns of both the United States and Cuba in the area of immigration as Cuba undergoes its transition to democracy. The terms of that legislation and treaty will be dictated by several factors.

First, U.S. policy toward Cuba in the last forty years has been motivated exclusively by the interest of the United States in fighting Communism and replacing the current Cuban government with a democratic regime. If the transition is perceived as a move towards democratization, the political objectives that have driven U.S. immigration policy toward Cuba will have been achieved. Immigration policy will then be driven primarily by economic rather than political factors. Accordingly, travel restrictions will be liberalized and preferential treatment programs will be reexamined and probably phased out.

Second, immigration is a politically explosive issue in the United States, particularly in those states in which most immigrants have traditionally settled.

83. See Adjustment of Status for Certain Nationals of Nicaragua and Cuba, 63 Fed. Reg. 27,823 (1998) (codified at 8 C.F.R. pts. 3, 240, 245, 274a, 299).

84. As noted earlier, *see* note 81, *supra* and associated text, the Cuban Refugee Adjustment Act has been repealed prospectively; the repeal will be effective upon a determination by the President under Section 203 (c)(3) of the LIBERTAD Act (22 U.S.C. §6063(c)(3) (1998)) that a democratically elected government is in power in Cuba.

Any new immigration proposals relating to Cuba are likely to be surrounded by substantial controversy. Legislators are therefore bound to consider Cuban immigration proposals both on their merits and in light of their political ramifications.

Third, although both countries will be working toward the goal of facilitating Cuba's economic recovery through the unimpeded flow of people between the two countries, the challenges they will confront are very different. Whereas Cuba's main objective will be to attract new investors and specialized workers, the United States will focus primarily on balancing its need to facilitate Cuba's transition through open immigration policies, with the somewhat conflicting goal of limiting Cuba-based immigration to manageable amounts.

Finally, immigration in the United States is already governed by a comprehensive policy that, with minor exceptions, applies equally to all countries: even Mexico and Canada are given few special immigration privileges despite their participation in the NAFTA.⁸⁵ Thus, while immigration from Cuba may be the subject of special provisions, those provisions will have to be of limited duration so that policy toward Cuba becomes consistent with the overall U.S. immigration policy. Like aliens from other countries, Cuban aliens seeking to enter the United States will be considered on the basis of their individual qualifications as opposed to their country of origin.

Cuba, for its part, must develop an immigration strategy that fosters the movement of goods, ideas and people across its borders during the transition. Once it becomes apparent that Cuba intends to liberalize its economy and commit to a democratic form of government, foreign investors and Cuban expatriates will seek to visit Cuba in substantial numbers. During the transition, it is essential that Cuba encourage such visits by developing an open and efficient immigration policy.

B. A Potential U.S. Approach To Cuban Post-Transition Immigration

1. Introduction

It is probably not in the national interest of either country to continue fostering permanent migration of Cuban nationals into the United States, even for a limited time, during the transition. Rather, given the need to rebuild Cuba, U.S. policy should encourage the temporary, business-oriented movement of Cubans in and out of the United States. Programs should be instituted to allow the free movement of business travelers and to allow Cubans to work in the United States for periods long enough to gain technical and administrative skills necessary to succeed in a restructured Cuban economy.

85. See Kevin Johnson, *Free Trade and Closed Borders: NAFTA and Mexican Immigration to the United States*, 27 U.C. DAVIS L. REV. 937, 940-941 (1994) [hereinafter "Johnson"] ("[W]hile NAFTA provides for a reduction of restraints on trade with the hopes of increasing commerce between the three nations, it for the most part does not deal with the flow of people between those same nations.").

Under this approach, the current refugee programs would be eliminated and concentration of immigration policies would shift from political to economic goals. Congress would establish new visa and immigration policies which would allow Cubans to travel and work in the United States for limited periods of time, without issuing them permanent immigrant visas. This approach would result in no net increase in the number of Cubans migrating permanently to the United States, and may actually result in fewer permanent Cuban immigrants, because some Cubans who qualify for permanent visas may opt for temporary visas instead. The elements of this approach are described below.

2. *The Mexican Model*

Although the situations of Mexico and Cuba are very different and likely to remain so, the relations between both countries and the United States raise many of the same immigration issues. Both have weak economies relative to that of the United States, both are located at or close to U.S. borders, and both have been the source of large numbers of legal and illegal immigrants to the United States. As a consequence, it is logical to assume that once the Castro regime no longer commands special treatment, U.S. policy makers will approach immigration from Cuba much as they have approached Mexican immigration.⁸⁶ Thus, if nothing else, U.S.-Mexican immigration policy provides some guidance as to the boundaries within which policy makers should stay, given the political climate in the United States.

Despite its seemingly natural link to free trade, immigration was not addressed in any meaningful manner by the NAFTA.⁸⁷ Consequently, "many commentators maintain that the NAFTA was not designed with the intention of creating a freedom-of-movement-of-person regime. On the contrary, it is an agreement specifically encouraging the freedom of movement of goods, capital, and services, and which in conspicuous silence excludes persons from its regime."⁸⁸ Thus, with a few minor exceptions,⁸⁹ Mexicans are not given preferential immigration treatment. The limited immigration scope of the NAFTA "reflects the tension between the goals of preserving national autonomy, border security, and protecting the permanent employment of each Party's domestic labor force on the one hand, and encouraging the liberalization of trade on the other."⁹⁰ Although somewhat contradictory, the U.S.-Mexican immigration policy is designed to encourage free and open trade across a relatively closed border.

