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## Fleeing Cuba: A Comparative Piece Focused on Toro and the Options Victims of Domestic Violence Have in Seeking Citizenship in the United States and Canada

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# FLEEING CUBA: A COMPARATIVE PIECE FOCUSED ON *TORO* AND THE OPTIONS VICTIMS OF DOMESTIC VIOLENCE HAVE IN SEEKING CITIZENSHIP IN THE UNITED STATES AND CANADA

Kiersten M. Schramek\*

## ABSTRACT

The United States Court of Appeals for the Eleventh Circuit decided a case on February 4, 2013 that has undoubted international implications. *Toro v. Sec’y* dealt with the language of the Cuban Refugee Adjustment Act of 1966 (CAA) and the provisions of the Violence Against Women Act (VAWA).

This article focuses on how and why the court reached its decision. It analyzes the conflict between the “plain language” of the CAA and its statutory construction to rebut the court’s assertion that the VAWA self-petition was irrelevant in this case, and ultimately, offer an alternative analysis to this case.

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This article also explores Canadian immigration law and demonstrates the difference in that nation's law, as applied to domestic violence survivors, from United States immigration law. Finally, this article discusses how this precedent will affect the future of immigration law and its affect on natives of other countries.

## I. INTRODUCTION

In 1972, the Supreme Court upheld, in *Kleindienst v. Mandel*, Congress's plenary authority over immigration matters.<sup>1</sup> "The power to regulate immigration is unquestionably exclusively a federal power."<sup>2</sup> In *Chae Chan Ping v. United States*, the Supreme Court ruled that the legislative authority to exclude aliens from the United States was inherent in sovereignty and thus, subject to almost no constitutional limitation.<sup>3</sup>

In cases where there is no constitutional issue, courts frequently use canons of statutory construction to help interpret

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<sup>1</sup> *Kleindienst v. Mandel*, 408 U.S. 753, 765-67 (1972) (noting that Congress has plenary control over admission and exclusion of aliens.); *see also* *Edye v. Robertson*, 112 U.S. 580 (1884) (holding that Congress's authority over immigration matters derives from the Foreign Commerce Clause in Article I.); *United States v. Hernandez-Guerrero*, 963 F. Supp. 933, 936 (1997) [hereinafter "*Hernandez-Guerrero*"] (Not only does Congress have the authority to regulate immigration, but Congress exhibited an intent to preemptively occupy the immigration sphere by passing the comprehensive, detailed regulatory scheme embodied in the Immigration and Nationality Act, § 101 et seq., as amended, 8 U.S.C. § 1101 et seq.).

<sup>2</sup> *De Canas v. Bica*, 424 U.S. 351, 354-55 (1976); *Hernandez-Guerrero*, 963 F. Supp. at 936 ("Moreover, the States do not have the power to regulate immigration.").

<sup>3</sup> *Chae Chan Ping v. United States*, 130 U.S. 581, 604 (1889) (quoting Chief Justice Marshall in *The Exchange v. McFadden*, 11 U.S. 116, 136 (1812), "The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.").

statutes.<sup>4</sup> The courts are bound by Congressional intent because Congress is the legislative body of government.<sup>5</sup> If a court believes that the meaning is “clear” and that Congress has expressed its intent, the court will interpret the statute accordingly.<sup>6</sup> Congressional intent of a specific provision, however, is often difficult, if not impossible to determine.<sup>7</sup>

There is a lesser-known canon of construction in immigration law.<sup>8</sup> The “rule of lenity” directs that when there are statutory ambiguities in deportation provisions, it be resolved in favor of the noncitizen.<sup>9</sup> “The Supreme Court explicitly created the immigration rule of lenity in 1948 in a case that did not raise constitutional concerns.”<sup>10</sup> Its reasoning for applying the rule of lenity, as stated in *Fong Haw Tan v. Phelan*, was that “because deportation is a drastic measure and at times the equivalent of banishment or exile,” deportation provisions should be strictly construed in favor of the alien.<sup>11</sup> The Court stated “because the stakes are considerable for the individual, we [the Court] will not assume that Congress meant to trench

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<sup>4</sup> See Brian G. Slocum, *Canons, The Plenary Power Doctrine, and Immigration Law*, 34 FLA. ST. U. L. REV. 363, 372 (2007).

<sup>5</sup> See Jerry L. Mashaw, *Textualism Constitutionalism, and the Interpretation of Federal Statutes*, 32 WM. & MARY L. REV. 827, 828 (1991).

<sup>6</sup> See Slocum, *supra* note 4, at 370.

<sup>7</sup> See Mashaw, *supra* note 5, at 828 (stating that “attempts to link the interpretation of statutes to the commands of an identifiable legislature are doomed.”).

<sup>8</sup> Brian G. Slocum, *The Immigration Rule of Lenity and Chevron Deference*, 17 GEO. IMMIGR. L. J. 515, 522 (2003) (“The rule of lenity is commonly thought of as the ancient canon of statutory construction which directs that ambiguities in penal statutes be construed in favor of the defendant.”).

<sup>9</sup> The word “alien” is a term of art in immigration law. The Immigration and Nationality Act (INA) defines “alien” as “any person not a citizen or national of the United States.” 8 U.S.C. § 1101(a)(3). The term is used in federal statutes, regulations, and judicial opinions, among other things. Due to the term’s offensiveness to many, this Article will substitute “noncitizen” for “alien” and intends that the terms be understood as synonymous; see *also* *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) (discussing, but not applying, the doctrine.); Slocum, *supra* note 8, at 516; see STEPHEN H. LEGOMSKY, *IMMIGRATION AND REFUGEE LAW AND POLICY* 1 (3rd ed. 2002).

<sup>10</sup> Slocum, *supra* note 4, at 373.

<sup>11</sup> *Fong Haw Tan v. Phelan* 333 U.S. 6 (1948); *Id.*

2015]

## FLEEING CUBA

643

on his freedom beyond that which is required by the narrowest of several possible meanings of the words used.”<sup>12</sup> Some scholars have recognized that noncitizens typically have no political voice or access to political power and a desire to counteract possible prejudice against them and ensure that the political process treats them fairly is another reason for invoking the rule of lenity.<sup>13</sup>

The case discussed in this article, *Aracelys C. Toro v. Secretary, U.S. Department of Homeland, Director, U.S. Citizenship and Immigration Services, Chief, Administrative Appeals Office, Director, Vermont Service Center*, dealt with the language of the Cuban Refugee Adjustment Act of 1966 (CAA) and the provisions of the Violence Against Women Act (VAWA).<sup>14</sup> The crux of the case was the conflicting arguments with respect to the statutory construction of the CAA.<sup>15</sup> The court struck down Mrs. Toro’s statutory interpretation argument, denying her self-petition under section 1 of the CAA.<sup>16</sup>

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<sup>12</sup> *Fong Haw Tan*, 333 U.S at 10.

<sup>13</sup> See William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1032 (1989). Some would add that the immigration rule of lenity is also important for other reasons, including the following: (1) immigration policies disproportionately affect persons of color; (2) the INS has at times been guilty of bias and incompetence; (3) administrative abuse is rampant; and (4) noncitizens often doubt that the process is fair; see Kevin R. Johnson, *Race Matters: Immigration Law and Policy Scholarship, Law in the Ivory Tower, and the Legal Indifference of the Race Critique*, 2000 U. ILL. L. REV. 525 (2000) (stating that immigration law disproportionately affects persons of color.); Joan Fitzpatrick, *Race, Immigration, and Legal Scholarship: A Response to Kevin Johnson*, 2000 U. ILL. L. REV. 603 (2000); Kevin R. Johnson, *Responding to the "Litigation Explosion": The Plain Meaning of Executive Branch Primacy Over Immigration*, 71 N.C. L. REV. 413 (1993) (arguing that the INS has demonstrated an anti-immigrant, pro-enforcement bias and that deportation decisions, which affect life and liberty, should receive more scrutiny than other administrative decisions.).

<sup>14</sup> See generally *Toro v. Sec’y, U.S. Dep’t of Homeland Sec.*, 707 F.3d 1224 (11th Cir. 2013).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 1231.

