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U.S. Policy on Cuban Migrants: In Brief

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Summary

The Obama Administration's efforts to normalize relations with Cuba focused attention on U.S. policies on immigration and federal assistance that apply to Cuban migrants in the United States—a set of policies that afford Cuban nationals unique immigration privileges. The November 2016 death of Cuba's Fidel Castro may lead to further consideration of these issues. "Normal" immigration from Cuba to the United States has not existed since the Cuban Revolution of 1959 brought Fidel Castro to power. For more than 50 years, the majority of Cubans who have entered the United States have done so through special humanitarian provisions of federal law.

U.S. policy on Cuban migration has been shaped by a 1966 law known as the Cuban Adjustment Act, as amended, and U.S.-Cuban migration agreements signed in the mid-1990s, operating in conjunction with the Immigration and Nationality Act (INA). Among the special immigration policies presently in place is a so-called "wet foot/dry foot" policy toward Cuban migrants who try to reach the U.S. shore by sea. "Wet foot" refers to Cubans who do not reach the United States. They are returned to Cuba unless they cite a well-founded fear of persecution, in which case, they are considered for resettlement in third countries. "Dry foot" is a reference to Cubans who successfully reach the U.S. shore and are generally permitted to stay in the country. After one year, these individuals can apply to become U.S. lawful permanent residents (LPRs) under the Cuban Adjustment Act.

In addition to entering the United States under special policies and becoming LPRs through the Cuban Adjustment Act, Cubans can gain permanent admission to the United States through certain standard immigration pathways set forth in the INA. They can be sponsored for U.S. permanent residence by eligible U.S.-based relatives who are U.S. citizens or LPRs through the U.S. family-based immigration system. They can also apply for asylum from within the United States or at a U.S. port of entry, or they can be considered for refugee status abroad. Persons granted asylum or admitted to the United States as refugees can apply for LPR status after one year.

Special provisions of law also make Cuban migrants in the United States eligible for federal assistance. The Refugee Education Assistance Act of 1980 defines the term "Cuban and Haitian entrant" for purposes of eligibility for federal assistance. It makes these entrants eligible for the same resettlement assistance as refugees. The Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996, as amended, makes Cuban and Haitian entrants eligible for certain federal public benefits to the same extent as refugees.

The steps taken by the Obama Administration to normalize relations with Cuba have raised questions about the possibility of future changes to U.S. policy toward Cuban migrants through either executive or congressional action. Regarding the latter, legislation was introduced in the 114th Congress to repeal the Cuban Adjustment Act and eliminate the special treatment that Cuban entrants receive with respect to federal refugee resettlement assistance and other federal assistance. It remains to be seen whether Congress will act on any such measures.

For an overview of current issues in U.S.-Cuban relations, see CRS Report R43926, *Cuba: Issues for the 114th Congress*.

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Introduction

Cuban migration to the United States is a topic of long-standing congressional interest. U.S. immigration policy toward Cuba is the product of a unique set of circumstances and is unlike U.S. immigration policy toward any other nation in the world. Efforts by the Obama Administration to normalize relations with Cuba following President Obama's December 2014 announcement of a major policy shift toward that country[1] focused increased attention on migration issues, leading some policymakers to reexamine the policies on immigration and federal assistance that apply to Cuban migrants.[2] The November 2016 death of Cuba's Fidel Castro may spur a broader reexamination of these policies. At the same time, concern among some in Cuba about possible changes to current U.S. migration policy is seen as a key factor behind recent upticks in Cuban arrivals to the United States.[3]

Cuban Migration Policy

"Normal" immigration from Cuba to the United States has not existed since the Cuban Revolution of 1959 brought Fidel Castro to power. For more than 50 years, the majority of Cubans who have entered the United States have done so through special humanitarian provisions of federal law. For example, between 1962 and 1979 hundreds of thousands of Cubans entered the United States under the parole provision in the Immigration and Nationality Act (INA).[4] The INA parole provision authorizes the Attorney General (now the Secretary of Homeland Security) "to parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States."[5] Although the Cubans who arrived in the United States after the Cuban Revolution were paroled in, they were considered to be refugees fleeing persecution. At the time, the INA did not contain the current definition of a refugee or the provisions on refugee admissions and asylum; these were added by the Refugee Act of 1980.[6]

In 1980, the INA parole provision was again used when a mass migration of asylum seekers—known as the Mariel Boatlift—brought approximately 125,000 Cubans (and 25,000 Haitians) to South Florida over a six-month period. The Carter Administration described these arrivals as "Cuban-Haitian entrants." The INA parole provision continues to be used today by executive discretion to allow some Cubans to enter the United States.