86. See generally *The North American Free Trade Agreement*, Dec. 17, 1992, U.S.-Can.-Mex., 32 I.L.M. 289, 296-456, 612-799 [hereinafter "NAFTA"].

87. See Johnson, *supra* note 85.

88. Noemi Gal-Or, *Labor Mobility Under NAFTA: Regulatory Policy Spearheading the Social Supplement to the International Trade Regime*, 15 ARIZ. J. INT'L & COMP. LAW 365, 366 (1998).

89. NAFTA creates a special category of temporary "TN" visas for which only Mexican and Canadian workers are eligible. Mexicans are limited to only 5,500 TN visas annually, so this program does not significantly affect U.S.-Mexican immigration trends. See NAFTA, *supra* note 86, ch. 16 & app. 1603.D.1; 8 C.F.R. § 214.6(c)(1992).

90. Ellen G. Yost, *NAFTA: Temporary Entry Provisions — Immigration Dimensions*, 22 CAN.-U.S. L. J. 211, 211 (1996).

The issues are virtually identical for Cuba. On the one hand, the United States has an important national interest in facilitating the transition to a strong free-market Cuba. An economically strong Cuba would consolidate what will most likely be a new democratic regime, offering new markets to U.S. businesses. Perhaps more importantly, a strong Cuba would eliminate the need of Cubans to seek work abroad, and thereby mitigate the labor, security and cultural problems that many perceive immigration to cause. An immigration policy that promotes the free movement of skilled workers between the United States and Cuba has the potential for helping advance these interests. Nonetheless, once the immigration policy toward Cuba starts to be evaluated primarily as an economic matter, rather than a political one, the United States is unlikely to view Cuban immigration issues much differently than it did those presented by NAFTA. Therefore, in order to stand a chance of generating the requisite political support for passage, any proposal addressing immigration during the transition must be consistent with the existing immigration policy of the United States toward Mexico and the rest of the world.

3. *Permanent Immigration of Cubans into the United States*

The permanent immigration policy of the United States is relatively inflexible and very unlikely to be modified to cater to Cuba's needs during the transition. Moreover, to the extent that the goal of both the United States and Cuba is to allow Cubans to gain training, experience, and new skills that they can later use to rebuild Cuba, permanent immigration should be discouraged. Nonetheless, because many Cubans will still be eligible to immigrate permanently into the United States, it is important to examine briefly how the global U.S. immigration policy will apply to Cubans during the transition.

U.S. immigration policy is driven primarily by four principles: family unification, harboring of refugees, cultural diversity and employment. Of the roughly 800,000 permanent immigrants that enter the United States each year, the vast majority enter through a program based upon one of these principles.⁹¹ Although a few special programs are tailored to address the needs of specific ethnic groups or nationalities, for the most part the policy applies equally to all countries.

Family unification, currently accounting for over 62% of all new immigrants, is clearly the cornerstone of the permanent immigration system.⁹² Of those 62%, over half enter as spouses, children or parents of U.S. citizens. There are unlimited visas available to these close relatives of U.S. citizens.⁹³

The remainder of the 62% is comprised of immigrants sponsored by either U.S. residents or by more distantly related U.S. citizens. Despite the issuance of approximately 200,000 visas to applicants falling in the latter category, some

91. See Prepared Testimony of Susan Martin, Executive Director U.S. Commission on Immigration Reform Before the Judiciary Committee Subcommittee on Immigration and Claims, U.S. House of Representatives, Federal News Service (May 17, 1995).

92. *Id.*

93. *Id.*

family members can expect to wait up to thirty years before they can legally enter the United States.⁹⁴ Nonetheless, in both family unification categories, the large number of Cubans already residing in the United States will allow Cubans to benefit substantially from family-oriented visa programs. There is no reason to believe that this trend will change during the transition.

Approximately 16% of current permanent immigrants arrive as refugees, many of whom originate in Cuba.⁹⁵ If we accept the premise that forms the basis for this paper, *i.e.*, that during its transition Cuba will observe democratic principles, few Cubans are likely to qualify as refugees.

In an effort to promote diversity from countries which have not traditionally supplied many immigrants to the United States, Congress has provided for 55,000 visas to be issued by lottery.⁹⁶ However, given that nearly 6.5 million people are competing for these “diversity” visas, few Cubans are likely to gain entry into the United States under this program.⁹⁷ Moreover, because Cuba is not an “undersubscribed” country, its citizens will probably not receive any preferential treatment from the United States in the interest of cultural diversity.

Finally, and most relevant to this discussion, 140,000 permanent visas are granted each year through employment-based programs, all of which are subject to limitations that protect the U.S. labor market.⁹⁸ Most of these visas are granted to applicants who can demonstrate through publications, academic or work credentials, or other means, that they are among the best in their fields, who are able to make substantial contributions to society in the United States, or who are high-level executives in international companies. If none of these criteria are met, applicants must show that they intend to fill a position for which there are no qualified U.S. workers available.⁹⁹ Additional programs are also available for applicants intending to invest money in or otherwise benefit the U.S. economy in some way.

