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**Why Not Row to the Bahamas Instead of Miami?:  
The Conundrum That Awaits Cuban Elite  
Baseball Players Who Seek Asylum and the  
Economic Nirvana of Free Agency**

Danyahel Michael Norris



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# **Why Not Row to the Bahamas Instead of Miami?: The Conundrum That Awaits Cuban Elite Baseball Players Who Seek Asylum and the Economic Nirvana of Free Agency**

By: Walter T. Champion\* and Danyahel Norris\*\*

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## **I. Introduction**

Cuban baseball player Orlando (El Duque) Hernandez escaped from Cuba on a rickety boat and after training in Costa Rica for two months he arrived in Miami with a \$6.6 million contract from the New York Yankees.<sup>1</sup> Maels Rodruiguez, a 24 year-old Cuban pitcher, became a free agent in the January 2004.<sup>2</sup> The work-out for his services took place in El Salvador, which is the country to which Rodruiguez defected.<sup>3</sup>

However, Rolando Viera, a Cuban pitcher, was denied his request for free agency by a judge who said the player would not be irreparably harmed by being part of baseball's amateur draft.<sup>4</sup> The draft covers U.S. residents who have completed high school or their junior year in college.<sup>5</sup> To avoid being subject to the draft, most Cuban players have gone to Central America or another Caribbean country when they have left their homeland."<sup>6</sup>

The singular goal of all Cuban baseball defectors is to sign a lucrative contract to the highest bidder. They do not want to be subject to the Major League Baseball (MLB) draft so that only one team will have the right to contract for their services. It is a matter of some loose interpretation regarding how to treat a foreign player. This lack of clarity allows for a

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<sup>1</sup> Brook Lamer, *Play 'Pelota'! As Opening Day Nears, Major League Teams Sign Up More Players Than Ever from Latin America; They're Good, Eager, and Relatively Cheap*, NEWSWEEK, March 30, 1998, at 30; see also Matthew Syed, *Glorious Amateurs' Risk Lives in Attempt to Flee Castro, Cuban Crosswords*, TIMES (LONDON), March 5, 2007, at 64.

<sup>2</sup> John Hickey, *Mariners Eyeing Cuban Defector Rodriguez Reportedly Throws 100 MPH, Will Work Out for Scouts*, SEATTLE POST – INTELLEGENCER, Jan. 14, 2004, at D1.

<sup>3</sup> Sam Borden, *Cuban Offers Arm Audition*, N.Y. DAILY NEWS, Dec. 4, 2003, at 74.

<sup>4</sup> *World Briefs*, SOUTH BEND TRIBUNE (INDIANA), June 5, 2001, at B3.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

“loophole” so that Cuban baseball defectors can avoid the Rule 4 draft and become a free agent.<sup>7</sup> The draft only applies to players from the United States and its commonwealths, possessions, and territories.<sup>8</sup> If a player came from Cuba, or some other country not listed in Rule 4, then that player would not be subject to the draft.<sup>9</sup> Usually, one can only achieve free-agent status by being in the league for six years.<sup>10</sup> Now, Cuban directors can achieve that laudable goal almost immediately. When a Cuban baseball player attempts to defect by way of a flimsy boat and is picked up by the U.S Coast Guard, he is transported either to the Bahamas or Miami.<sup>11</sup> If the player is detained in the Bahamas, his agent might be able to expedite matters so he can be granted asylum quickly by either the Dominican Republic or Costa Rica. Once the player has entered into a foreign country, his agent can set up auditions for major league scouts. However, once he’s in Costa Rica or the Dominican Republic, he must apply for U.S. entry under one or more of the available non-immigrant visa categories.<sup>12</sup> MLB can bring to the United States as many skilled players as they desire because there is no quota system and the players are considered proven talent.<sup>13</sup>

## **II. Defection of Cuban Baseball Players**

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<sup>7</sup> Jason Weiss, *The Changing Face of Baseball: In The Age of Globalization, Is Baseball Still as American as Apple Pie and Chevrolet?*, 8 U. MIAMI INT’L & COMP. L. REV. 123, 140 (1999-2000).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