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[1] For more information, see CRS In Focus IF10045, *Cuba: President Obama's New Policy Approach*.

[2] This report does not cover immigration enforcement policies.

[3] See, for example, Miriam Jordan, "More Cubans Migrate to U.S. Migrants fear narrowing or closure of window of opportunity that provides them special treatment," *Wall Street Journal Online*, September 20, 2015.

[4] The INA is Act of June 27, 1952, ch. 477, codified, as amended, at 8 U.S.C. §§1101 et seq.

[5] INA §212(d)(5)(A). Under the INA, an alien is a person who is not a citizen or a national of the United States.

[6] The Refugee Act is P.L. 96-212, March 17, 1980. In general, under the INA as amended by the Refugee Act, a refugee is a person who is outside his or her country and who is unable or unwilling to return because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion (INA §101(a)(42)). Individuals meeting this definition and other requirements who are abroad can be granted refugee status (INA §207(c)); those meeting this definition and other requirements who are physically present in the United States or at a land border or port of entry can be granted asylum (INA §208). The Refugee Act also amended the INA parole provision to place restrictions on paroling refugees into the United States. For information on the U.S. refugee program, see CRS Report RL31269, *Refugee Admissions and Resettlement Policy*.

Key Legislation and International Agreements

U.S. policy on Cuban migration has been shaped by a 1966 law, as amended, and migration agreements between the United States and Cuba, operating in conjunction with the INA.

Cuban Adjustment Act of 1966

The 1966 law commonly known as the Cuban Adjustment Act (CAA),[7] as amended, enables Cubans who have been present in the United States for at least one year to adjust to lawful permanent resident status (becoming lawful permanent residents (LPRs) of the United States)[8] provided they are eligible to receive an immigrant visa and are admissible to the United States for permanent residence.[9] Unlike most other applicants for adjustment to LPR status, Cuban nationals do not have to be sponsored by an eligible family member or employer. The CAA concerns Cubans who are already present in the United States and, as such, is distinct from U.S. policy on Cuban migrants attempting to reach the United States (see "Migration Agreements of 1994 and 1995" and "Wet Foot/Dry Foot Policy").

Under the CAA:

> [T]he status of any alien who is a native or citizen of Cuba and who has been inspected and admitted or paroled into the United States subsequent to January 1, 1959 and has been physically present in the United States for at least one year, may be adjusted by the Attorney General [now the Secretary of Homeland Security], in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if the alien makes an application for such adjustment, and the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence.

In FY2014, the most recent year for which data are available, about 40,000 Cubans and their dependents adjusted to LPR status under the CAA.[10]

The CAA, which predated the Refugee Act of 1980, arguably reflected a belief that Cuban migrants to the United States were refugees under international law.[11] The treatment of Cuban arrivals as refugees is a recurring theme in U.S. immigration policy toward Cuba.

There have been legislative efforts over the years to sunset or repeal the CAA. In 1996, a provision was enacted as part of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) that provides for the repeal of the CAA "effective only upon a determination by the President ... that a democratically elected government in Cuba is in power."[12]

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[7] P.L. 89-732, November 2, 1966.

[8] Lawful permanent residents, also known as immigrants and green card holders, are noncitizens who are legally authorized to reside permanently in the United States.

[9] For background information on the immigrant admissions process, see CRS Report R42866, *Permanent Legal Immigration to the United States: Policy Overview*.

[10] U.S. Department of Homeland Security, Office of Immigration Statistics, *2014 Yearbook of Immigration Statistics*, August 2016, Table 7.

[11] The title of the bill was "To adjust the status of Cuban refugees to that of lawful permanent residents of the United States, and for other purposes."

[12] IIRIRA is Division C of P.L. 104-208, September 30, 1996. The provision is §606.

