

## Legal Sidebar

# Rescission of the Wet-Foot/Dry-Foot Policy as to Aliens from Cuba Raises Legal Questions

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On January 12, 2017, the Obama Administration [announced](#) certain changes in policy that could make it more difficult for some Cuban citizens or nationals to enter and remain in the United States. Specifically, the Administration announced that it was rescinding the [“wet-foot/dry-foot” policy](#), as well as several other immigration policies that apply only to citizens or nationals of Cuba. Under the wet-foot/dry-foot policy, Cubans seeking to enter the United States who were interdicted at sea were generally returned to Cuba, while those who had reached U.S. territory were “paroled” into the United States. Cubans who were so paroled were generally [eligible to adjust](#) to lawful permanent resident (LPR) status after one year. LPRs [may generally apply](#) to become U.S. citizens after five years.

This Sidebar provides answers to frequently asked questions about the legal implications of the Obama Administration’s changes in policy as to Cuban citizens and nationals.

### **Does the new policy run afoul of the Cuban Adjustment Act?**

The wet foot/dry foot policy embodied [agreements](#) entered into between the United States and Cuba in 1994 and 1995, which sought to normalize migration between the two countries. Collectively, the accords made provision for some *legal* emigration from Cuba and immigration to the United States. The accords also called for both countries to take steps to deter *unauthorized* migration. One step involved the United States generally returning Cuban citizens or nationals who were interdicted at sea to their home country. On the other hand, Cubans who reached “U.S. territory”—a sometimes [contested term](#) in this context—were to be paroled into the United States pursuant to [Section 212\(d\)\(5\)](#) of the Immigration and Nationality Act (INA). Section 212(d)(5) generally authorizes the Executive to permit the entry into the United States of aliens “under such conditions as [it] may prescribe” for “urgent humanitarian reasons or significant public benefits” for a period of time that can vary, depending upon the purpose of the parole. Aliens who are so paroled [are not seen](#) to have been “[admitted](#)” to the country. They [lack a legal immigration status](#), although they are deemed to be lawfully present in the country while their period of parole lasts.

The [Cuban Adjustment Act](#) (CAA) is a 1966 enactment that gives the Executive discretionary authority to adjust certain Cuban citizens and nationals to LPR status. Specifically, the CAA provides for the adjustment to LPR status of Cubans who, among other things, have been (1) “inspected and admitted” into the United States as nonimmigrants *or* (2) paroled into the country. (As used here, the term “nonimmigrant” generally encompasses aliens admitted to the United States pursuant to one of the [various “lettered” visas](#) (e.g., [F visas for students](#))). Such adjustment may be granted at any time after the alien has been physically present in the United States for one year.

The CAA is silent as to which Cubans are to be paroled into the United States. As such, it does not purport to require or otherwise address the substance of the wet-foot/dry-foot policy (i.e., that Cubans interdicted at sea be returned to Cuba, while those who reach U.S. territory be paroled into the country).

### **Will Cubans be subject to expedited removal?**

[Section 235\(b\)](#) of the INA generally calls for “arriving aliens” who have no immigration documents or fraudulent

immigration documents to be placed in expedited removal proceedings. (“[Arriving aliens](#)” are applicants for admission who are coming, or attempting to come, into the United States at a port of entry.) Expedited removal proceedings are streamlined ones conducted before immigration officers, unlike the formal proceedings conducted before immigration judges under the authority of [INA § 240](#).

Prior to the Obama Administration’s change in policy, Cuban citizens and nationals apprehended at the U.S. border or a port of entry without the requisite documents had generally not been subject to expedited removal proceedings or to other types of removal proceedings (e.g., proceedings under INA § 240). Cubans arriving by aircraft were expressly exempted from expedited removal proceedings pursuant to [INA § 235\(b\)\(1\)\(F\)](#), which provides that expedited removal proceedings:

shall not apply to an alien who is a native or citizen of a country in the Western Hemisphere with whose government the United States does not have full diplomatic relations and who arrives by aircraft at a port of entry.

Other Cubans, however, were effectively exempt from removal proceedings because of the wet-foot/dry-foot policy, which provided that Cuban citizens or nationals who reached U.S. territory would generally be paroled into the country, rather than being subjected to any type of removal proceedings.

In its January 12, 2017, actions, the Obama Administration not only [rescinded](#) the wet-foot/dry-foot policy, but also [announced](#) that the protections of INA § 235(b)(1)(F) no longer apply to Cuban citizens or nationals, given the resumption of diplomatic relations between the United States and Cuba. As such, “arriving aliens” from Cuba who lack the requisite documents *could* be subject to expedited removal in the future. However, it is important to note that while INA § 235(b) states that certain aliens “shall” be subject to expedited removal proceedings, the Executive has been seen to have discretion to use either formal proceedings under INA § 240 or expedited proceedings under INA § 235(b) against such aliens. In its 2011 decision in [Matter of E-R-M- & L-R-M-](#), the Board of Immigration Appeals (BIA) noted the use of “shall” in INA § 235(b) and observed that “shall” is ordinarily construed to indicate mandatory action. However, it declined to find that the Executive was therefore precluded from using formal removal proceedings under INA § 240 against aliens who could have been subject to expedited removal proceedings under INA § 235(b). The BIA reached this conclusion, in part, on the grounds that decisions about what type of removal proceedings to use against individual aliens have historically been seen as within the Executive’s [prosecutorial or enforcement discretion](#).

### **Under the new policy, is there any way that Cubans who lack the requisite immigration documents could remain in the United States and become LPRs?**

Even after the Obama Administration’s change in policy, Cubans who qualify for asylum under [INA § 208](#) could obtain LPR status. Asylum is akin to [refugee status](#), but is granted to aliens who are physically present at the U.S. border or a port of entry, or within the United States, as opposed to a foreign country. To qualify for asylum, aliens must show they have [experienced persecution](#), or have a well-founded fear of persecution, in their country of nationality or last habitual residence on account of their race, religion, nationality, political opinion, or membership in a particular social group. They must also not be among those aliens barred from asylum under [INA § 208](#) (e.g., aliens who have persecuted others, or aliens for whom there are reasonable grounds to regard them as a danger to U.S. security). Arriving aliens who are [subject to expedited removal](#) must show that they have a [“credible fear of persecution”](#) as a necessary first step to obtaining asylum. Other aliens may simply indicate an intention to apply for asylum. Aliens who are granted asylum [may generally apply](#) for LPR status after one year.

Also, Cubans who are paroled into the United States on some basis *other than* the former wet-foot/dry-foot policy could still obtain LPR status pursuant to the [CAA](#). For example, the [January 12, 2017, announcement](#) by the Obama Administration rescinded two routes by which Cubans were formerly paroled into the United States, (1) the wet-foot/dry-foot policy and (2) the [Cuban Medical Professional Parole Program](#). It did not purport to restrict other routes by which Cuban citizens or nationals could be paroled into the United States, such as the [Cuban Family Reunification Parole Program](#).

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