II. BACKGROUND OF *TORO V. SEC'Y*

In *Toro v. Sec'y*, the petitioner Aracelys C. Toro was a native from Venezuela who came to the United States on a B-2 Tourist Visa, on January 7, 1996.<sup>17</sup> She married a Cuban citizen in Orlando, Florida, on March 28, 2001.<sup>18</sup> Later that year, Mr. Toro filed a Form I-485<sup>19</sup> for permanent resident status under section 1 of the CAA<sup>20</sup> and listed Mrs. Toro as a derivative beneficiary.<sup>21</sup> The requirements for permanent residency under section 1 of the CAA provide that any alien who is a native or citizen of Cuba and who has been inspected and:

- (1) admitted or paroled into the United States subsequent to January 1, 1959 and;
- (2) has been physically present in the United States for at least one year, may be adjusted by the Attorney General, in his discretion and under such regulation as he may prescribe, to that of an alien lawfully admitted for permanent residence if
- (3) the alien makes an application for such adjustment and;
- (4) the alien is eligible to receive an immigrant visa and;
- (5) is admissible to the United States for permanent residence.<sup>22</sup>

According to USCIS, Mr. Toro satisfied each of the elements of the CAA, except one. As such, Mr. Toro's Form I-485 application was denied on account of his criminal history.<sup>23</sup> This criminal history rendered him inadmissible to the United States and as a result, Mrs. Toro, as a derivative beneficiary, was denied permanent residency as well.<sup>24</sup>

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<sup>17</sup> *See Id.* at 1226.

<sup>18</sup> *Id.*

<sup>19</sup> This form is used by a person who is in the United States to apply to U.S. Citizenship and Immigration Services (USCIS) to adjust to permanent resident status or register for permanent residence.

<sup>20</sup> *Toro*, 707 F.3d at 1226.

<sup>21</sup> *Id.* (Section 1 of the CAA allows natives or citizens of Cuba *and their spouses* to become permanent residents of the United States after having been admitted or paroled into the country.).

<sup>22</sup> Cuban Adjustment Act, 89 P.L. 732, 80 Stat. 1161, at §1 [hereinafter CAA]; *Id.* at 1228.

<sup>23</sup> *Toro*, 707 F.3d at 1226.

<sup>24</sup> *Id.*

Years later, Mrs. Toro sought alternative relief. On January 31, 2008, Mrs. Toro self-petitioned as a battered spouse<sup>25</sup> of a Cuban alien, under section 1 of the CAA, to adjust her status to permanent lawful resident.<sup>26</sup> Section 1 of the CAA has been expanded by two laws amending the Violence Against Women Act of 1994.<sup>27</sup> The amendments allow the battered spouse “of any Cuban alien described in [section 1 of the CAA]” to self-petition for adjustment through what is commonly known as a “VAWA petition.”<sup>28</sup> As such, if successful, this could allow an individual to adjust his or her status to legal permanent residence.

However, USCIS denied Mrs. Toro’s application, stating that she did not have a qualifying relationship with a Cuban alien.<sup>29</sup> Mrs. Toro appealed to the Administrative Appeals Office (AAO), which affirmed USCIS’s denial of her application and dismissed her claim.<sup>30</sup> Relying on *Quijada-Coto*, decided in 1971 by the Board of Immigration Appeals, the AAO concluded that because Mr. Toro must be admissible to the United States and was not, Mrs. Toro had no qualifying relationship with a Cuban alien for purposes of section 1 of the CAA.<sup>31</sup>

In May 2011, Mrs. Toro filed a complaint in United States District Court for the Middle District of Florida<sup>32</sup> alleging that USCIS’s denial of her self-petition was contrary to law and

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<sup>25</sup> The case is devoid of any facts as to the abuse Mrs. Toro endured by Mr. Toro.

<sup>26</sup> *Toro*, 707 F.3d at 1226.

<sup>27</sup> Violence Against Women Act of 1994 (VAWA), Pub. L. No. 103-322, tit. IV, 108 Stat. 1902 (codified as amended in scattered sections of 8, 16, 18, 28 and 42 U.S.C.).

<sup>28</sup> CAA §1.

<sup>29</sup> Because Mrs. Toro’s husband had been denied permanent resident status, Mrs. Toro was not the “spouse of any alien described in section 1 of the CAA.” Mr. Toro would have had to be admissible and accepted in to the United States in order for Mrs. Toro to benefit under the VAWA Act.

<sup>30</sup> *Toro*, 707 F.3d at 1227.

<sup>31</sup> *Id.*; see also *Quijada-Coto* 13 I. & N. Dec. 740, 741 (B.I.A. 1971) (holding that Congress did not intend to apply the benefits of the CAA to the spouse of an alien described in the Act, when the alien himself has been denied adjustment of status under the act.).

<sup>32</sup> D.C. Docket No. 6:11-cv-00743-GAP-DAB.

congressional intent.<sup>33</sup> She also argued that the denial violated her equal protection rights under the Fifth Amendment.<sup>34</sup> Only the first allegation will be discussed in this article.

With respect to the complaint, the district court found that the CAA's plain language governed the case, and dismissed both counts for failure to state a claim.<sup>35</sup> Mrs. Toro appealed to the Eleventh Circuit.<sup>36</sup> In her appeal, Mrs. Toro contended that only the first two requirements of section 1 of the CAA were necessary for her to have grounds to apply for permanent legal resident status, and that the last three speak to guidance and discretion of the Attorney General.<sup>37</sup> Therefore, her husband did not need to satisfy the last three requirements.<sup>38</sup>

If the statute were interpreted in Mrs. Toro's favor, her husband would have satisfied the necessary requirements, and Mrs. Toro would have had grounds to obtain legal permanent resident status. The outcome of this case would have been reversed; however, the Eleventh Circuit rejected this statutory construction argument.

The Eleventh Circuit reasoned that if it finds the text of a statute ambiguous, and Congress has delegated rule-making authority to an agency, it will generally defer to the agency's exercise of its formal rule-making authority.<sup>39</sup> Therefore, because the Attorney General has vested the Board of Immigration (BIA) with power to provide, through precedential decisions, "clear and uniform guidance to the Service, the immigration judges, and the general public on the proper interpretation and administration of the Act and its implementing regulations," the BIA should be given deference as it gives

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<sup>33</sup> *Toro*, 707 F.3d at 1227.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 1228.

<sup>38</sup> *Id.*

<sup>39</sup> *See generally* *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (holding that if a statute was silent or ambiguous with respect to the specific issue, the question for a court was whether the agency's action was based on a permissible construction of the statute.).



2015]

*FLEEING CUBA*

647

ambiguous statutory terms concrete meaning through its case by case adjudication.<sup>40</sup> Therefore, the court affirmed the lower court's decisions and concluded that the statute's language is clear and consequently, Mrs. Toro did not have a qualifying relationship under section 1 of the CAA.<sup>41</sup>

This article will assess U.S. and Canadian immigration law and discuss that although Mrs. Toro could not successfully self-petition under the Violence Against Women's Act (VAWA) as a battered spouse, there is an alternative solution for Mrs. Toro: she can petition for a U-Visa. Then it will examine the future movement and immigration law reform.

### III. THE IMMIGRATION LEGAL SYSTEM IN THE UNITED STATES

There are three branches of immigration enforcement within the Department of Homeland Security. Immigration enforcement consists of: United States Citizenship and Immigration Services, United States Immigration and Customs Enforcement, and Customs and Border Protection.<sup>42</sup> Each agency has its own goals and priorities, but they also invariably overlap and work together.

The United States Citizenship and Immigration Services ("USCIS") oversees lawful immigration to the United States. USCIS secures America's promise as a nation of immigrants by providing accurate and useful information to its customers; granting immigration and citizenship benefits; promoting an awareness and understanding of citizenship; and ensuring the integrity of the immigration system.<sup>43</sup> Its "number one goal is strengthening the security and integrity of the immigration system through efficient and consistent adjudications of benefits, fraud detection, and enhanced customer ser-

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<sup>40</sup> *Toro*, 707 F.3d. at 1229.

<sup>41</sup> *Id.*

<sup>42</sup> See generally OFFICIAL WEBSITE OF THE DEPARTMENT OF HOMELAND SECURITY, <http://www.dhs.gov/> (last visited Apr. 26, 2015).