In 1977, MLB Commissioner Bowie Kuhn established the Kuhn Directive in which he outlined MLB's position on Cuban baseball players.<sup>14</sup> This directive provides that U.S. teams could not recruit from Cuba or negotiate with players in Cuba.<sup>15</sup> It was not really implicated until 1991, when the first Cuban player, Rene Arocha, defected from Cuba with the sole intention of playing major league baseball.<sup>16</sup> Arocha slipped away from the rest of the Cuban baseball team while at Miami International Airport and immediately requested political asylum.<sup>17</sup> He was granted political asylum and allowed to remain in the U.S. and play professional baseball; MLB arranged a special lottery to allow interested teams the right to negotiate with Arocha.<sup>18</sup> After Arocha's defection, MLB formulated an ad hoc policy for Cuban nationals who had established residency in America; rather than subject him to the regular amateur draft, MLB held a special lottery open to any team interested in signing him.<sup>19</sup>

In 1992, MLB subjected two players to a special lottery; Cuban national team shortstop, Osmani Estrada, and left fielder, Alexis Cabrera, who defected in Mexico and crossed over the border, even though both sought free agency.<sup>20</sup> In 1993, future star shortstop of the New York

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<sup>14</sup> Andrea K. Schneider, *Baseball Diplomacy*, 12 MARQ. SPORTS L. REV. 473, 480 (2001).

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

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

<sup>17</sup> Baxter and Dominguez, *Baseball Si, Cuba No—Castro's Island May be a Goldmine for Major League Talent, But Under his Regime We May Never Know to What Extent*, THE SPORTING NEWS, Mar. 21, 1994, at 12.

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

<sup>19</sup> *Id.*; see also Barry Horn, *Cubans Travel Long Road to Join Rangers*, DAILY OKLAHOMAN, Jul. 11, 1993, at 7.

<sup>20</sup> Baxter & Dominguez, *supra* note 17, at 12; see also Matthew N. Greller, *Give Me Your Tired, Your Poor, Your Fastball Pitchers Yearning for Strike Three: How Baseball Diplomacy Can Revitalize Major League Baseball and United States-Cuba Resolutions*, 14 AM. U. INT'L & L. REV. 1647, 1672-73 (1999).

Mets, Rey Ordonez, defected and was subjected to a special lottery.<sup>21</sup> But, pitcher Ariel Prieto's entry in the 1995 amateur draft following his April 1994 defection was the last example of a high-profile Cuban player coming directly into the United States and being subjected to the draft or a draft variant.<sup>22</sup>

Joe Cubas, agent and self-proclaimed "enemy" of the Castro Government, perfected a different approach in shuttling Cuban ballplayers to the major leagues. Cubas initiated his technique while representing pitchers Osvaldo Fernandez and Livan Hernandez, who had defected in Tennessee and Mexico, respectively, during the summer and fall of 1995.<sup>23</sup> Cubas did not have his players seek residency in the United States as others did; instead, he took the pair to the Dominican Republic for six months to establish residency.<sup>24</sup> He exploited the "loophole" in MLB rules by establishing residency in the Dominican Republic, rather than the United States, thus avoiding the draft and allowing his players to sign as free-agents.<sup>25</sup>

### **III. Choice of Designation**

The choice of the designation to which one would seek asylum is crucial, especially since sea defections are fraught with danger. However, many Cuban baseball defectors simply walk away when Cuban national teams play elsewhere.<sup>26</sup> But, the Cuban government sometimes anticipates a defection; in those cases they simply bar that player from traveling with the national

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<sup>21</sup> See Baxter & Dominguez, *supra* note 17, at 12.

<sup>22</sup> See Murray Chass, *New Route to Majors for Cuban Defectors*, N.Y. TIMES, Dec. 7, 1995, at B24; see also Plunkett, *Cuban Refugee Makes Big Pitch for Big Times*, CHI. SUN TIMES, May 28, 1995, at 12.

<sup>23</sup> Matthew Frankel, Note, *Major League Problems: Baseball's Broken System of Cuban Defection*, 25 B.C. THIRD WORLD L. J. 383, 398-99 (2005).