Migration Agreements of 1994 and 1995

Negotiated at a time of increasing U.S. Coast Guard interdictions of Cubans trying to reach the United States by sea, the 1994 migration agreement purportedly sought to normalize migration between Cuba and the United States. Under the agreement, both nations agreed to take steps to promote "safe, legal, and orderly" migration. Among the agreement's key elements, Cuba agreed to try to prevent unsafe departures from the island, and the United States agreed that Cuban migrants rescued at sea would not be allowed to enter the United States and instead would be taken to safe-haven camps. With respect to legal migration, the United States agreed to admit no less than 20,000 Cuban immigrants annually, excluding the immediate relatives of U.S. citizens.[13] To help achieve this level of admissions, the United States established the Special Cuban Migration Lottery; lottery winners, who are randomly selected among applicants, are considered for immigration parole.

The 1995 migration agreement built on the 1994 accord. A key element of this agreement concerned treatment of Cubans intercepted at sea on their way to the United States. Both nations agreed that intercepted Cubans would be returned to Cuba and that this would be done in a manner consistent with "the parties' international obligations."[14]

Wet Foot/Dry Foot Policy

The 1994 and 1995 migration agreements, supported by the CAA, have resulted in a so-called "wet foot/dry foot" policy toward Cuban migrants. "Wet foot" refers to Cubans who do not reach the U.S. shore. They are returned to Cuba unless they cite a well-founded fear of persecution, in which case they are considered for resettlement in third countries. "Dry foot" is a reference to Cubans who successfully reach the U.S. shore, are inspected by Department of Homeland Security (DHS) officers, and generally are permitted to stay in the United States. It is important to note that those who are permitted to stay under the "wet foot/dry foot" policy are not granted formal admission to the United States. Instead, they are typically granted parole and, as parolees, can apply to adjust to LPR status under the CAA after one year.

Unauthorized Migration Statistics

DHS U.S. Coast Guard and U.S. Customs and Border Protection (CBP)[15] data reveal recent increases in unauthorized immigration from Cuba to the United States, which experts attribute mainly to Cuban concerns that the policy of allowing those who reach the U.S. shore to become permanent residents may soon change.[16] As shown in **Figure 1**, since FY2013 (the year before the announced shift in U.S. policy toward Cuba), there have been notable increases in U.S. Coast Guard maritime interdictions, in U.S. Border Patrol apprehensions between U.S. ports of entry, and especially in numbers of unauthorized Cubans presenting themselves at official U.S. ports of

[13] "Immediate relatives" are the spouses, minor children, and parents of U.S. citizens who can enter the United States in unlimited numbers under the U.S. family-based immigration system. See CRS Report R42866, *Permanent Legal Immigration to the United States: Policy Overview*.

[14] White House (Clinton Administration), Office of the Press Secretary, "Joint Statement," May 2, 1995 (on file with CRS).

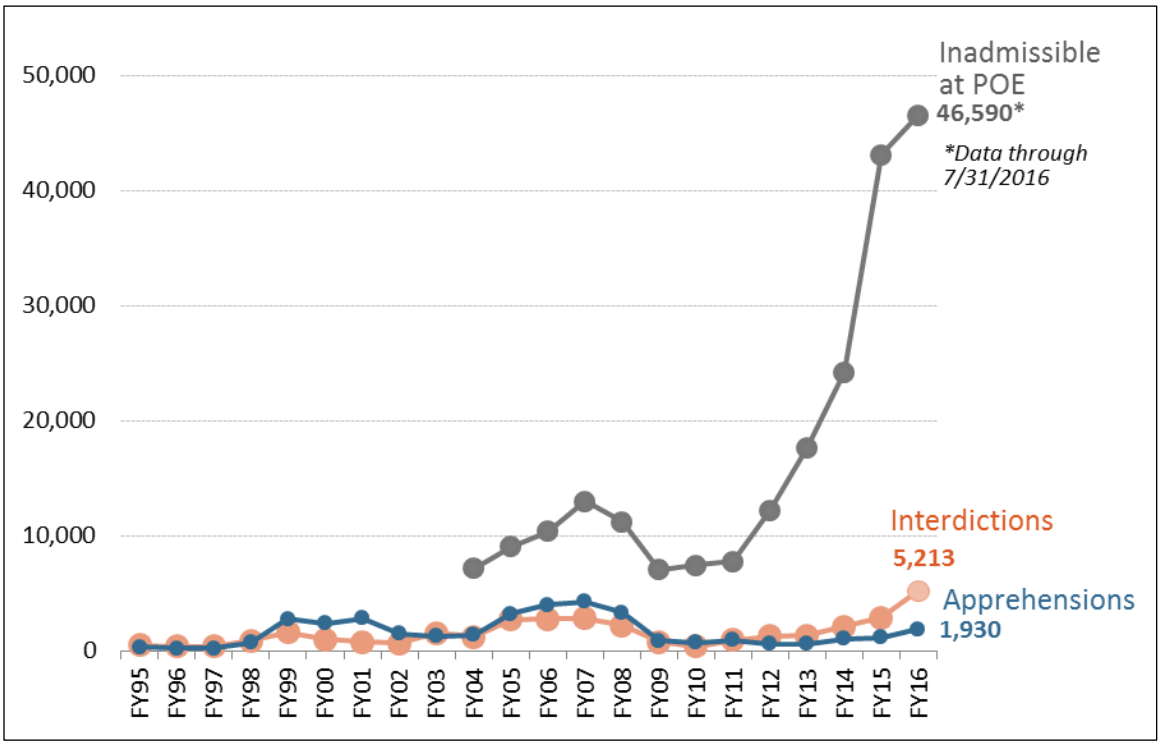
[15] At ports of entry (POEs), the CBP Office of Field Operations is responsible for conducting immigration, customs, and agricultural inspections of travelers seeking admission to the United States. Along the border between POEs, CBP's U.S. Border Patrol is responsible for enforcing immigration law and other federal laws and preventing unlawful entries into the United States.