<sup>43</sup> See CITIZENSHIP AND IMMIGRATION OVERVIEW, <http://www.dhs.gov/topic/citizenship-and-immigration-overview> (Last visited Apr. 26, 2015).

vice.”<sup>44</sup> “USCIS promotes flexible and sound immigration policies and programs as well as immigrant participation in American civic culture.”<sup>45</sup> Its other core values are: integrity, respect, ingenuity, and vigilance.<sup>46</sup>

United States Immigration and Customs Enforcement (“ICE”) is the principal investigative arm of the United States Department of Homeland Security (“DHS”).<sup>47</sup> Created in 2003 through a merger of the investigative and interior enforcement elements of the U.S. Customs Service and the Immigration and Naturalization Service, ICE now has more than 20,000 employees in offices in all 50 states and 47 foreign countries. “ICE receives an annual appropriation from Congress sufficient to remove a limited number of more than 10 million individuals estimated to unlawfully be in the United States.”<sup>48</sup>

As a result, “ICE must prioritize which individuals to pursue.”<sup>49</sup> ICE sets “clear priorities that call for the agency's enforcement resources to be focused on the identification and removal of those individuals who have broken criminal laws; recently crossed our border; repeatedly violated immigration laws; or, are fugitives from immigration court.”<sup>50</sup> This ensures that resources are allocated where they are needed most.<sup>51</sup> For example, in 2011, ICE removed more than 396,000 individuals.<sup>52</sup> Ninety percent of these removals fell into one of ICE's enforcement priority categories.<sup>53</sup>

U.S. Customs and Border Protection (“CBP”) safeguards

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<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> See U.S. CITIZENSHIP AND IMMIGRATION SERVICES, <http://www.uscis.gov/aboutus> (last updated Apr. 26, 2015).

<sup>47</sup> See U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, <http://www.ice.gov/about/overview> (last visited Apr. 26, 2015).

<sup>48</sup> See IMMIGRATION ENFORCEMENT OVERVIEW, <http://www.dhs.gov/topic/immigration-enforcement-overview> (last visited Apr. 26, 2015).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

2015]

*FLEEING CUBA*

649

the American homeland, at and beyond the United States borders. “CBP officers and agents welcome all legitimate travelers and trade while preventing the entry of terrorists and their weapons.”<sup>54</sup> CBP officials enforce U.S. law, stopping narcotics, agricultural pests and smuggled goods from entering the country.<sup>55</sup> “They also identify and arrest travelers with outstanding criminal warrants.”<sup>56</sup> On a typical day last year, CBP officers and agents admitted 963,121 people at the nation’s 329 land, air, and seaports, and apprehended or arrested 1,053 people at or between [these] ports of entry.<sup>57</sup>

## IV. HISTORY OF THE CUBAN REFUGEE ADJUSTMENT ACT OF 1966

The Cuban Refugee Adjustment Act (“CAA”) was enacted in 1966 in response to the mass migration that occurred after the Cuban Revolution of 1959, and after repeated attempts by the U.S. government to overthrow the Castro regime failed.<sup>58</sup> American law defines a “refugee” as a person who, “owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his nationality, and is unable to or, owing to such fear, is unwilling to avail himself of the protection of that country.”<sup>59</sup>

Prior to 1966, the majority of Cubans who entered the United States did so without visas, background checks, or employment authorizations.<sup>60</sup> For these Cubans, once within the

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<sup>54</sup> See *Fiscal Year 2012 Statistics and Accomplishments*, U.S. CUSTOMS AND BORDER PROTECTION, <http://www.cbp.gov/newsroom/stats/fiscal-year-2012-statistics-and-accomplishments> (last visited Apr. 26, 2015).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> Kelly Knaub, *The Cuban Refugee Act 44 Years Later*, HAVANA TIMES (May 15, 2010), available at <http://www.havanatimes.org/?p=24150> (last visited Apr. 26, 2015).

<sup>59</sup> United Nations Convention Relating to the Status of Refugees of 1951, Apr. 22, 1954, 189 U.N.T.S. 150, at art. 1(A)(2), available at <http://www1.umn.edu/humanrts/instreet/v1crs.htm>.

<sup>60</sup> John Scanlan & Gilbert Loescher, *U.S. Foreign Policy, 1959-80: Impact*

United States, the process of obtaining an immigrant visa became a near impossible feat.<sup>61</sup> Cubans seeking permanent United States residency, like all other nationalities, were required to leave the United States, go back to Cuba, and apply for an immigration visa at a United States consulate.<sup>62</sup> Only after obtaining the immigrant visa could a Cuban return to the United States as a permanent resident, able to legally work and enroll in school.<sup>63</sup> In an effort to hasten the resettlement of the ever increasing, unemployable Cuban population, Congress drafted the Cuban Refugee Act, later renamed the Cuban Adjustment Act (CAA).<sup>64</sup>

Congressional authority to enact the CAA derived from the Constitution, which gives Congress the exclusive power to enforce laws governing United States immigration policy.<sup>65</sup> Because the Supreme Court has historically respected Congress's plenary power over immigration matters, Congress has broad discretion to determine that criteria by which refugees enter and are expelled from the United States.<sup>66</sup> Congress has provided several means throughout the years to help them enter the United States and establish permanent residence.

Refugees have two paths to permanent residence: overseas refugee programs and political asylum.<sup>67</sup> The CAA falls under

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*on Refugee Flow from Cuba*, 467 ANNALS AM. ACAD. POL. & SOC. SCI. 116, 118 (1983).

<sup>61</sup> Javier Talamo, *The Cuban Adjustment Act: A Law Under Siege?*, 8 ILSA J. INT'L & COMP. L. 707, 709–10 (2002).

<sup>62</sup> *Id.* at 709.

<sup>63</sup> *Id.* at 709-10.

<sup>64</sup> CAA, 89 P.L. 732, 80 Stat. 1161 (codified at 8 U.S.C. § 1255n (2006)) (The Act was amended by the Immigration and Nationality Act Amendments of 1976. Pub. L. No. 94-571, § 9, 90 Stat. 2703, 2707 (codified as amended at 8 U.S.C. § 1153 (2006)).

<sup>65</sup> See U.S. Const. art. I, §8, cl. 3; *Id.* at art. I, §8, cl. 4 (granting Congress the power to “establish a uniform Rule of Naturalization”).

<sup>66</sup> See, e.g., *Harisiades v. Shaughnessy*, 342 U.S. 580, 589-90 (1952) (upholding a congressional act requiring deportation of legal resident aliens because of membership in the Communist Party.).

<sup>67</sup> THOMAS ALEXANDER ALEINIKOFF, DAVID A. MARTIN & HIROSHI MOTOMURA, IMMIGRATION: PROCESS AND POLICY 718, 721 (3d ed. 1995).

the second path.<sup>68</sup> As part of the application process, asylum seekers, must demonstrate a “well-founded fear of persecution.”<sup>69</sup> However, Cuban immigrants may bypass this process and seek refuge under the preferential treatment provisions of the CAA.<sup>70</sup> The procedure is relatively simple for most Cubans because immigration officials do not generally question them about the reasons they left Cuba.<sup>71</sup>

Cuban aliens who reach U.S. soil circumvent the asylum process because they are generally paroled into the country.<sup>72</sup> Parole is intended as a, “temporary, unofficial entry into the United States pending the resolution of [an] application.”<sup>73</sup> However, parole for Cubans means something quite unique because the CAA gives the Attorney General the discretion to award permanent residency to any Cuban who is paroled into and physically present for one year in the United States.<sup>74</sup> In fact, under the CAA, “most of the undocumented Cubans who arrive in the United States are allowed to stay and adjust to permanent resident status.”<sup>75</sup> Therefore, once Cubans are stateside, they usually remain in the United States permanently.<sup>76</sup>

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<sup>68</sup> *The Cuban Adjustment Act of 1966?: Mirando Por Los Ojos De Don Quijote O Sancho Panza?*, 114 Harv. L. Rev. 902, 906 (2001).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> Under INA §212(d)(5), the Attorney General has the discretion to parole an alien into the United States temporarily. INA §212(d)(5), 8 U.S.C. §1182(d)(5) (1994 & Supp. II 1996).

<sup>73</sup> *Benitez v. Wallis*, 337 F.3d 1289, 1296 (11th Cir. 2003) (He [Benitez] was paroled because Congress has recognized that it is often necessary to permit arriving aliens, such as Benitez, to make a temporary, unofficial entry into the United States pending the resolution of their applications.).

<sup>74</sup> CAA § 1 (codified as amended at 8 U.S.C. § 1255 (2006)).