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

<sup>25</sup> *Id.*; see also AP, *U.S. Asylum Could Cost Cuban Pitcher \$2 Million*, PALM BEACH POST, Jan. 2, 1998, at 4A; Joel Stein, *People: Como Se Dice Free Agent*, TIME MAG., Jan. 12, 1998, at 95; Simon Gonzalez, *Rangers Get First Chance at Cubans*, FT. WORTH STAR TELEGRAM, Dec. 15, 1995, at 3.

team.<sup>27</sup> Thus, the only option for banned players who seek to play professional baseball in the United States is to embrace the dangerous water route.

El Duque and his companions spent nearly four days on a remote deserted island in the Bahamas after failing to connect with a boat that was supposed to take him to Florida.<sup>28</sup> The defectors sustained on Spam, sugar, and boiled conch (which they peeled off rocks) before they were rescued by the U.S Coast Guard and delivered to a detention center in Freeport, Bahamas.<sup>29</sup> Alex Sanchez was 18 when he embarked on a raft held together by wire tubes, bolts, and ropes.<sup>30</sup> Cuban national team member, first baseman, Lou Toca, escaped when a Bahamian lobsterman noticed a small light several hundred yards away.<sup>31</sup> The Cuban's dilapidated, single-engine boat was ankle-deep in water and sinking fast.<sup>32</sup> The defectors had little more than fresh water for provisions and had no navigational equipment.<sup>33</sup> The lobstermen deposited the nine Cuban defectors with the Bahamian government the next day, who then took them to a detention center in Nassau.<sup>34</sup>

The Bahamas, the Dominican Republic, and the United States have each agreed to repatriate Cuban refugees who are denied asylum—these individuals are then returned to Cuba.<sup>35</sup>

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<sup>26</sup> Frankel, *supra* note 23, at 408.

<sup>27</sup> *Id.* at 409.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 409-10.

<sup>31</sup> *Id.* at 410.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

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

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

However, American authorities are more inclined to grant asylum to Cuban baseball players based on legal, political, and humanitarian concerns. To avoid repatriation under the United States' "Wet Feet, Dry Feet" policy,<sup>36</sup> Cuban refugees are forced to resort to the use of professional smugglers.<sup>37</sup> Ballplayers' agents sometimes arrange for Miami-based smugglers to bring the players' families from Cuba to Florida.<sup>38</sup>

#### **IV. MLB Rules**

The MLB's "loophole" fuels the circuitous route to asylum that Cuban baseball players take on their route to playing professionally in the United States. In the case of Juan Carlos Diaz and Josue Perez, the MLB commissioner granted them free agency after they were signed by the Los Angeles Dodgers.<sup>39</sup> The two Cuban ballplayers claimed they were deceived by the team and denied a chance to sign with other major league clubs.<sup>40</sup> The commissioner also fined the Los Angeles Dodgers for violating MLB rules against scouting in Cuba or arranging defections.<sup>41</sup> Their agent further alleged that "the Dodgers tried to have the players' visas terminated and told them they had to leave the country."<sup>42</sup> [The agent]. . . said they are being allowed to stay pending a decision by the immigration services."<sup>43</sup>

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<sup>36</sup> *Id.* at 412.

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

<sup>38</sup> *Id.* at 415; *see also* Greller, *supra* note 20, at 1673-83.

<sup>39</sup> AP, *Cuban Players Blaming the Dodgers*, ALBANY TIMES UNION, Jun. 30, 1999, at C5; *see also NL Extra Bases Dodgers Fined, Lose Cuban Players*, ATLANTA JOURNAL CONSTITUTION, Jun. 30, 1999 at 5C .

<sup>40</sup> AP, *supra* note 39.