Although there are limitations on the number of such visas, the number of visas issued is normally well below the limit, for the eligibility criteria are stringent enough to effectively curtail permanent immigration for employment reasons from any country. Nevertheless, any Cuban that meets the substantive requirements of the employment-based programs will be eligible for permanent admission into the United States.

94. *Id.* The amount of time an applicant can expect to wait depends largely upon which country he or she is from. Quotas are assigned to each country, and certain countries' limits are quickly reached each year.

95. Alan Reynolds, Address Before the Judiciary Committee Subcommittee on Immigration and Claims, U.S. House of Representatives, in *FEDERAL NEWS SERVICE* (April 21, 1998).

96. *Id.*

97. *Id.*

98. *Id.* See also, American Immigration Lawyers Association (AILA), 1 1998-99 IMMIGRATION & NATIONALITY LAW HANDBOOK 278-296 (1998) [hereinafter “HANDBOOK”].

99. HANDBOOK, *supra* note 98, at 296.

4. *Categories of Non-Immigrant Visas Allowing Work in the United States*

a. *Introduction*

As noted earlier, U.S. policy should focus primarily upon providing opportunities for Cubans to work or study in the United States for limited periods of time.¹⁰⁰ This strategy is appropriate for several reasons:

(1) It does not permanently drain Cuba of skilled workers who would otherwise be able to make significant contributions to the development of a democratic free-market Cuba. Rather, it allows those workers to acquire additional technical and administrative skills and experiences in the United States over a period of years that they can subsequently use to benefit Cuba;

(2) It temporarily relieves the burden on what will likely be a fragile democratic regime to provide the Cuban population with benefits and jobs. Moreover, Cubans working in the United States will continue to be able to send money home to support relatives in Cuba during the transition;

(3) It is much easier to gain political support for temporary work and study programs than for policies promoting permanent immigration.

The following discussion examines some of the temporary work categories that could benefit Cubans during the transition period.

b. *Professional Worker Visas*

The most useful vehicle for Cubans to enter and work in the United States during the early years of the transition could be the "H-1B" visa.¹⁰¹ H-1B visas would be available to professional workers from Cuba who have at least a bachelors degree, or equivalent work experience. The main obstacles to Cubans obtaining H-1B visas are:

(1) The prevailing wage requirement mandates that an employer pay any foreign national at least the "prevailing wage" for a given type of work.¹⁰² To the extent that these wages are set too high, U.S. companies may lack an incentive to hire workers from Cuba.

(2) The H-1B applicant must already have a job lined up in the United States. This should not be overly burdensome, for it is to be expected that skilled Cuban workers will be in demand in the United States, especially given the large number of potential Cuban-American employers in the United States and Cuba's geographic proximity.

(3) There is a limit on H-1B visas — no more than 65,000 may be issued in any one given year.¹⁰³ In 1997, for the government fiscal year ending on

100. Temporary non-immigrant visas are provided for in the Immigration and Naturalization Act of 1952.

101. INA §§ 101(a)(15)(H), 212(n), 8 USC § 1101(a)(15)(H); 8 C.F.R. § 214(h).

102. Employers must file a Labor Condition Application with the U.S. Department of Labor attesting that it intends to pay the H-1B workers at least the "prevailing wage" in the geographical area of employment for the position that worker is expected to fill. HANDBOOK, *supra* note 98, at 171; 8 U.S.C. § 1182(n)(1)(A); 20 C.F.R. § 655.730(b)(3).

103. HANDBOOK, *supra* note 98, at 174.

October 1, the cap was reached by mid-August.¹⁰⁴ In 1998, all 65,000 visas had been issued by early May.¹⁰⁵

c. *Intra-Company Transferees*

A second type of non-immigrant work visa (the "L-1" visa) is available for Intra-Company Transferees.¹⁰⁶ Employees of a U.S. company or affiliate who have worked abroad for one continuous year during the preceding three years in an executive, managerial or specialized knowledge capacity, are eligible to be transferred to the United States to work in a similar capacity for an affiliate of that same company.¹⁰⁷ These L-1 visas are likely to become increasingly important as the economies of Cuba and the United States become more intertwined. As more foreign investment enters Cuba, more Cuban employees will become eligible to work in the United States. Conversely, as more workers return to Cuba with newly-developed skills and work experience, more foreign investors will be willing to invest in Cuba. The primary advantage of this visa over the H-1B visa is that it is limited neither by quotas nor by prevailing wage requirements.

The main drawback of the L visas is that they will not be available during the early stages of the transition, because U.S. companies will not have been established in Cuba long enough for their Cuban staffs to satisfy the one year employment requirement. On the other hand, the eventual availability of these visas should provide an incentive to U.S. employers to hire capable Cuban employees early and give them management responsibilities right away, so they can be available for transfer, if desired, to the company's facilities in the United States.

d. *Treaty Traders and Investors*

A class of non-immigrant visas ("E visas") is available to Treaty Traders and Investors.¹⁰⁸ Applicants must demonstrate intent and capacity either to engage in substantial trade and commerce in the United States, or to invest in and develop a new and substantial enterprise that would benefit the U.S. economy. Treaty investors and traders must also be from a country with which the United States has a treaty of commerce and navigation, a free trade agreement or a bilateral investment treaty.