<sup>75</sup> Ruth Ellen Wasem, *Cuban Migration to the United States: Policy & Trends*, CONG. RESEARCH SERV., 2 (2009), available at <http://www.fas.org/sgp/crs/row/R40566.pdf>.

<sup>76</sup> See Heather Reynolds, *Irreconcilable Regulations: Why the Sun Has Set on the Cuban Adjustment Act in Florida*, 63 FLA. L. REV. 1013, 1020 (2011).

In practice, a Cuban entering the United States is ordinarily inspected and paroled within the same day.<sup>77</sup> Thereafter, the Cuban will enjoy the majority of benefits reserved for citizens, including permission to work within the United States and access to government-provided healthcare.<sup>78</sup> After two years of residence in the United States, the Cuban may apply for an adjustment of status to that of permanent residence, if not already granted by the Attorney General.<sup>79</sup> This is a privilege afforded to no other nationality and has been understood “by generations of Cuban-Americans and many politicians to be an open-ended entitlement [to permanent residence] for all Cubans . . . .”<sup>80</sup>

#### V. HISTORY OF VIOLENCE AGAINST WOMEN ACT

In recognition of the gravity of the crimes associated with domestic violence, sexual assault, and stalking, Congress passed the Violence Against Women Act of 1994 (“VAWA 1994”) as part of the Violent Crime Control and Law Enforcement Act of 1994.<sup>81</sup> VAWA 1994 is a comprehensive legislative package designed to end violence against women and was reauthorized in 2000, 2005, and 2013.<sup>82</sup> The Act’s “legislative history [of VAWA]<sup>83</sup> indicates that Congress seeks to remedy the legacy of laws and social norms that serve to justify violence against women.”<sup>84</sup> “Since the passage of VAWA, there has been a paradigm shift in how the issue of violence against women is

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<sup>77</sup> *Id.*

<sup>78</sup> Wasem, *supra* note 75, at 6-8.

<sup>79</sup> CAA §1.

<sup>80</sup> Reynolds, *supra* note 76, at 1020.

<sup>81</sup> See *About the Office on Violence Against Women*, UNITED STATES DEPT. OF JUSTICE OFFICE ON VIOLENCE AGAINST WOMEN, <http://www.justice.gov/sites/default/files/ovw/legacy/2011/07/08/about-ovw-factsheet.pdf> (last visited Apr. 26, 2015).

<sup>82</sup> *Id.*

<sup>83</sup> Sometimes referred to as “VAWA” when referring generally to the legislation.

<sup>84</sup> See *About the Office on Violence Against Women*, *supra* note 81.

2015]

*FLEEING CUBA*

653

addressed.”<sup>85</sup>

VAWA was designed to improve criminal justice responses to domestic violence, sexual assault, and stalking, as well as increase the availability of services for victims of these crimes.<sup>86</sup> VAWA requires a coordinated community response to domestic violence, sexual assault, and stalking, “encouraging jurisdictions to bring together players from diverse backgrounds to share information and to use their distinct roles to improve community responses to violence against women.”<sup>87</sup> The preamble of VAWA 1994 states its purpose is, “To control and prevent crime.”<sup>88</sup> “The federal law takes a comprehensive approach to violence against women by combining tough new penalties to prosecute offenders while implementing programs to aid the victims of such violence.”<sup>89</sup>

Although there are significant protections for battered women in this legislation, more reform is still needed for battered immigrant women and LGBT populations. “Immigrant women are particularly in need of assistance because many times, they rely upon their batterers for their immigration status, and they must overcome language and cultural barriers, as well.”<sup>90</sup> VAWA 1994, “helped to remedy the situation by allowing battered immigrants who were abused by their U.S. citizen or lawful permanent resident spouses or parents to file their own applications for immigration relief without the cooperation of their abusive spouse or parent, enabling them to safely flee the violence.”<sup>91</sup>

This reform is a great first step; however, this legislation only applies to those women who have a qualifying relation-

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<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> See Violence Against Women Act, Pub. L. No. 103-322, 108 Stat. 1902 (1994) (codified as amended in scattered sections of 8, 16, 18, 28, and 42 U.S.C.).

<sup>89</sup> See *About the Office on Violence Against Women*, *supra* note 81.

<sup>90</sup> H. R. Rep. No. 106-891, at 87 (2000), available at <http://beta.congress.gov/106/crpt/hrpt891/CRPT-106hrpt891-pt1.pdf>.

<sup>91</sup> H. R. Rep. No. 106-891, at 90.

ship. That is, that she is married to a U.S. citizen or legal permanent resident. This law does not protect those battered women who are not married to a U.S. citizen or a legal permanent resident, like Mrs. Toro. Hence, the women remain controlled by their batterer and cannot otherwise easily obtain permanent status in the United States. Canada has a similar law with respect to requiring a qualifying relationship to obtain permanent status; however, its laws seem stricter in other respects compared to the United States.

#### VI. CANADA: A COMPARATIVE PERSPECTIVE

In order to give a broader and more international perspective with respect to immigration law and such law as it pertains to refugees and abused spouses, we now turn to examine Canada, which is arguably the most comparable nation to the United States.

The "Immigration and Refugee Protection Act", S.C. 2001, c. 27, (hereinafter "IRPA") is an Act of the Parliament of Canada, passed in 2002, which replaced the "Immigration Act, 1976" as the primary federal legislation regulating immigration to Canada.<sup>92</sup> The "IRPA" came into effect on June 28, 2002.<sup>93</sup> The government failed however to implement a component of the legislation that would have implemented a Refugee Appeal Division as part of Canada's immigration system at that time.<sup>94</sup>

"IRPA" creates a detailed framework delineating the goals and guidelines the Canadian government has set with regards

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<sup>92</sup> Immigration and Refugee Protection Act, S.C. 2001, c. 27 (Can.) [hereinafter IRPA].

<sup>93</sup> *Id.*; see also Canada, *Acts, Rules and Regulations*, IMMIGRATION AND REFUGEE BOARD OF CANADA, at Act, <http://www.irb-cisr.gc.ca/eng/BoaCom/references/ActRegLoi/Pages/index.aspx> (last visited Apr. 26, 2015).

<sup>94</sup> Canada, *Refugee Appeal Division*, IMMIGRATION AND REFUGEE BOARD OF CANADA, <http://www.irb-cisr.gc.ca/Eng/RefApp/Pages/RadSar.aspx> (last visited Apr. 26, 2015) (Launched on December 15, 2012, the Refugee Appeal Division (RAD) considers appeals against decisions of the Refugee Protection Division (RPD) to allow or reject claims for refugee protection.).



to immigration into Canada by foreign residents.<sup>95</sup> The Immigration and Refugee Protection Regulations (IRPR) contain the laws created to fit within the IRPA in order to specify how the IRPA is to be applied.<sup>96</sup> Portions of the “IRPA” are administered by the Canada Border Services Agency.<sup>97</sup>

“The Canadian refugee system has two main parts: one for people making claims for refugee protection from within Canada, and one for people seeking protection from outside Canada.”<sup>98</sup> Objectives of the “IRPA” with respect to refugees include:

(a) to recognize that the refugee program is in the first instance about saving lives and offering protection to the displaced and persecuted; (b) to fulfill Canada’s international legal obligations with respect to refugees and affirm Canada’s commitment to international efforts to provide assistance to those in need of resettlement; (c) to grant, as a fundamental expression of Canada’s humanitarian ideals, fair consideration to those who come to Canada claiming persecution; (d) to offer safe haven to persons with a well-founded fear of persecution based on race, religion, nationality, political opinion or membership in a particular social group, as well as those at risk of torture or cruel and unusual treatment or punishment; (e) to establish fair and efficient procedures that will maintain the integrity of the Canadian refugee protection system, while upholding Canada’s respect for the human rights and fundamental freedoms of all human beings; (f) to support the self-

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<sup>95</sup> IRPA, S.C. 2001, c. 27.

<sup>96</sup> See Immigration and Refugee Protection Regulations, SOR/2002-2007, available at <http://laws-lois.justice.gc.ca/eng/regulations/SOR-2002-227/>.