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

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*



The embargo established by the Helms-Burton Act against Cuba regulates virtually all commerce between the United States and Cuba.<sup>44</sup> The embargo is the primary reason for the preservation of the broken system of Cuban baseball defection. This act seriously impacts major league baseball and Cuban defectors alike. The act mandates strict enforcement of the Cuban Assets Control Regulations (CACRs), which provides the embargo's rules as they pertain to MLB clubs and Cuban players.<sup>45</sup> The CACRs prohibit "transactions incident to travel to, from, and within Cuba" as well as any "payment or transfer" to any Cuban national.<sup>46</sup> The embargo prohibits MLB teams from conducting any business in Cuba such as signing or scouting prospective ballplayers.<sup>47</sup> Cuban players who sign lucrative contracts in America are prohibited from sending all but a portion of their earnings back to Cuba.<sup>48</sup> The embargo prevents MLB team officials from traveling to Cuba and transacting with any Cuban nationals; thus, ballplayers must not only leave Cuba, but they must also defect and renounce their Cuban citizenship as a prerequisite before they can play for an MLB club.<sup>49</sup>

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<sup>44</sup> 22 U.S.C. §§ 6021-91 (2009).

<sup>45</sup> *Id* at § 6032.

<sup>46</sup> 31 C.F.R. §§ 515.305, 515.309(a), 515.415(a) (1) (2009) (An exception allows emigrants to send \$300 every three months to Cuban households); *see also* 31 C.F.R. § 515.570(a) (2009).

<sup>47</sup> Frankel, *supra* note 23, at 393.

<sup>48</sup> *See* 31 C.F.R. §515.570 (2009); *see also* Steve Fainara & Ray Sanchez, *THE DUKE OF HAVANA: BASEBALL, CUBA, AND THE SEARCH FOR THE AMERICAN DREAM* 111-112, 138-39 (2001) (noting that Liván Hernández, after revealing in a newspaper interview that he sent money in excess of the limitations back to Cuba, was directed to cease and desist by the U.S. Treasury Department, embargo convictions can generate stiff penalties).

<sup>49</sup> *See* Greller, *supra* 20, at 1661-66 (noting that a combination of the U.S. Immigration policies and MLB rules compel players to defect if they want to play in the MLB); *see also* Scott Cwierny, Note, *The Need for a Worldwide Draft: Major League Baseball and Its Relationship with the Cuban Embargo and United States Foreign Policy*, 20 *LOY. L.A. ENT. L. REV.* 391, 411-16 (2000); Schneider, *supra* note 14, at 479-86.

MLB subjects Cuban players to a more complex set of rules than it does other foreign amateur players.<sup>50</sup> Ballplayers residing within the United States, its territories and possessions, and Canada are subjected to the June amateur draft.<sup>51</sup> Once an MLB team drafts a player, that franchise holds exclusive negotiating rights to that player for a contract at the minor league level where the player will have the opportunity to prove himself capable of moving up to the majors.<sup>52</sup> However, foreign players are not drafted; their entrance into the league is governed instead by a simple minimum age requirement.<sup>53</sup> As long as this requirement is met, foreign ballplayers are free agents who can sign with any team willing to pay.<sup>54</sup> Free agency produces larger contracts as a result of bidding wars between teams vying for their services.<sup>55</sup> Agents advise foreign players to remain outside the United States until they are signed, since establishing U.S. residency would subject them to the amateur draft and less lucrative contracts.<sup>56</sup>

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<sup>50</sup> See Schneider, *supra* note 14, at 480-91; see also MAJOR LEAGUE BASEBALL, THE OFFICIAL PROFESSIONAL BASEBALL RULES BOOK, R. 3, 4 (2003) [hereinafter MLB RULES BOOK] (The MLB Commissioner “has broad power to approve contracts; resolve disputes between clubs and between players; discipline players, clubs, and club owners; and make rules governing the administration of the baseball enterprise.”); ROGER I. ABRAMS, LEGAL BASES: BASEBALL AND THE LAW 96, 113 (1998). (Thus, the Commissioner’s office formulates and enforces all rules governing the entrance of players into the league, including Cubans and other foreigners); see Cwiertny, *supra* note 49, at 411-12 (Judge Walter C. Lindley, in a 1931 case involving the Commissioner’s power of investigation, described the Commissioner as “a benevolent but absolute despot [with] all the disciplinary powers of the proverbial pater familias.”); Milwaukee Am. Ass’n v. Landis, 49 F.2d 298, 299 (N.D. Ill. 1931) (Legal challenges to the Commissioner’s actions rarely succeed, as courts generally do not disturb the Commissioner’s decisions absent a clear violation of his duties under the MLB charter.); See generally Matthew B. Pachman, Note, *Limits on the Discretionary Powers of Professional Sports Commissioners: A Historical and Legal Analysis of Issues Raised by the Peter Rose Controversy*, 76 VA. L. REV. 1409 (1990).