[16] See, for example, Miriam Jordan, "More Cubans Migrate to U.S. Migrants fear narrowing or closure of window of opportunity that provides them special treatment," *Wall Street Journal Online*, September 20, 2015.

entry (see **Appendix** for the yearly data in **Figure 1**). The terms "unauthorized" and "inadmissible" are used here to describe these Cuban migrants because they do not meet the INA requirements for admission to the United States (although policies may permit them to enter and remain in the country).

Figure 1. Unauthorized Cuban Migration: FY1995-FY2016

Maritime Interdictions, Border Patrol Apprehensions, and Inadmissible Cubans Arriving at Ports of Entry



Source: CRS presentation of U.S. Coast Guard, CBP U.S. Border Patrol, and CBP Office of Field Operations data.

Notes: FY2016 data on inadmissible Cubans arriving at a port of entry (POE) are as of July 31, 2016; other FY2016 data are for the full year.

The U.S. Coast Guard is charged with interdicting unauthorized migrants at sea prior to landfall in the United States. As shown in **Figure 1**, the annual number of maritime interdictions of Cubans has fluctuated over the years (see **Figure A-1** for yearly data). The trend, however, has been consistently upward since 2010. Between FY2013 (the year before the announced shift in U.S. policy toward Cuba) and FY2016, the number of maritime interdictions increased nearly fourfold, from 1,357 in FY2013 to 5,213 in FY2016. The number of maritime interdictions in FY2016 was higher than in any other year during the FY1995-FY2016 period.

The annual number of Cubans apprehended by the Border Patrol between U.S. ports of entry has likewise fluctuated over the years, generally tracking the interdiction data. These apprehensions have risen consistently since FY2012 (see **Figure A-2**). Between FY2013 and FY2016, Border Patrol apprehensions of Cubans increased more than threefold, from 624 to 1,930. The FY2016 figure was the highest since FY2008. Consistent with maritime travel, the vast majority of these encounters have occurred in U.S. coastal areas.

Far greater than the number of Coast Guard interdictions and Border Patrol apprehensions of Cubans each year combined, at least since FY2004, is the number of Cubans encountered at

official U.S. ports of entry (see **Figure A-3**). These data reflect a preference on the part of Cubans to travel to the United States mainly by land. Unlike migrants of other nationalities, Cubans who are not eligible for formal admission are nevertheless generally able to enter and live in the United States in accordance with special immigration policies, as discussed. The number of inadmissible Cubans arriving at ports of entry has grown annually since FY2009. The increases since FY2014 have been marked, with total numbers more than doubling between FY2014 (24,277) and FY2016 (46,590). The majority of these Cubans present themselves at land ports of entry along the southwest border.