<sup>97</sup> Memorandum of Understanding between the Department of Citizenship and Immigration, the Canada Border Services Agency and the Immigration and Refugee Board of Canada, *Memorandum of Understanding*, available at <http://www.cic.gc.ca/english/department/laws-policy/mou/mou-cbsa.asp> (last visited Apr. 26, 2015) (“Whereas the CBSA... is responsible for providing integrated border services that support national security, public safety and trade, which is achieved through the administration and enforcement of various acts, including the IRPA, to facilitate the free flow of persons and goods to and from Canada.”).

<sup>98</sup> *Canada’s role – Refugees*, GOVERNMENT OF CANADA, <http://www.cic.gc.ca/english/refugees/help.asp> (last modified Mar. 4, 2015).

sufficiency and the social and economic well-being of refugees by facilitating reunification with their family members in Canada; (g) to protect the health and safety of Canadians and to maintain the security of Canadian society; and (h) to promote international justice and security by denying access to Canadian territory to persons, including refugee claimants, who are security risks or serious criminals.<sup>99</sup>

Another component of Canada's immigration administration is the Immigration and Refugee Board (hereinafter "IRB"). The IRB "is Canada's largest independent administrative tribunal, responsible for making well-reasoned decisions on immigration and refugee matters efficiently, fairly and in accordance with the law."<sup>100</sup> The IRB consists of four divisions: the Refugee Protection Division<sup>101</sup>; the Immigration Division; the Immigration Appeal Division; and, the most recent implementation, the Refugee Appeals Division.<sup>102</sup>

Another resource for refugees in Canada is the Canadian Council for Refugees. The Council is a non-profit umbrella organization committed to the rights and protection of refugees in Canada and around the world, as well as the settlement of refugees and immigrants in Canada.<sup>103</sup> "The membership is made up of organizations involved in the settlement, sponsor-

<sup>99</sup> IRPA, S.C. 2001, c. 27, at §3(2)(a)-(h).

<sup>100</sup> Canada: *Immigration and Refugee Board of Canada*, UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES-REFWORLD, <http://www.refworld.org/publisher/IRBC.html> (last visited Apr. 26, 2015).

<sup>101</sup> Canada, *Designated Representative's Guide*, Immigration and Refugee Board of Canada, available at <http://www.irb-cisr.gc.ca/Eng/BoaCom/references/LegJur/Pages/GuideDesRep.aspx> (last visited Apr. 26, 2015); see also Canada, *Refugee Appeal Division*, *supra* note 94 (Launched on December 15, 2012, the Refugee Appeal Division (RAD) considers appeals against decisions of the Refugee Protection Division (RPD) to allow or reject claims for refugee protection. "The Refugee Protection Division decides claims for refugee protection made by people already in Canada.")

<sup>102</sup> *Id.*; Canada, *Refugee Appeals*, Immigration and Refugee Board of Canada, available at, <http://www.irb-cisr.gc.ca/Eng/RefApp/pages/RadSar.aspx> (last visited July 9, 2015).

<sup>103</sup> *About the CCR*, CANADIAN COUNCIL FOR REFUGEES, <http://ccrweb.ca/en/about-ccr> (last visited Apr. 26, 2015).

2015]

*FLEEING CUBA*

657

ship, and protection of refugees and immigrants.”<sup>104</sup> “The Council serves the networking, information-exchange and advocacy needs of its membership.”<sup>105</sup>

## VII. CANADIAN IMMIGRATION AND DOMESTIC VIOLENCE POLICY

As of October 25, 2012, the Citizenship and Immigration Canada (CIC) has introduced amendments to the Immigration and Refugee Protection Regulations.<sup>106</sup> They include a new regulation, which imposes a two-year condition on all permanent residents who come to Canada as a sponsored spouse.<sup>107</sup> The regulation applies to all sponsored spouses<sup>108</sup> who, at the time of the sponsorship application, have resided for two years or less with their sponsors, and do not have any children in common.<sup>109</sup> Once they arrive in Canada, the sponsored spouse must continue to cohabit with her sponsor in a conjugal relationship for at least two years, or risk losing her permanent resident status and ultimately be deported.<sup>110</sup>

The government has justified the new regulation in the name of curbing “marriage fraud” or “marriage of convenience” without offering evidence of the prevalence of these problems.<sup>111</sup> According to the Canadian Border Services Agency, about 120 cases a year are referred to removal proceedings on suspected misrepresentation relating to spousal sponsorship.<sup>112</sup>

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<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> Backgrounder, *Conditional Permanent Resident Status*, GOVERNMENT OF CANADA, <http://www.cic.gc.ca/english/department/media/backgrounders/2012/2012-10-26a.asp> (last modified Oct. 26, 2012).

<sup>107</sup> *Id.*

<sup>108</sup> This law would not apply to Mrs. Toro, as she did not come here as a sponsored spouse.

<sup>109</sup> Backgrounder, *Conditional Permanent Resident Status*, *supra* note 106.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> Debbie Douglass, Avvy Go & Sarah Blackstock, Op-Ed., *Canadian Immigration Changes Force Women to Stay with Sponsoring Spouse for Two Years*, THE STAR, (Dec. 5, 2012), [http://www.thestar.com/opinion/editorialopinion/2012/12/05/canadian\\_immigr](http://www.thestar.com/opinion/editorialopinion/2012/12/05/canadian_immigr)

Refugee advocates argue, “Even if all 120 cases are found to involve marriage fraud, which is highly unlikely, it still does not justify amending the law and putting the lives of thousands of women at risk.”<sup>113</sup> The conditional measure only applies to permanent residents whose applications are received on or after October 25, 2012—the day that the amendments came into force.<sup>114</sup>

There are exceptions in the law, however, specifically for abuse or neglect.<sup>115</sup> “Given concerns about the vulnerability of spouses in abusive relationships, the proposed condition would cease to apply in instances where there is evidence of abuse (that is, physical, sexual, psychological or financial) or neglect (failure to provide the necessities of life).”<sup>116</sup> This exception recognizes the need to create immigration laws with sensitivity towards domestic violence victims and survivors.

Despite the exception however, many groups, including the public, the provincial and municipal levels of government, the stakeholders and non-governmental organizations, and various federal departments (including the Department of Canada) remain concerned about the vulnerability of spouses/partners in abusive relationships.<sup>117</sup> “Making permanent residence for the sponsored spouse/partner conditional puts all the power into the hands of the sponsor, who can use the precarity of his or her partner’s status as a tool for manipulation – at any time, he [or she] can declare the spouse fraudulent and have her deported. This can be a constant threat and source of fear for the sponsored person.”<sup>118</sup> As such, these groups also argue that

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ation\_changes\_force\_women\_to\_stay\_with\_sponsoring\_spouse\_for\_two\_years.html.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> Backgrounder, Conditional Permanent Resident Status, *supra* note 106.

<sup>116</sup> *Id.*

<sup>117</sup> Backgrounder, Exceptions from Conditional Permanent Residence for Victims of Abuse or Neglect, GOVERNMENT OF CANADA, <http://www.cic.gc.ca/english/department/media/backgrounders/2012/2012-10-26b.asp> (last modified Oct. 26, 2015).

<sup>118</sup> *Id.*

2015]

FLEEING CUBA

659

even with the exception in place, many stigmas remain that may serve as barriers for abused spouses to report abuse.<sup>119</sup>

Some advocates go as far as to say that the exception is, in fact, moot. Abused partners continue to face three obstacles that will render the exemption ineffective:

Lack of information and language barriers;

The burden of proof of abuse is on them;

The cost of providing evidence of co-habitation and abuse. Abused partners often don't have their own resources.<sup>120</sup> Because of these barriers, it is the vision of the Council for Refugees, for example, to remove the condition on permanent resident status altogether.<sup>121</sup>

Advocates discussed that this process needs to be explained to immigrants in order to effectively assist immigrants abroad and on the homeland.<sup>122</sup> Immigrants need to know their rights and the process by which they can apply for this exception. As such, Citizenship and Immigration Canada (CIC) is creating documentation which will be translated into multiple languages and will be shared, on the Web, with the assistance of other partner agencies, with immigrants abroad and in Canada.<sup>123</sup> This documentation will inform them about the exception and make immigrants aware that their permanent resident status will not be revoked.<sup>124</sup>

#### VIII. U-VISA: THE ALTERNATIVE TO A VAWA SELF-PETITION

The United States, like Canada, has recognized a need to

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<sup>119</sup> Backgrounder, *Exceptions from Conditional Permanent Residence for Victims of Abuse or Neglect*, *supra* note 117.