<sup>51</sup> MLB RULES BOOK, *supra* note 22, at R. 4(a).

<sup>52</sup> *Id.* at R. 4(d)-(f); Greller, *supra* note 20, at 1662 (A player who is eligible for the draft but is not drafted can negotiate with any team as a free agent); MLB RULES BOOK, *supra* note 22, at R. 4(i); Schneider, *supra* note 14, at 480.

<sup>53</sup> Frankel, *supra* note 23, at 396.

<sup>54</sup> *Id.*

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

The embargo, along with MLB policy, adds complications to the possibility of Cuban players hoping to play as professionals in America. The Kuhn Directive establishes the basics of MLB's Cuban policy.<sup>57</sup> The directive disallows any club from recruiting or negotiating with any player in Cuba.<sup>58</sup> Cuban players must establish residency outside of Cuba if they wish to play in MLB.<sup>59</sup> These MLB rules work with political and legal considerations to effectively compel Cuban players to defect if they want to play American baseball.<sup>60</sup>

### V. INS Rules

The "loophole" itself is not the basis of the bizarre treatment that awaits Cuban ballplayers who seek asylum, but an opportunistic response to America's Anti-Castro policy. Congress amended existing immigration laws which provided for "O" and "P" visa categories for arriving athletes who do not intend to permanently reside in the United States.<sup>61</sup> For many foreign baseball players, the "O" and "P" visa categories provide a ticket to major league baseball. The "O" visa category provides an extremely practical forum of entry for proven baseball players. It not only provides temporary work permits for foreign baseball players, it also enables coaches, trainers, and their families to enter.<sup>62</sup> In applying for the "O" visa, a baseball team need only contact the foreign player and file a petition with one of the four

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<sup>56</sup> *Id.*, at 396; *See also, e.g.*, Jerry Crasnick, *Ordonez Is Off to Succeed the Wizard*, DENVER POST, Apr. 7, 1996, at C15 (discussing Cuban defector Rey. Ordonez's path from Cuba, through the New York Mets minor league system, to his debut for the Mets on opening day, 1996); *see also* Horn, *supra* note 9, at 7 (discussing how two early Cuban defectors, Osmani Estrada and Alexis Cabreja, were drafted and signed to minor league contracts by the Texas Rangers).

<sup>57</sup> Frankel, *supra* note 23, at 397.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> Greller, *supra* note 20, at 1655-56.

regional INS Centers.<sup>63</sup> The player’s petition for the “O” category visa must include the baseball team’s schedule with the specific dates and locations of each game.<sup>64</sup> Approval of these “O” visa petitions requires consultation with a peer group in the player’s field.<sup>65</sup> Baseball player peer groups can consist of other players, managers, or baseball officials as long as they can attest to the exceptional ability of the foreign player.<sup>66</sup>

The “O” visa category contains three subcategories.<sup>67</sup> The first subcategory, the “O-1” visa, enables an alien to enter the United States if the alien possesses extraordinary athletic ability that is supported by sustained recognition.<sup>68</sup> Congress enables an unlimited allotment of these “O-1” visas per year, and allows foreign baseball players to use these visas for a maximum period of three years.<sup>69</sup> The second subcategory, known as the “O-2” visa, provides a nonimmigrant visa for an alien to accompany the “O-1” alien.<sup>70</sup> For foreign baseball players, a coach or trainer can utilize this “O-2” visa subcategory to accompany the player.<sup>71</sup> The third

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<sup>62</sup> *Id.* at 1657.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 1657-58; *see* 8 U.S.C. § 1101 (a) (15) (o)-(p) (2003).

<sup>67</sup> Greller, *supra* note 20, at 1658; *see also* 8 U.S.C. § 1101 (a) (46) (1992).

<sup>68</sup> *Id.*

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

<sup>70</sup> *Id.* at 1659.

<sup>71</sup> Greller, *supra* note 20, at 1659.