Other Immigration Pathways

Qualified Cubans can also avail themselves of pathways to permanent residence in the United States available to all nationalities. Cuban asylum seekers, like those of all nationalities, can apply for asylum from within the United States or at a U.S. port of entry, or they can be considered for refugee status abroad. Under the INA, refugees typically have to be outside their home country, but there is an in-country refugee program that enables certain Cubans, including human rights activists, members of persecuted religious minorities, and former political prisoners, to apply to the U.S. refugee program while still in Cuba.[17] Persons granted asylum or admitted to the United States as refugees can apply for LPR status after one year.[18] Among the other pathways to permanent residence, U.S. citizens and LPRs can petition for eligible family members in Cuba to become LPRs through the U.S. family-based immigration system.[19]

Statistics on Refugee Status and Asylum

Annual numbers of refugee admissions to the United States from Cuba have varied over the years, revealing no clear trend. With the exception of one year when annual admissions of Cuban refugees exceeded 6,000, refugee admissions from Cuba have numbered less than 5,000 each year since FY1996.[20] Asylum grants have been significantly lower. In FY1996, the peak year for asylum grants in the FY1996-FY2014 period, 886 Cubans were granted asylum. In each year between FY2002 and FY2014, fewer than 100 Cubans received asylum.[21]

Eligibility for Federal Assistance

In addition to creating processes for the admission of refugees and the granting of asylum, the Refugee Act of 1980 authorized federal assistance to resettle refugees of all nationalities and promote their self-sufficiency. It established the Office of Refugee Resettlement at the

[17] See CRS Report R42866, *Permanent Legal Immigration to the United States: Policy Overview*; and CRS Report R44020, *In-Country Refugee Processing: In Brief*.

[18] INA §209(a) provides that after one year of physical presence in the United States, a refugee "shall ... return or be returned to the custody of the Department of Homeland Security for inspection and examination for admission to the United States as an immigrant." INA §209(b) authorizes the Secretary of Homeland Security or the Attorney General to adjust the status of a person granted asylum, subject to specified requirements.

[19] See CRS Report R42866, *Permanent Legal Immigration to the United States: Policy Overview*.

[20] U.S. Department of Homeland Security, Office of Immigration Statistics, *2005 Yearbook of Immigration Statistics*, November 2006, Table 14;.U.S. Department of Homeland Security, Office of Immigration Statistics, *2014 Yearbook of Immigration Statistics*, August 2016, Table 14.

[21] U.S. Department of Homeland Security, Office of Immigration Statistics, *2005 Yearbook of Immigration Statistics*, November 2006, Tables 17, 19; U.S. Department of Homeland Security, Office of Immigration Statistics, *2014 Yearbook of Immigration Statistics*, August 2016, Tables 17, 19.

Department of Health and Human Services (HHS) to administer a set of refugee resettlement assistance programs.

Another 1980 law, the Refugee Education Assistance Act,[22] enacted at the time of the Mariel Boatlift, addressed the eligibility of Cubans and Haitians for federal assistance and benefits. Section 501(e) of the law defined the term "Cuban and Haitian entrant," which had been used by the Carter Administration to describe Mariel arrivals, for purposes of eligibility for federal assistance:

> (1) any individual granted parole status as a Cuban/Haitian Entrant (Status Pending) or granted any other special status subsequently established under the immigration laws for nationals of Cuba or Haiti, regardless of the status of the individual at the time assistance or services are provided; and
>
> (2) any other national of Cuba or Haiti—
>
> (A) who—(i) was paroled into the United States and has not acquired any other status under the Immigration and Nationality Act; (ii) is the subject of removal proceedings under the Immigration and Nationality Act; or (iii) has an application for asylum pending with the Immigration and Naturalization Service; and
>
> (B) with respect to whom a final, nonappealable, and legally enforceable order of removal has not been entered.

The law directed the President "to exercise authorities with respect to Cuban and Haitian entrants which are identical to the authorities which are exercised under [the Refugee Assistance provisions of the INA]."[23] It also allowed the President to provide by regulation "that benefits granted by any law of the United States ... with respect to individuals admitted to the United States [as refugees] ... shall be granted in the same manner and to the same extent with respect to Cuban and Haitian entrants."[24] Another law, the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996, as amended,[25] made Cuban and Haitian entrants eligible for certain federal public benefits to the same extent as refugees.[26]

Policy Proposals

Steps taken by the Obama Administration to date to normalize relations with Cuba have not changed U.S. policy toward Cuban migrants. However, these efforts have raised questions about the potential for changed policies in the future through either executive or congressional action. Much of this attention has focused on the CAA, which, as discussed, grants DHS the discretionary authority to adjust the status of eligible Cubans. Generally speaking, the executive could be said to have some latitude under the CAA to determine whether to exercise this discretion toward individual Cuban migrants or classes of Cuban migrants. With respect to congressional action, bills were introduced in the 114th Congress to repeal the CAA.[27] If enacted,

[22] P.L. 96-422, October 10, 1980.