<sup>120</sup> Canadian Council for Refugees, *Conditional Permanent Residence: Towards vulnerability and violence* (March 2012), available at <http://ccrweb.ca/sites/ccrweb.ca/files/cprstoriesen.pdf>.

<sup>121</sup> Canadian Council for Refugees, *Our Vision: Secure Status in Canada and access to protection*, <http://ccrweb.ca/en/conditional-permanent-residence> (last visited Apr. 27, 2015).

<sup>122</sup> *See Id.*

<sup>123</sup> Backgrounder, *Exceptions from Conditional Permanent Residence for Victims of Abuse or Neglect*, *supra* note 117.

<sup>124</sup> *Id.*

establish its immigration laws with a similar goal of protecting domestic violence victims and survivors. “Congress created the U nonimmigrant visa (“U-Visa”) with the passage of the Victims of Trafficking and Violence Protection Act (including the Battered Immigrant Women’s Protection Act) in October 2000.”<sup>125</sup> However, Congress has limited the number of approved U-Visas to 10,000 each fiscal year.<sup>126</sup> The legislation was intended to strengthen the ability of law enforcement agencies to investigate and prosecute cases of domestic violence, sexual assault, trafficking of aliens and other crimes while, at the same time, offer protection to victims of such crimes.<sup>127</sup> “The legislation also helps law enforcement agencies to better serve victims of crimes.”<sup>128</sup>

In order to become eligible for a U-Visa, a person must fulfill four main requirements and have it certified by a qualifying agency.<sup>129</sup> A certifying agency can include federal, state, or local law enforcement agency (i.e. a police department, district attorney’s office, prosecutor’s office, Child Protective Services, or another investigative agency that has jurisdiction).<sup>130</sup> The requirements state that 1.) the individual must have suffered substantial physical or mental abuse as a result of having been a victim (directly or indirectly) of a qualifying criminal activity; 2.) the individual must have information concerning that criminal activity; 3.) the individual must have been helpful, is being helpful, or is likely to be helpful in the investigation or prosecution of the crime; and 4.) the criminal activity violated U.S.

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<sup>125</sup> USCIS, *Victims of Criminal Activity: U Nonimmigrant Status*, <http://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity-u-nonimmigrant-status/victims-criminal-activity-u-nonimmigrant-status> (last updated Jan. 9, 2014).

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Fact Sheet: Certifying U Nonimmigrant Status*, USCIS, (Sept. 5, 2007), [available at http://www.asistahelp.org/documents/resources/CIS\\_U\\_cert\\_fact\\_sheet\\_66458DB0CE360.pdf](http://www.asistahelp.org/documents/resources/CIS_U_cert_fact_sheet_66458DB0CE360.pdf).

2015]

*FLEEING CUBA*

661

laws.<sup>131</sup>Qualifying crimes include:<sup>132</sup>

<ul style="list-style-type: none"> <li>• Abduction</li> <li>• Abusive Sexual Contact</li> <li>• Blackmail</li> <li>• Domestic Violence</li> <li>• Extortion</li> <li>• False Imprisonment</li> <li>• Genital Female Mutilation</li> <li>• Felonious Assault</li> </ul>	<ul style="list-style-type: none"> <li>• Hostage</li> <li>• Incest</li> <li>• Involuntary Servitude</li> <li>• Kidnapping</li> <li>• Manslaughter</li> <li>• Murder</li> <li>• Obstruction of Justice</li> <li>• Peonage</li> <li>• Perjury</li> <li>• Prostitution</li> <li>• Rape</li> </ul>	<ul style="list-style-type: none"> <li>• Sexual Assault</li> <li>• Sexual Exploitation</li> <li>• Slave Trader</li> <li>• Torture</li> <li>• Trafficking</li> <li>• Witness Tampering</li> <li>• Unlawful Criminal Restraint</li> <li>• Other Related Crimes</li> </ul>
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The purpose of the U-visa is essentially to give an incentive to the victim to report the crime to law enforcement, in exchange for temporary residency.<sup>133</sup> Congress' stated purpose for the U-Visa is to create a new nonimmigrant visa classification that will strengthen the ability of law enforcement agencies to detect, investigate, and prosecute cases of domestic violence,

<sup>131</sup> *Id.*<sup>132</sup> *Id.*

<sup>133</sup> See USCIS, *Victims of Criminal Activity: U Nonimmigrant Status: Form I-918*, <http://www.uscis.gov/sites/default/files/files/form/i-918instr.pdf> (last visited Apr. 26, 2015) ("You should use Form I-918 to request temporary immigration benefits if you are a victim of certain qualifying criminal activity.").

sexual assault, trafficking of aliens, and other crimes described in section 101(a)(15)(U)(iii) of the Immigration and Nationality Act committed against aliens, while offering protection to victims of such offenses in keeping with the humanitarian interests of the United States.<sup>134</sup> This visa will encourage law enforcement officials to better serve immigrant crime victims and to prosecute crimes committed against aliens.<sup>135</sup>

Furthermore, the U-Visa creates a new nonimmigrant visa classification that will facilitate the reporting of crimes to law enforcement officials by trafficked, exploited, victimized, and abused aliens who are not lawful immigrants. It also gives law enforcement officials a means to regularize the status of cooperating individuals during investigations or prosecutions.<sup>136</sup> Providing temporary legal status to aliens who have been severely victimized by criminal activity also comports with the humanitarian interests of the United States.<sup>137</sup> Finally, the U-Visa gives the Attorney General discretion to convert the status of such nonimmigrants to that of permanent residents when doing so is justified on humanitarian grounds, for family unity, or is otherwise in the public interest.<sup>138</sup>

In addition to the principal applicant, a person can file for qualifying family members.<sup>139</sup> Qualifying family members

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<sup>134</sup> *Id.*

<sup>135</sup> USCIS, *Victims of Criminal Activity: U Nonimmigrant Status: Background*, <http://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity-u-nonimmigrant-status/victims-criminal-activity-u-nonimmigrant-status#U%20Nonimmigrant%20Eligibility> (last visited Apr. 26, 2015) (“The legislation was intended to strengthen the ability of law enforcement agencies to investigate and prosecute cases of domestic violence, sexual assault, trafficking of aliens and other crimes, while also protecting victims of crimes who have suffered substantial mental or physical abuse due to the crime and are willing to help law enforcement authorities in the investigation or prosecution of the criminal activity. The legislation also helps law enforcement agencies to better serve victims of crimes.”).

<sup>136</sup> Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464, §1513(a)(2)(A)-(B) (2000).

<sup>137</sup> *Id.* at §1513(a)(2)(B).

<sup>138</sup> *Id.* at §1513(a)(2)(C).

<sup>139</sup> USCIS Form I-918, DEPARTMENT OF HOMELAND SECURITY (Jan. 15, 2013), available at [http://www.uscis.gov/sites/default/files/files/form/i-](http://www.uscis.gov/sites/default/files/files/form/i-918.pdf)



2015]

*FLEEING CUBA*

663

depend on the applicant's age.<sup>140</sup> If the applicant is under 21 years of age, qualifying family members include: spouse, unmarried children under 21 years of age, parent(s), and unmarried siblings under 18 years of age.<sup>141</sup> If the applicant is over 21 years of age, the qualifying family members include only one's spouse or unmarried children under 21 years of age.<sup>142</sup> USCIS applies a "totality of the circumstances" approach when determining whether or not to issue a U-Visa and to whom.<sup>143</sup>

IX. THE U-VISA AS APPLIED TO THE *TORO* CASE

As previously mentioned, Mrs. Toro attempted to obtain residency based on the VAWA Self-Petition,<sup>144</sup> however, in that case, she was unsuccessful because she did not have a qualifying relationship under the Act.<sup>145</sup> But, assuming she fulfilled the requirements and applied for a U-Visa, she may have been able to obtain temporary legal residency. U-Visas are valid for up to four years and can be extended.<sup>146</sup> It is also a path for citizenship because after being in the country for three years, the person has assisted law enforcement, and if the certifying agency determines that the individual's continued presence in the country is justified based on humanitarian grounds (i.e.: family unity), a U-Visa holder can apply for legal permanent residency or, more commonly known, a green card.<sup>147</sup>

Turning to the *Toro* case, we look to each of the requirements and apply them in turn. First, a person must have suffered substantial physical or mental abuse as a result of having been a victim (directly or indirectly) of a qualifying

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<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Fact Sheet: Certifying U Nonimmigrant Status*, *supra* note 130.