“O” visa subcategory, known as the “O-3” visa, permits the spouse or children of an “O-1” or “O-2” alien to accompany or follow their alien family member.<sup>72</sup>

The “P” visa category provides for the temporary employment of internationally renowned athletes.<sup>73</sup> While the “P” visa includes four subcategories, the “P-1” visa subcategory proves particularly useful for foreign baseball players because it can cover either internationally recognized individual baseball players, or each member of an internationally recognized team.<sup>74</sup> Although the procedures for obtaining a “P” visa are generally the same for the “O” visa, the “P” visa category contains less stringent eligibility requirements and a longer period of stay.<sup>75</sup> To petition for the “P-1” visa, a foreign baseball player needs a tendered contract with a specific team.<sup>76</sup> These baseball players must also provide documentation of at least two of the following: participation with a national team during international competition; a written statement by an MLB official detailing the player’s international reputation; or evidence that the player received a significant award or honor.<sup>77</sup> By demonstrating sufficient talent, a foreign national team baseball player who is tendered a contract with an MLB team can obtain a “P-1” visa.<sup>78</sup>

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<sup>72</sup> *Id.* at 1659; *see also* Jon Jordan, Comment, *The Growing Entertainment and Sports Industries Internationally: New Immigration Laws Provide for Foreign Athletes and Entertainers*, 12 U. MIAMI ENT. & SPORTS L. REV. 207, 218-22 (1995).

<sup>73</sup> Greller, *supra* note 20, at 1659-60.

<sup>74</sup> *Id.* at 1660.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 1661.

<sup>77</sup> Greller, *supra* note 20, at 1661.

<sup>78</sup> *See* Immigration and Nationality Act § 101 (a)(15)(o)(iii); 8 U.S.C. § 1101 (a)(15)(o)(iii) (detailing the circumstances in which certain persons may accompany an athlete or artist). *See generally* Greller, *supra* note 20, at 1658-59.

MLB's operating procedures express the eligibility requirements for MLB teams to sign or draft baseball players under the terms of Major League Baseball Professional Rules 3 and 4.<sup>79</sup> These rules apply only to players who never signed a major league or minor league contract, and to those who satisfy certain residency requirements.<sup>80</sup> Foreign baseball players' entry into the MLB is governed only by the minimum age requirements of Rule 3.<sup>81</sup> Once these age requirements are met, the foreign players can freely negotiate with all thirty MLB teams to sign a contract.<sup>82</sup> For either "O" or "P" visas, the player must sign a contract with an MLB team.<sup>83</sup>

For Cuban players the road is much more circuitous. Cuban ballplayers need not apply for the "O" and "P". The interaction of MLB's internal policies and hostile relations with Cuba steer Cuban baseball players in a different direction. The former Kuhn Directive forbids MLB teams from either discussing or negotiating with anyone in Cuba regarding the signing of any baseball player in Cuba.<sup>84</sup> This policy effectively forces Cuban players to seek residency elsewhere if they desire to play in MLB.<sup>85</sup> Current immigration policy toward Cuban refugees requires Cubans to reach United States soil in order to invoke the Cuban Adjustment Act of 1966

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<sup>79</sup> Greller, *supra* note 20, at 1661.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 1662.

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

<sup>83</sup> *Id.* at 1663.

<sup>84</sup> *Id.* at 1664-65.

<sup>85</sup> *Id.* at 1665; see 8 C.F.R. § 214.2(p)(4)(i)(A)-(B)(1998) (setting forth the regulations for obtaining "P-1" visas for non-internationally recognized team members of an internationally recognized team); 8 C.F.R. § 214.2(p)(1) (observing that unlike the "extraordinary ability" requirements of the "O-1" category, baseball players seeking to enter under a "P-1" visa only need to demonstrate that they can compete at an "internationally recognized level of performance"); see also Immigration and Nationality Act, §. 214, 8 U.S.C. §. 1184 (a)(2)(B)(i) amended by Illegal Immigration and Nationality Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (emphasizing that under the "P" visa category, athletes seeking to compete in the United States can stay for a maximum of ten years, whereas under the "O" visa category, foreign athletes seeking to play in the United States can stay for a maximum of three years).