The basic concept behind the E visas is that they should be granted to those who generate significant trade or those who invest in the U.S. economy, and either directly or indirectly create jobs. Assuming the United States and Cuba

104. *Id.*

105. Notice: Fiscal Year 1998 Numerical Limitation Reached for H-1b Non-immigrants, 63 Fed. Reg. 25,870 (1998).

106. INA § 101(a)(15)(L); 8 C.F.R. § 214.2(l) (as amended by 56 Fed. Reg. 61117-37 (Dec. 2, 1991)).

107. HANDBOOK, *supra* note 98, at 202.

108. 8 U.S.C. § 1101(a)(15)(E) (1998); 8 C.F.R. § 214.2(e) (1998).

enter into some type of trade agreement, this visa category may apply.¹⁰⁹ While this program has the potential to increase the aggregate number of Cubans working in the United States, the portion of the program that gives immigration benefits to investors serves U.S. interests largely at the cost of Cuba's development. Because the money of Cuban investors could be better spent in Cuba, the E-class visa program would not be helpful to facilitate Cuba's transition. Also, as a practical matter, it would be some time before Cuban entrepreneurs developed the means to qualify as investors. On the other hand, the trader portion of the E-visa category is arguably beneficial to both countries and generates jobs in both. Therefore, as a policy matter, it should be encouraged.

e. Other Visa Categories Allowing Cubans to Work in the United States

The U.S. government may determine that the national interest of the United States is best served by allowing more Cubans to enter and work in this country temporarily during the transition than would be possible under the existing immigration system. If such a decision is reached, Congress may implement several measures, including the following:

- Increase the H-1B quota to allow the issuance of more visas to skilled or professionally trained Cuban workers. For example, inspired by the need to attract technical workers, at the time of this writing, Congress was considering a bill entitled "The American Competitiveness Act."¹¹⁰ This bill recognizes that there is a serious shortage of highly skilled workers in the United States, and that this shortage threatens the competitiveness of American businesses. Although the bill is inspired by the need to attract more technical workers from Asia, Cubans would also benefit from an increase in the number of H1-B visas available.
- Establish a TN-like visa category for Cubans. This would allow Cubans to enter the United States independently of whether the H-1B numerical limit has been reached. Although Congress can legally provide for as many special TN-like visas as it deems appropriate, it may be faced with strong protests from Mexico if the number of visas set aside for Cubans is set at or above Mexico's limit of 5,500.
- Develop special visa programs for those foreign visitors with special knowledge or ability. Generally, "O" visas allow scientists, athletes or artists of

109. It would be important to Cuba's economic recovery to negotiate a trade agreement with the United States as early in the transition as possible. See MATIAS F. TRAVIESO-DIAZ, *THE LAWS AND LEGAL SYSTEM OF A FREE-MARKET CUBA — A PROSPECTUS FOR BUSINESS* 183-84 (1997).

110. S. 1723, 105th Cong. (1998). A similar bill containing somewhat different provisions (the "Temporary Access to Skilled Workers and H-1B Nonimmigrant Program Improvement Act of 1998," H.R. 3736) is also pending in the House. The sponsors of the two bills, Rep. Lamar Smith (R-Texas) and Sen. Spencer Abraham (R-Mich.) announced on July 24, 1998 that they had agreed on a compromise settling their differences over the inclusion of new requirements aimed at protecting U.S. workers. Smith's bill (H.R. 3736) would have required employers seeking to hire under the H-1B program to attest that they had first attempted to recruit U.S. workers for the jobs and that they had not laid off U.S. workers from the jobs they were seeking to fill with foreign workers. Under the compromise, the current 65,000 cap would be raised to 95,000 in 1999, 105,000 in 2000, and 115,000 in 2001 and 2002. *BNA DAILY REP'T FOR EXECUTIVES*, Jul. 27, 1998. President Clinton, however, has threatened to veto the bill on the grounds that it does not provide adequate training and protection for American workers. William Branigin, *House Sets Aside Bill to Allow Hiring of More Foreign Workers*, WASHINGTON POST, Aug. 1, 1998, at A2.

extraordinary ability to work in the United States.¹¹¹ O visas may prove useful to talented Cubans who do not qualify for E, H or L visas, but who might benefit from working temporarily in the United States. Also, in addition to the O visas, other programs may be developed to encourage the immigration of former government employees who may possess valuable or sensitive information deriving from Cuba's relationship with the former Soviet Union. To the extent that the United States has an interest in obtaining or protecting such information, it may consider allowing those officials to enter the United States under "O"-type visas.¹¹²

All of the above initiatives have the potential to help both Cuba and the United States. They provide a means for Cubans to work in the United States, but only to the extent that those workers are needed to further economic interests. These initiatives should be less controversial than other immigration issues in that they should not deprive U.S. workers of jobs and are consistent with the interests of the U.S. economy.