<sup>144</sup> *Toro*, 707 F.3d at 1226.

<sup>145</sup> *Id.*

<sup>146</sup> USCIS, *Victims of Criminal Activity: U Nonimmigrant Status: Background*, *supra* note 135, at Extensions.

<sup>147</sup> *Id.*

criminal activity.<sup>148</sup> Assuming that a qualifying agency could certify that Mrs. Toro was a victim of domestic violence, a qualifying crime,<sup>149</sup> and show substantial physical or mental abuse, as the facts make out in this case, Mrs. Toro would satisfy the first requirement.<sup>150</sup>

Second, the individual must have information concerning that criminal activity. Here, Mrs. Toro was the direct victim of her husband's abuse.<sup>151</sup> Therefore, she would undoubtedly have information concerning the criminal activity.

Third, is whether a person was helpful, is being helpful, or is likely to be helpful in the investigation or prosecution of the crime. The case itself is devoid of any facts to suggest that Mrs. Toro pressed any charges or told the police about her husband's criminal activity.<sup>152</sup> But, assuming she did report the crime to and was cooperative with the police, this prong would be satisfied.

Lastly, the crime must have violated United States law. Here, the couple was living in Florida,<sup>153</sup> and because domestic violence is a qualifying crime to obtain a U-Visa, Mrs. Toro's husband violated United States law. Therefore, the fourth prong would be satisfied.

Admittedly, the case itself is lacking in sufficient facts to clearly indicate whether Mrs. Toro would qualify for the U-Visa; however, the present facts are not dispositive of the possibility of Mrs. Toro being eligible because it is likely there is more that happened in the relationship that we cannot gather from the face of the decision. Therefore, petitioning for a U-Visa seems to be a viable option for Mrs. Toro, provided the 10,000 U-visa cap has not been reached. Although, the process contains an extra step, in that Mrs. Toro would need to have a

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<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *See Toro*, 707 F.3d at 1226 (stating that Toro self-petitioned as the battered spouse of a Cuban alien.).

<sup>151</sup> *Id.*

<sup>152</sup> *See generally Id.* at 1224.

<sup>153</sup> *Id.* at 1226.

visa for three years then apply for a green card, a U-Visa is another way for Mrs. Toro to accomplish the same goal of permanent residency.

#### X. THE STATUS OF IMMIGRATION POLICY TODAY AND VIOLENCE AGAINST WOMEN

Despite the successes of VAWA and the U-Visa, immigration law continues to be a barrier that keeps immigrant women and children locked in abusive relationships. Intervening changes in immigration, for example a 10,000 cap for granting U-Visas<sup>154</sup> and welfare laws enacted by the United States, have undermined many of VAWA's protections for battered immigrants.<sup>155</sup> Currently, if a person is unable to obtain a U-Visa either because of the 10,000 cap or ineligibility, but is being abused, the person ultimately has no other alternative remedy.<sup>156</sup> As a result, many battered immigrant women and children are forced to stay with their abusers, risking their lives and the lives of their children.

Similarly, with respect to Canada, the conditional permanent residence regulation is a major step backward in Canada's fight against gender-based violence. As such, it resurrects the notion of women as chattels of their spouse with no legal right outside of their husband and his family. Many cases of domestic violence go unreported,<sup>157</sup> and although Canada is attempt-

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<sup>154</sup> USCIS, *Victims of Criminal Activity: U Nonimmigrant Status: Background*, *supra* note 135, at U Visa Cap.

<sup>155</sup> Katerina Shaw, *Barriers to Freedom: Continued Failure of U.S. Immigration Law to Offer Equal Protection to Immigrant Battered Women*, 15 *CARDOZO J. L. & GENDER* 663, 683 (2009) ("If an undocumented immigrant battered woman reports her abuser to the police, she risks deportation.").

<sup>156</sup> USCIS, *Victims of Criminal Activity: U Nonimmigrant Status: Background*, *supra* note 135, at U Visa Cap (If the cap is reached before all U nonimmigrant petitions have been adjudicated, USCIS will create a waiting list for any eligible principal or derivative petitioners that are awaiting a final decision and a U visa. Petitioners placed on the waiting list will be granted deferred action or parole and are eligible to apply for work authorization while waiting for additional U visas to become available.).

<sup>157</sup> Facts and Figures: Ending Violence against Women, *A pandemic in diverse forms*, UN WOMEN, <http://www.unwomen.org/en/what-we-do/ending->

ing to preserve the sanctity of marriage, it places a heavy burden on the victim to report violence, endure living with an abusive person for two years, or risk being deported.

## XI. FUTURE MOVEMENTS TOWARD IMMIGRATION REFORM

### A. Movement Toward CAA Reform

Effective January 14, 2013, Cuban immigration authorities implemented its own broad travel reform that eliminated the need for most island residents to obtain an “exit permit” to leave, while also extending the time Cubans can remain abroad without losing their residency status to 24 months.<sup>158</sup> The Communists put the exit permit system in place long ago as a method of control.<sup>159</sup>

Under the exit permit system, Cuban citizens were obliged not only to procure passports and visas for the country or countries to which they intended to travel, but once these were obtained, they then also had to obtain an exit permit from the Cuban immigration service.<sup>160</sup> The permits were time-specific. If one were to stay outside the country beyond the time authorized, there was no assurance at all that Cuban officials would allow an individual to return.<sup>161</sup> If the officials did allow a person back, he or she might be subject to jail or other penalties for violating the permit.<sup>162</sup>

Castro officials said the purpose of the reform was to facilitate ease of travel and movement for island residents and the

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violence-against-women/facts-and-figures (last visited Apr. 26, 2015) (“More often than now, cases of violence against women go unreported.”).

<sup>158</sup> Nick Miroff, *Immigration reform: A Cuban readjustment?*, GLOBAL POST, Feb. 6, 2013, <http://www.globalpost.com/dispatch/news/regions/americas/cuba/130205/immigration-reform-cuban-adjustment-act-immigrants>.

<sup>159</sup> W.D. Reasoner, *What's Cuba's New Exit Rules Mean for the United States?* (Oct. 19, 2012), <http://www.cis.org/reasoner/what-cubas-new-exit-rules-mean-united-states>.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

roughly 2 million Cubans living abroad, a majority of them in the United States<sup>163</sup> Since announcing their travel reforms, Cuban immigration officials have openly acknowledged that island residents now obtain United States residency under the terms of the Act while also preserving Cuban residency and their property back home.<sup>164</sup> It was also a major step toward creating a new kind of socialist laborer: the migrant worker, who earns money abroad to spend and invest back home in Cuba.<sup>165</sup>

This essentially gives up “refugee” status for which the CAA was enacted. This circular movement is precisely the type that has unnerved Cuban-American lawmakers in the United States.<sup>166</sup> Lawmakers now appear to be considering what was once unthinkable: altering the Cuban Adjustment Act. Each year more than 10,000 Cubans are put on a path to a green card by, reaching the United States border with Mexico, landing on south Florida beaches by raft, or in a smuggler's speedboat. Others enter with tourist visas and then opt to seek residency through the Cuban Adjustment Act.

But, none of these Cubans are required to demonstrate political persecution.<sup>167</sup> There is one thing these travelers have in common: they do not behave like prototypical political refugees,<sup>168</sup> which arguably was the original intent of the CAA in 1966. Although unfettered American tourism to Cuba remains illegal because of U.S. trade sanctions, in April 2009, Barack Obama's administration lifted restrictions and created a general license for Cuban-Americans<sup>169</sup> who have relatives on the

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<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> Miroff, *supra* note 158.

<sup>166</sup> *Id.*

<sup>167</sup> The Cuban Adjustment Act of 1966?: *Mirando Por Los Ojos De Don Quijote O Sancho Panza?*, *supra* note 68, at 906 (Cuban immigrants may bypass this process and seek refuge under the preferential treatment provisions of the CAA.).

<sup>168</sup> Miroff, *supra* note 158.

<sup>169</sup> Mauricio Claver Carone, *Amend the Cuban Adjustment Act*, CAPITAL HILL CUBANS (Aug. 21, 2011, 9:40 AM), <http://www.capitolhillcubans.com/2011/08/amend-cuban-adjustment-act.html>.

island. This means most Cuban-Americans can return as often and stay as long as they wish, furthering Castro's objectives.