“CAA”),<sup>86</sup> otherwise known as the “Wet Feet, Dry Feet” policy.<sup>87</sup> If intercepted at sea, refugees are returned to Cuba unless they are found to have a “credible fear of persecution,” in which case they are taken to Guantanamo naval base and granted a second interview.<sup>88</sup> If during the second interview it is determined that a “fear of persecution” exists, they are then transferred to a third country.<sup>89</sup> If no “credible fear of persecution is determined” to exist, the refugee is automatically repatriated to Cuba. The “Wet Feet, Dry Feet” interdiction policy is used to circumvent the CAA since in order to invoke the CAA, a refugee has to be on U.S soil.<sup>90</sup> Whether, a Cuban refugee is discovered in the water or on land has no logical relation to the reasons why he seeks to invoke the CAA.

Interdicted refugees must establish a “credible fear of persecution” in order to prevent repatriation.<sup>91</sup> This standard is comprised of two prongs. The first entails determining whether there exists a “substantial likelihood” the refugee is being truthful.<sup>92</sup> The second prong requires making the determination of whether the claimant would have a reasonable possibility of establishing a well-founded fear of persecution.<sup>93</sup> The “substantial likelihood” standard required in the first prong is a much stricter test than required by the United Nations High Commissioner

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<sup>86</sup> Cuban Adjustment Act, Pub. L. No. 89-732, 80 Stat. 1161 (1966).

<sup>87</sup> Roland Estevez, Note, *Modern Application of the Cuban Adjustment Act of 1966 and Helms-Burton: Adding Insult to Injury*, 30 HOFSTRA L. REV. 1273, 1290 (2002).

<sup>88</sup> *Id.* at 1290.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*; *See also* 8 U.S.C. § 1255 (2000)).

<sup>91</sup> Estevez, *supra* note 88, at 1290.

<sup>92</sup> *Id.*

<sup>93</sup> Estevez, *supra* note 88, at 1291.

for Refugees.<sup>94</sup> Additionally, performing an asylum hearing onboard a Coast Guard vessel by “shipboard adjudicators,” as required by interdiction policy,<sup>95</sup> limits the opportunity for a fair hearing. Also, it’s impossible to prevent the Castro government from harassing repatriated refugees.<sup>96</sup> The CAA was instituted almost forty years ago to provide haven from political persecution.<sup>97</sup> The CAA was also enacted to provide humanitarian support for the Cuban people.<sup>98</sup> The interdiction policies prevent the CAA from serving its intended role. However, the CAA has come under criticism by commentators claiming that the CAA provides preferential treatment to Cubans over other immigrants.<sup>99</sup>

## **VI. The Economic Nirvana of Free Agency**

Free agency is the cherished goal of every athlete. It gives the athlete the ability to market their services to the highest bidder. It is the antithesis of the life of a baseball player in Cuba. However, free agency and even the concept of free agency is anathema to the hopes, dreams, and convictions of all team owners everywhere. If it is allowed by management, it is never given freely, or without as many restrictions and exceptions as possible.<sup>100</sup> Free agency is only acquired through the give-and-take of collective bargaining.<sup>101</sup> From baseball’s reserve

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<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 1292; see also Read Sawczyn, Note, *The United States Immigration Policy Toward Cuba Violates Established Maritime Policy, It Does Not Curtail Illegal Immigration, and Thus Should be Changed So That Cuban Immigrants Are Treated Similarly to Other Immigrants*, 13 FLA. J. INT’L L. 343, 348-49 (2001).

<sup>97</sup> Estevez, *supra* note 88, at 1292.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*; see also Sawczyn, *supra* note 34, at 356; Bill Frelick, *U.S. Refugee Policy in the Caribbean: No Bridge Over Troubled Waters*, 20 FLETCHER F. WORLD AFF. 67, 72-73 (1996).

<sup>100</sup> See Weiss, *supra* note 7, at 133-34 (discussing restrictions of MLB baseball players).

<sup>101</sup> *Id.* at 128-34 (discussing collective bargaining of baseball players).



clause, to football's Rozelle Rule,<sup>102</sup> owners have tried to keep salaries relatively low by stopping every attempt by the teams to bid against each other for the services of a particular athlete.