5. *Other Categories of Temporary Visas*

a. *Non-Immigrant Business Travel*

If Cuba is to make a successful transition, it is essential that Cuban business people be able to travel unimpeded to the United States. Whether it be to attract foreign investors, negotiate with U.S. businesses or recruit skilled workers, Cubans need to be able to enter and exit the United States with relative ease to conduct business. These needs should be adequately met by the existing B-1 visa program, which allows travelers to enter the United States temporarily to engage in business if they comply with certain procedural requirements. As long as consular officers do not find that potential travelers have the intent to settle in the United States, B-1 visas should be routinely granted to all Cubans having legitimate business to conduct in the United States.¹¹³

b. *Educational and Cultural Exchange Programs*

In order to help meet Cuba's immediate need for trained professionals during the transition, the United States might establish a special type of education-related visa that Cubans working or studying in certain fields could obtain. A program could be created that would allow Cuban workers and students to enter the United States temporarily to acquire skills and experience determined to be lacking in Cuba. Cubans who fell into one of the categories on the "skills list" would be eligible for a "J" type of visa as long as they were sponsored by a U.S. citizen, lacked intent to abandon their residence abroad, and agreed to leave the

111. 8 U.S.C. §1101(a)(15)(O) (1998); 8 C.F.R. § 214.2(o) (1998).

112. A similar program was implemented following the collapse of the Soviet Union, under which an immigration category was established to allow scientists or engineers of the former Soviet Union who had "expertise in a [defense-related] high-technology field" to more easily enter the United States. See 8 C.F.R. § 204.10 (1997).

113. Visitors traveling with a B-1 visa cannot intend to work or settle in the United States. 8 U.S.C. § 1101(a)(15)(B) (1998); 8 C.F.R. § 214.2(b) (1997).

United States for at least two years following the expiration of their visa.¹¹⁴ (These requirements are designed to increase the probability that foreign workers will use their newly acquired skills in their home countries.) The broad guidelines for granting J visas provide ample leeway to tailor a program specifically to meet the needs of a free-market Cuba.¹¹⁵

6. *Handling of Illegal Immigrants*

U.S. immigration policy will also have to address the fact that a free and open Cuba will give rise to increased illegal immigration. The U.S. is currently negotiating with Mexico about ways to strengthen border security and decrease illegal immigration. However, the problem that exists with Mexico (and potentially with Cuba) is that the interests of the United States and Mexico are directly opposed in this area. Mexico has neither the money nor the interest to curb the illegal immigration of workers (generally of lower socio-economic classes) for whom it cannot provide jobs.

A similar situation is likely to arise in Cuba. Indeed, with the large population of Cuban-Americans and Cuban immigrants already in the United States, the opportunities for Cuban visitors to stay in this country after the expiration of their visas are likely to be large, potentially undercutting other programs intended to provide an orderly flow of temporary visitors. This is a problem that will need to be faced through increased enforcement action by the U.S. immigration authorities.

7. *Legislative Approach*

Immigration is currently an extremely explosive issue in the United States, especially in states like Florida, where many immigrants tend to settle. Regardless of the economic rationale for allowing Cuban workers in the United States, Congress is certain to have difficulty generating support for any legislation or agreement that substantially increases the number of Cubans who qualify for visas and that appears to threaten U.S. jobs. The best strategy may be to link the expanded temporary work visa provisions with strong entry controls and anti-illegal immigration policies. Such a strategy would allow all sides of the immi-

114. Currently, immigration laws define a "J-1" category of exchange visitor, who is an alien, as follows: One who has a residence in a foreign country which she has no intention of abandoning; a bona fide student, scholar, trainee, teacher, professor, research assistant, specialist, or leader in a field of specialized knowledge or skill; or other person of similar description, who is coming temporarily to the United States as a participant in a program designated by the Director of the United States Information Agency, for the purpose of teaching, instructing or lecturing, studying, observing, conducting research, consulting, demonstrating special skills, or receiving training. 8 U.S.C. § 1101(a)(15)(J) (1998).

115. Examples of J-1 programs currently in existence include: (1) Students may enter the United States to complete up to 24 months of post-secondary study and 18 months of practical training work authorization upon completion of their studies. Post-doctoral training is permitted for 36 months after the degree is awarded; (2) Professors, researchers and international and government visitors may be granted a J-1 visa to participate in conferences, workshops, etc.; (3) Alien physicians may take a residency of up to 7 years; (4) Camp counselors, teachers, specialists and au pairs may work temporarily in the United States. 22 C.F.R. § 514 (1998).

gration dispute to feel they have accomplished their aims, and might result in the enactment of useful legislation.

C. Cuba's Immigration Policy In A Post-Transition Environment

1. Introduction

Since the first wave of Cubans immigrants arrived in the United States, a desire to return to their native country has nested in the hearts of many Cubans in exile.¹¹⁶ While many Cuban-Americans believe that they will be unable to return to their homeland while the Castro regime is in power, there has been movement on the Cuban side to facilitate short-term visits to the country by Cubans residing abroad.¹¹⁷ In late 1978, the policy towards Cuban exiles experienced a turn for the better when Cuba lifted restrictions on émigré travel to Cuba.¹¹⁸ In 1994, additional assurances were given that no action would be taken against those Cubans who returned after attempting to immigrate illegally.¹¹⁹ However, those who have left Cuba illegally still have reason to fear reprisal and imprisonment from the Cuban government despite its agreement to cease such punishment. Cuba's "illegal exit" and "illegal entry" laws remain in effect and the government's assurances of non-punishment are insufficient to ensure the safety of exiles who return to Cuba.