"This policy of unlimited Cuban-American travel is raising questions on Capitol Hill about the legitimacy of the Cuban Adjustment Act, which consequently is becoming contradictory and obsolete."<sup>170</sup> The legislative history of the CAA holds that immigrants from Cuba are refugees under international law.<sup>171</sup>

"If people come to this country seeking refuge and then begin traveling back to Cuba 10 to 12 times a year, it becomes difficult for us to return to Washington and justify the special status that Cubans have in comparison with the rest of the population," said Sen. Marco Rubio, R-Fla., "That endangers the Cuban Adjustment Act."<sup>172</sup>

On the other hand, it is argued, specifically by analyst Phil Peters, that the problem with Senator Rubio and others' belief is that most Cubans who arrive do not claim to be political refugees in need of protection from persecution.<sup>173</sup> Such claims are projected upon them.<sup>174</sup> "Rubio and Ros-Lehtinen are accusing their constituents of being hypocrites, based on a claim that these immigrants have never made," Peters argued.<sup>175</sup>

Therefore, it remains to be seen whether the CAA ultimately will become futile or moot based on the fact that President Obama has now lifted travel restrictions to Cuba if individuals have family there, or if protection from persecution, as Phil Peters suggests, was simply an assumption placed on the Cuban "refugees" who came here and asserted permanent residency under the CAA.<sup>176</sup> It will be interesting to see now what impact the recent opening of the embassies in both the U.S. and Cuba will have on the effectiveness of the CAA.

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<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> Miroff, *supra* note 158.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> Carone, *supra* note 169.

*B. Safe Third Country Agreement*

Mexico and Canada already have normal diplomatic relations with Cuba.<sup>177</sup> They have for years; however, the United States is the exception in the community of nations.<sup>178</sup> Cubans can simply obtain visas from either Mexico or Canada, fly there, make their way to the United States border, and then cross surreptitiously.<sup>179</sup> Once in, all they need do is present themselves at any of the homeland security agencies charged with immigration administration (Citizenship and Immigration Services; Customs and Border Protection; or Immigration and Customs Enforcement), turn themselves in, get processed, paroled, wait a year, and they are then eligible for a green card.<sup>180</sup>

The Safe Third Country Agreement between Canada and the United States, on the other hand, was implemented as part of the United States–Canada Smart Border Action Plan.<sup>181</sup> Following the "Smart Border Declaration" announced in 2002 between Canada and the United States, the two countries finalized a "Safe Third Country" agreement in December.<sup>182</sup> The Agreement builds on a strong history of Canada-United States cooperation on issues related to migration and refugee protection and came into effect on December 29, 2004.<sup>183</sup> To date, the United States is the only country that is designated as a safe third country by Canada under the "Immigration and Refugee Protection Act" ("IRPA").<sup>184</sup> The Agreement does not apply to United States citizens or habitual residents of the United States who are not citizens of any country ("stateless per-

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<sup>177</sup> Reasoner, *supra* note 159.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Canada-U.S. Safe Third Country Agreement*, GOVERNMENT OF CANADA, <http://www.cic.gc.ca/english/department/laws-policy/menu-safethird.asp> (last visited Apr. 26, 2015).

<sup>182</sup> *Canada-U.S. Third Country Agreement*, CANADA BORDER SERVICES AGENCY, <http://www.cbsa-asfc.gc.ca/agency-agence/stca-etps-eng.html> (last visited Apr. 26, 2015).

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

sons").<sup>185</sup>

The Safe Third Country Agreement applies only to refugee claimants who are seeking entry to Canada from the U.S.:

- at Canada-U.S. land border crossings;
- by train or;
- at airports, **only if** the person seeking refugee protection in Canada has been refused refugee status in the U.S. and is in transit through Canada after being deported from the U.S.<sup>186</sup>

The agreement would deny individuals who pass through the United States the right to claim asylum in Canada.<sup>187</sup> The United States would also have reciprocal rights, although the numbers transiting Canada to the United States is typically only about 200 persons a year, compared to roughly 15,000 heading to Canada. The agreement allows the United States to send Canada 200 refugees of their choosing.<sup>188</sup> "It is expected that the United States will send persons intercepted at sea, predominately Haitians, Dominicans, and Cubans to Canada."<sup>189</sup>

There are exceptions to the Safe Third Country Agreement.<sup>190</sup> They are based on principles that take into account the importance of family unity, the best interests of children, and public interest. The four types of exceptions include: family member exceptions, unaccompanied minors exception, document holder exceptions, and public interest exceptions.<sup>191</sup> Despite qualifying for one of the exceptions outlined above, refugee claimants must still meet all other eligibility criteria of Canada's immigration legislation.<sup>192</sup> For example, a person

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<sup>185</sup> *Id.*

<sup>186</sup> Canada-U.S. Third Country Agreement, *supra* note 182.

<sup>187</sup> U.S. Committee for Refugees World Refugee Survey 2003 – Canada, UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (June 1, 2003), <http://www.refworld.org/docid/3eddc48d14.html>.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> Canada-U.S. Third Country Agreement, *supra* note 182.

<sup>191</sup> Canada-U.S. Safe Third Country Agreement, *supra* note 181.

<sup>192</sup> *Id.*



2015]

*FLEEING CUBA*

671

seeking refugee protection will not be eligible to make a refugee claim in Canada if he or she has been determined to be inadmissible to Canada on grounds of security, violating human or international rights, or criminality.<sup>193</sup> Therefore, although this is another avenue for refugees to establish residency, it is limited and residency continues to depend on certain eligibility criteria.

## XII. CONCLUSION

Mrs. Toro was denied her application under section 1 of the CAA because her husband was not admissible or paroled into the United States. The court ultimately struck down her statutory interpretation argument, which was that her husband needed only to fulfill the first two requirements and the other three were guidance for the Attorney General. She also was not entitled to a VAWA self-petition because she still would have needed a qualifying relationship, similar to section 1 of the CAA. Therefore, her quest for legal permanent residency was unsuccessful.

Even if Mrs. Toro lived in Canada, she might have had an even tougher time obtaining permanent status because of the two-year cohabitation requirement. If she did not report the abuse, she would have been forced to live with her husband for at least two years. If, however, Mrs. Toro could establish that she was an abused spouse, she might have fallen under the “abused or neglect” exception. This would have required her to report the abuse to a law enforcement agency at the very least. Such report could have placed an undue burden on Mrs. Toro and may have ultimately placed her in a dangerous situation with a risk of retaliation from her husband.

As an alternative, she could have obtained her permanent residency in the United States through a U-Visa, as opposed to the VAWA self-petition. There is no requirement of a qualifying relationship for a U-Visa and there is no two-year cohabitation requirement. However, as in Canada, Mrs. Toro would need to

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<sup>193</sup> *Id.*

report the abuse, assist law enforcement in the prosecution of her husband, and have her assistance certified by a qualifying agency. This too would place a burden on the victim, like Mrs. Toro, to report the abuse, again potentially placing herself at risk of retaliation. But, after four years of being a visa holder, she can make an application to adjust her status to legal permanent residency. Therefore, assuming she met the other necessary requirements, she may not have had to go to court in the first place and would have received the desired result anyway.

In conclusion, there must be more reform done in the immigration law realm. It is clear from this discussion that although there are ways for victims to become legal permanent residents, victims have to jump through the proverbial "hoops," in order to gain status. Thus, this essentially holds victims captive forcing them to stay with their abusers, or at very least jeopardize their safety, just so they can remain in the United States.

Admittedly, some advances in reform have taken place since 2000 with the implementation of the U-Visa for example. The U-Visa is a viable and sometimes very effective way for victims to escape their abusive relationships, while being afforded immigrant benefits and a path for residency. But, it should also be acknowledged that this is a self-serving way for the government to prosecute abusers. Many times victims do not want to report their abusers to authorities because they risk retaliation or may feel badly for the abusers. In addition, only 10,000 U-Visas are granted each fiscal year. Once that number is reached, the victim must wait until the next fiscal year, further jeopardizing her safety.

As such, reformists must recognize that not all victims are the same and not all are in the same situation, despite the common thread of abuse. Therefore, a more comprehensive remedy needs to be established and immigration law reform must continue. Additional safeguards must be provided to victims of domestic violence with respect to immigration law.