[23] P.L. 96-422 §501(a)(1).

[24] P.L. 96-422 §501(b).

[25] P.L. 104-193, August 22, 1996; P.L. 105-33, August 5, 1997.

[26] For information about federal assistance available to refugees, see CRS Report RL31269, *Refugee Admissions and Resettlement Policy*.

[27] See, for example, H.R. 3818 and H.R. 4847, as introduced in the 114th Congress.

measures such as these would eliminate the special adjustment of status pathway for Cubans, requiring them to qualify for adjustment of status under the applicable provisions in the INA.

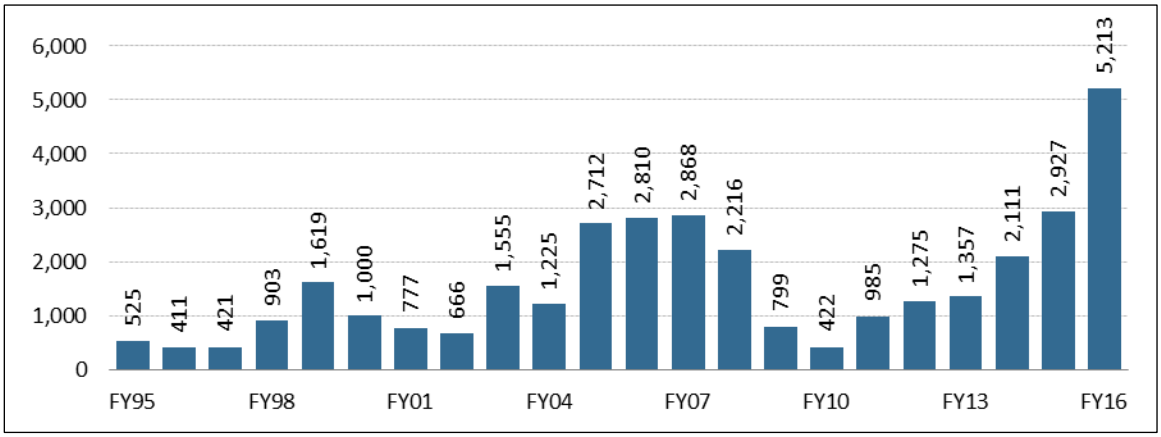
Other legislation was introduced in the 114th Congress that would eliminate the special treatment that Cuban entrants receive with respect to federal refugee resettlement assistance and other federal assistance. Proposals limited to ending federal assistance, however, would not change existing immigration policies toward Cubans and, thus, would not directly impact the ability of Cubans to enter the United States or to adjust status under the CAA.[28]

[28] See, for example, H.R. 4247 and S. 2441, as introduced in the 114th Congress. By contrast, H.R. 4847, as introduced, includes provisions to both end eligibility for federal assistance and change immigration policies.

Appendix. Unauthorized Cuban Migration Statistics

These three figures provide available data on the migration of unauthorized Cubans to the United States. These are the same data included in **Figure 1**. The figures display annual data since FY1995 on U.S. Coast Guard interdictions (**Figure A-1**) and U.S. Border Patrol apprehensions between U.S. ports of entry (**Figure A-2**), and annual data since FY2004 on inadmissible Cubans encountered at U.S. ports of entry (**Figure A-3**).[29] As discussed, the recent increases in all three measures are widely attributed to Cuban concerns that U.S. treatment of Cuban migrants may soon change. The data, however, also reflect considerable variability in earlier years. Observers have identified a number of factors that may have contributed to these annual changes. On the U.S. side, these include U.S. economic conditions (e.g., the 2007-2009 recession and slow recovery) and migration-related policies affecting Cubans (e.g., changes in Coast Guard patrolling methods).[30]