Upon its transition to democratic rule, Cuba is expected to repeal most, if not all, of the existing travel restrictions and allow Cuban exiles to return freely to the island.¹²⁰ Once the travel restrictions on Cuban exiles seeking to return to

116. In a survey conducted by a Spanish-language television station in Miami, "one in five Cubans in the metropolitan area said they would return home, although the results are regarded . . . more as coming from the heart than the head." Laura Parker, *Radio Marti Director Ousted as Exiles Discuss Returning to Cuba*, WASHINGTON POST, Mar. 13, 1990, at A3. In economic terms, Cuban-Americans contribute hundreds of millions of dollars annually in remittances to their impoverished relatives in the island. U.S. Dep't of State, BACKGROUND NOTES: CUBA 5 (Apr. 1998).

With the Pope's visit to Cuba in January 1998, many Cuban expatriates saw a glimmer of hope for reunification with their Cuban relatives. Indeed, as one reporter summarized, Pope John Paul II's pilgrimage sought, among other goals, Cuban reunification. "John Paul's trip to Cuba was aimed not just at persuading Cuban leader Fidel Castro to open up his socialist regime, or at scolding U.S. authorities for a devastating 37-year-old embargo, but also to help unify 14 million Cubans and Cuban-Americans. . . ." Alfredo Corchado, *Cubans, Cuban-Americans see Hope for Reconciliation in Visit: John Paul's Message Stresses Forgiveness*, DALLAS MORNING NEWS, Jan. 26, 1998, at 10A.

117. The United States, however, continues to impose restrictions on travel to Cuba by exiles. The Cuban Asset Control Regulations ("Regulations"), promulgated by the Office of Foreign Assets Control ("OFAC") of the U.S. Department of the Treasury, implement the U.S. trade embargo against Cuba. Cubans who have become U.S. citizens or permanent residents are prohibited under current U.S. law from traveling to Cuba without obtaining a license from OFAC. According to the Regulations, licenses are only granted to journalists, official government travelers, members of an international organization of which the United States is also a member, and persons traveling once a year to visit close relatives in Cuba. See 31 C.F.R. § 515.560 (1998).

118. Gonzalez-Pando, *supra* note 11, at 56.

119. Bonavia, *supra* note 78, at 1040.

120. On November 6, 1995, Cuba loosened travel restrictions by allowing Cuban émigrés to remain in Cuba indefinitely or travel back and forth as many times as they want as long as they renew their visitors permit every two years. Exiles living in the United States cannot take advantage of these relaxed Cuban regulations because U.S. law permits them to travel to Cuba only by obtaining a specific license from OFAC, unless they visit close relatives. Tracy Eaton, *Cuban Exiles Win Right to Return Home*, NEW ORLEANS TIMES-PICAYUNE, Nov. 7, 1995, at F11.

their native country are lifted by both the United States and Cuba, the demand for opportunities to travel to Cuba is likely to be enormous.¹²¹ Such travel is likely to be limited only by the physical ability to transport and accommodate the visitors in Cuba. A massive reverse exodus raises important policy questions for a future transition government. The next section explores some of these questions.

2. Cuban Policy Regarding Permanent Immigration of Cuban Expatriates

The mass return of Cuban exiles to the island on a permanent basis is likely to be fraught with difficulties. One obstacle to the repatriation of the Cuban exiles is their legal status upon returning to Cuba. Presently, the Cuban Constitution provides that one loses Cuban citizenship by becoming a citizen of a foreign country, and holding a dual citizenship is not allowed.¹²² Thus, unless the new constitution or other transition period statute provides otherwise, those Cuban émigrés who have become naturalized citizens of other countries, including the United States will have to renounce the other country's citizenship and apply for reinstatement of their Cuban citizenship.¹²³

Whether as reinstated Cuban citizens or as resident aliens, a large number of Cuban expatriates, mainly Cuban-Americans, are likely to want to settle permanently on the island. This raises the question of whether the Cuban economy will be able to accommodate a mass return of expatriates. In the post-transition period of Nicaragua, for example, the president voiced concerns over repatriation and the inability of its country's fragile economy to support a mass return of exiles.¹²⁴ Cuba's economy is also likely to be in severe distress at the time of

121. Cuban exiles are eager to return to the island for various reasons, which include reuniting with relatives, revisiting their birthplace, and contributing to its political and economic growth. Achy Obejas, *Miami, Havana: Jealous Rivals Pope's Visit Pushes Resentments to Fore*, CHICAGO TRIBUNE, Jan. 19, 1998, at N1.

122. CONSTITUCION DE LA REPUBLICA DE CUBA, *supra* note 9, art. 32.

123. It has been argued, based on the presumed continued vitality of Cuba's 1940 Constitution (which, in Article 15(a), states that those Cubans who acquire another country's citizenship lose their status as Cubans), that this automatic loss of citizenship should not apply to Cuban exiles who have opted to become citizens of their country of residence. The rationale for this argument is that to do so would bar the exiles from "participating in the Cuban political process." Jose D. Acosta, *El Marco Jurídico-Institucional de un Gobierno Provisional de Unidad Nacional en Cuba*, in CUBA IN TRANSITION — PAPERS AND PROCEEDINGS OF THE SECOND ANNUAL MEETING OF THE ASSOCIATION FOR THE STUDY OF THE CUBAN ECONOMY 61, 82 (August 1992). However, the opposite argument appears more persuasive. This argument states that the provision mandating automatic loss of Cuban citizenship for those who opt to become citizens of another country should remain in effect precisely to protect the Cuban political process from undue influence by those who have sworn allegiance to a foreign country. In this context, it is instructive to recall that the process for regaining Cuban citizenship that was in place before 1959 was anything but automatic. It required a formal re-application for citizenship, followed by one year of continuous residence in Cuba, followed by another formal appearance before a public official, in order for the reinstatement of citizenship to become effective. REGLAMENTO, *supra* note 9, art. 35.

124. With an estimated per capita income of \$465, Nicaragua is the second poorest country in the Western Hemisphere. U.S. Dep't of State, NICARAGUA COUNTRY REPORT ON HUMAN RIGHTS PRACTICES FOR 1997, released by the Bureau of Democracy, Human Rights, and Labor, January 30, 1998. After the Sandinistas were removed from power, the Nicaraguan government reacted to its

the transition. However, unlike other groups of returning émigrés, Cuban-Americans have largely achieved a high standard of living and are unlikely to become a burden on Cuba's economy should they choose to return permanently to the island. To the contrary, they will be capable of returning with capital to invest in Cuba.¹²⁵ Nonetheless, a transition Cuban government will need to impose admission criteria based on absence of criminal record and financial self-sufficiency before allowing Cuban-Americans or other foreign nationals to settle permanently on the island.¹²⁶

3. Cuban Policy Toward Non-Immigrants

Cuba must develop an immigration policy that will promote the movement of goods, ideas and people across its borders. Once it becomes apparent that Cuba intends to liberalize its economy and to commit to a more democratic form of government, foreign investors and Cuban expatriates will seek to visit Cuba in substantial numbers. During the transition, it is essential that Cuba encourage such visits by developing an open and efficient immigration policy. That policy should include the following features:

- Cuban expatriates who are citizens of other countries should be treated as "foreign investors," so that they are eligible for any special benefits given to such investors.¹²⁷ Even though granting Cuban expatriate investors privileges unavailable to resident nationals could lead to resentment from people on the island, this is a necessary consequence of the likely treatment as aliens of those who have lost their Cuban citizenship by becoming citizens of other countries.

economic dilemma by pleading for hundreds and thousands of exiles to return and rebuild the country: on December 16, 1996, "President-elect Arnaldo Aleman . . . invited hundred of thousands of Nicaraguans abroad to return to their country and said they would be allowed to bring back their money and belongings tax-free." REUTERS, *Nicaraguan Exiles Told to Return, Bring Assets*, FT. LAUDERDALE SUN-SENTINEL, Dec. 17, 1996, at A16. Nevertheless, the Nicaraguan government realized that its weak economy could not support a mass return of its exiles, even with the economic assistance that was given by the U.S. Therefore, Nicaraguan President Aleman extended a plea to the United States, calling for the U.S. government not to begin a mass deportation of Nicaraguans living illegally in the United States, and cautioned that the exile return must be gradual. *Id.* The mass repatriation concerns among Central American leaders dates back to the November, 1994 enactment of California's Proposition 187. See, e.g. Tracy Wilkinson, *Central America; Leaders Worry: After Prop. 187, The Deluge; Latin Presidents Fear a Massive Return of Citizens. They Hope to Lobby Clinton at Upcoming Miami Summit, American Leaders Fear Mass Return to Their Nations*, L.A. TIMES, Nov. 26, 1994, at A2.

125. The poverty rate for people of Hispanic origin was 30.3% in 1995 and 29.4% in 1996. U.S. Census Bureau, March Current Population Survey, Poverty 1996. In contrast, only 16.5% of all Cuban immigrants fall below the poverty line. See Pedraza, *supra* note 8, at 323.

126. While it may be argued that Cuba may not deny admission into the country to those of its nationals residing abroad, it would appear that, at least with respect to those who have lost their Cuban citizenship, Cuba has the right to impose and apply immigration standards to prevent unfit persons from settling in the country. Indeed, before the Revolution, Cuba denied the right to acquire its citizenship to individuals who had been convicted of a felony, those of "dubious morality," and those who advocated doctrines or principles "incompatible with the current organization of the Cuban state or with its democratic regime and form of government." REGLAMENTO, *supra* note 9, arts. 25, 29.

127. See generally Matias F. Travieso-Díaz & Steven R. Escobar, *Cuba's Transition to a Free-Market Democracy: A Survey of Required Changes to Laws and Legal Institutions*, 5 Duke J. Comp. & Int'l L. 379, 414-15 (1995).