Figure A-1. Maritime Interdictions of Cubans

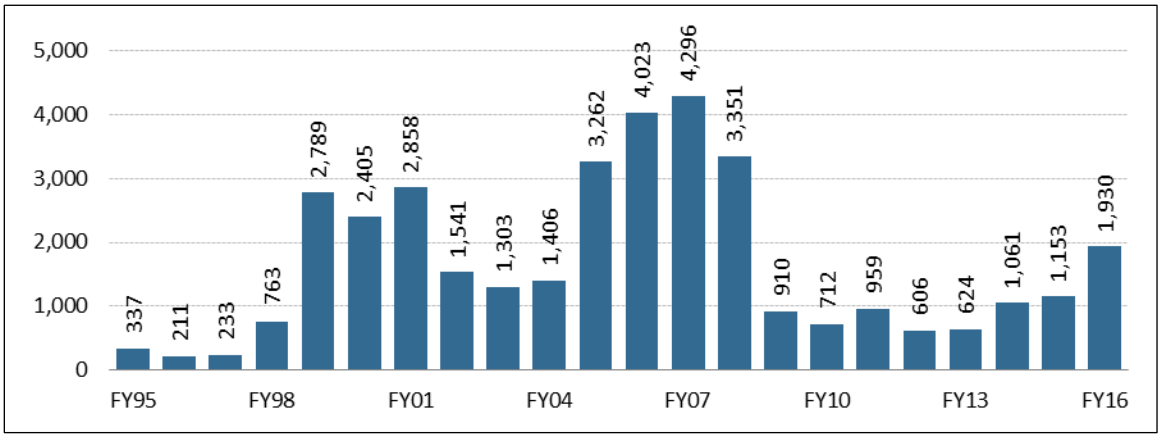


Source: CRS presentation of U.S. Coast Guard data.

[29] According to the CBP Office of Field Operations, pre-2004 data are not available.

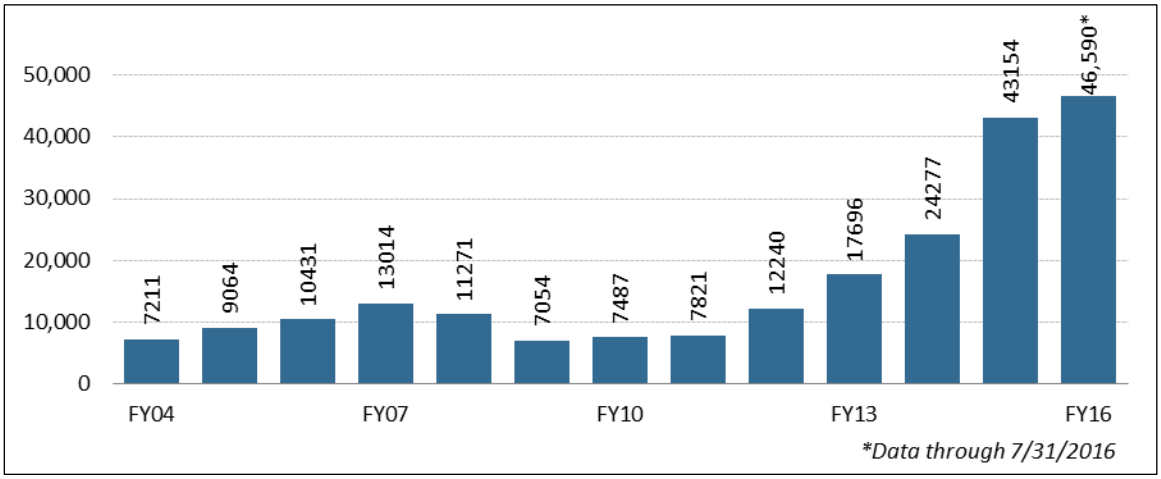
[30] See, for example, Alfonso Chardy and Juan O. Tamayo, "Number of Cubans trying to enter U.S. increases," *Miami Herald*, June 17, 2012. For a discussion of Cuban policies and the policies of other nations that may have affected unauthorized Cuban migration to the United States over the years (e.g., changes in Cuban travel policies), see CRS Report R43926, *Cuba: Issues for the 114th Congress*.

Figure A-2. Border Patrol Apprehensions of Cubans



Source: CRS presentation of CBP U.S. Border Patrol data.

Figure A-3. Inadmissible Cubans Arriving at U.S. Ports of Entry



Source: CRS presentation of CBP Office of Field Operations data,

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