- Foreign investors should have the ability to employ foreign personnel, particularly for key positions.¹²⁸ The Cuban government should therefore refrain from unduly limiting the number of foreign personnel a company can bring into the country, or imposing unreasonable time limits on their visas. It is likely that there will be an acute shortage of skilled management personnel in Cuba during the transition to a market economy, so foreign managers will be necessary to operate foreign investors' enterprises until the local population acquires the requisite management and business skills.¹²⁹ Allowing foreign managers to enter and work in Cuba serves a dual purpose. *First*, it introduces Cuban workers to modern work practices necessary to compete in the global marketplace. *Second*, it assures foreign investors that they will have the personnel that they need to effectively operate their businesses.
- The visa structure should be open and simple to administer. In contrast to the United States, Cuba will not be affected by large-scale migrations of uneducated or impoverished workers, at least not from the United States. As a result, Cuba should eliminate all visa requirements for short-term pleasure or business trips originating in the United States and other developed countries.¹³⁰ Doing away with the need for visas avoids expending scarce resources in the administration of the immigration program, and allows foreign investors easy access to the island. While Cuba should seek reciprocal arrangements with the United States and other countries, the importance of foreign investment to Cuba is such that Cuba should unilaterally eliminate visa requirements even if reciprocal treatment is not granted by the United States and other developed countries.¹³¹
- The Cuban visa structure should not establish special visa categories for particular classes of foreign investors. An example of a special type of visa is the "alien entrepreneur" visa program in the United States, which reserves a certain number of immigrant visas for investors "who establish new commercial enterprises in the United States, invest at least \$1,000,000 . . . and employ at least ten Americans."¹³² This type of special incentive is warranted only if a restrictive business visa structure is in place, which should not be the case in Cuba during the transition to a market economy; both large and small investors should be allowed easy access to the island.

IV.

CONCLUSIONS

For the last forty years, the United States and Cuba have used immigration as a foreign policy weapon. For most of that period, the interests of both countries, although diametrically opposed in most respects, coincided in encouraging large numbers of disaffected Cubans to leave the island and come to the United States. The arriving Cubans, whether they followed the legal procedures set by

128. See IBRAHIM F. I. SHIHATA, *LEGAL TREATMENT OF FOREIGN INVESTMENT: THE WORLD BANK GUIDELINES* 155, 159 (1993).

129. Matias F. Travieso-Diaz & Alejandro Ferrate, *Recommended Features of a Foreign Investment Code for Cuba's Free Market Transition*, 21 N.C. J. INT'L LAW & COM. REG. 511, 557 (1996).

130. There are several countries in close proximity to Cuba having large impoverished populations. Unskilled migrants from those countries, under favorable conditions, may seek to relocate in Cuba. For that reason, some sort of visa structure must be retained to control the entry of immigrants who may become public charges.

131. See *Opening the Door for Business Travel to a Free-Market Cuba*, 1 FREE MARKET CUBA BUS. J. 8 (Shaw, Pittman, Potts & Trowbridge), Spring/Summer 1992, at 7.

132. 8 U.S.C. § 1153(b)(5) (1990).

both countries or came without observing legal formalities, were received in the United States with open arms and were helped along in becoming part of American society.

After 1994, the interests of both Cuba and the United States changed and, though still generally opposed, again coincided in their approach to immigration: no longer did either country have an interest in fostering a mass exodus of Cubans to the United States. Thus, the current arrangement was reached. It contemplates a limited, orderly migration of Cubans towards the United States under established visa procedures, with relatively infrequent instances of "illegal immigrants" attempting (and in some cases successfully making) an unauthorized escape to the U.S. shores.

While the current situation is stable, there is no guarantee that this stability will endure. As has already happened repeatedly, events in Cuba could at any moment upset this delicate balance that has been achieved. As long as there is an impoverished population in Cuba and a government that uses emigration as an escape valve to rid itself of malcontents, there is always the possibility that another Camarioca or another Mariel will occur, testing the resolve and the moral principles of whoever is running the U.S. government at the time.

When Cuba makes the long-awaited transition to a free-market, democratic society, the governments of both countries will have the opportunity to develop, for the first time in half a century, immigration policies that are not dictated by political considerations but by the desire to contribute to Cuba's economic reconstruction. At that moment, and for a period whose duration will be determined by the length of the transition, the United States should put in place special programs such as those described in this paper. These programs should allow qualified Cubans to enter the United States on a temporary basis and make an economic contribution here, while preparing them to take their newly developed skills and economic resources back to the island. This form of assistance to Cuba's transition will be perhaps as important and considerably less costly than the economic aid programs that have already been promised and will undoubtedly be made available to Cuba by the United States and other international donors.¹³³

Cuba must help the process along by establishing an open and efficient immigration policy that provides the greatest possible ease of transit in and out of the country to business people, consistent with maintaining public order and security. No artificial limitations should be placed on the number of people who travel from the United States to Cuba, on the length of their stay, or on the activities they are allowed to conduct on the island, including the hiring of domestic and foreign personnel. The legal status of Cuban-Americans who seek to return to Cuba should also be addressed, but however this thorny issue is solved, Cuba should not discourage the flow of people, goods and ideas from the Cuban-American community to the island. Specific measures should be taken to

133. Letter to Congressional Leaders Transmitting the Report Entitled "Support for a Democratic Transition in Cuba," 11 WEEKLY COMP. PRES. DOC. 112 (Jan. 28, 1997); see 22 U.S.C. § 6062 (1998).

encourage foreign investors from all over the world to travel to Cuba to investigate business prospects and establish operations. In short, Cuba should take all reasonable steps to ensure that immigration does not become another obstacle in what is likely to be a difficult road to democracy and economic stability.