But, by using MLB's "loop-hole" and the "Wet Feet, Dry Feet" policy of the USCIS, Cuban ballplayers are able to secure free-agency by traveling directly to the Bahamas. By not entering U.S territorial waters they also avoid interdiction by the U.S Coast Guard and subsequent repatriation to Cuba, while en route to their asylum destination. The penalty for ballplayers who attempt but fail to gain asylum is repatriation, and with that, the end of their baseball careers.

Livan Hernandez, the half-brother of Orlando "El Duque" Hernandez, defected in the summer of 1995 when he was with the national team in Monterrey, Mexico.<sup>103</sup> The omnipresent agent, Joe Cubas, waited outside of a restaurant parking lot in Monterrey.<sup>104</sup> Cubas drove Livan to the Monterrey airport where he flew to Venezuela; after arriving safely in Venezuela, Livan left for the Dominican Republic where he applied for and received political asylum.<sup>105</sup> Livan became a free agent and received a \$2.5 million signing bonus and a four-year contract for \$4.495 million to play for the Florida Marlins.<sup>106</sup>

One year after Livan's defection, "El Duque" was removed from the Cuban national team and was banned from the sport as punishment for his brother's defection and as deterrence to

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<sup>102</sup> See Tim Harlow, *Edward Glennon Fought for Free Agency*, STAR TRIB., May 4, 2009, at 8A.

<sup>103</sup> Weiss, *supra* note 7, at 143.

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

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

other players who might contemplate defection.<sup>107</sup> “El Duque” secured a new job as a sports trainer in a Cuban mental hospital for \$10.00 a day.<sup>108</sup> On December 26, 1997, Orlando Hernandez and seven others escaped from Cuba on a raft.<sup>109</sup> The U.S. Coast Guard found the group a few days later on a remote Bahamian island, and turned them over to Bahamian authorities.<sup>110</sup> Orlando and the others sought political asylum in the United States, but only Orlando, his common law wife, and a Cuban catcher were granted humanitarian parole and allowed entry.<sup>111</sup> The State Department’s rationale to grant legal status was that after Livan’s defection, El Duque was banned for life from organized baseball in Cuba, depriving him of his livelihood and subjecting him to harassment.<sup>112</sup> Under ordinary circumstances he would qualify for a U.S. visa issued to persons of extraordinary ability, including athletes, but the restrictions imposed on him made that impossible.<sup>113</sup> Orlando Hernandez did not immediately travel to the United States but waited with his traveling companions who were not granted legal status.<sup>114</sup> Joe Cubas advised Orlando to travel to Costa Rica, establish residency, and become a free agent.<sup>115</sup>

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<sup>106</sup> *Id.* at 144; *see also* Cwiertyny, *supra* note 49, at 399; Greller, *supra* note 22, at 1664; Fainara, *supra* note 20, at 100, 113; Thomas Stinson, *Baseball 96: National League: The Rookies: Cubans Will Make Contributions*, ATLANTA J. CONST., Mar. 31 1996, at 23F.

<sup>107</sup> Weiss, *supra* note 7, at 144.

<sup>108</sup> *Id.*; *see also* Kevin Baxter, *Throwing Cuban Players a Lifeline; Agent Joe Cubas has Turned Paupers into Princes—But Not Without Raising a Sea of Disturbing Questions*, THE SPORTING NEWS, Apr. 6, 1998 at 10.

<sup>109</sup> Weiss, *supra* note 7, at 144.

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

<sup>111</sup> *Id.*; *see also* Brendon Farrington, ‘El Duque’ Agrees to \$6.6 Million, Four Year Deal with Yankees, AP ONLINE NEWS WIRES, Mar. 7, 1998.

<sup>112</sup> Weiss, *supra* note 4, at 145.

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

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

<sup>115</sup> *Id.*

With the exception of his common law wife, Orlando and his travel partner went to Costa Rica; Orlando trained to get back into baseball shape and began auditioning for MLB scouts.<sup>116</sup> The New York Yankees eventually signed Orlando to a four year, \$6.6 million contract.<sup>117</sup>

Orlando could have lost \$2 Million or more if he immediately came to the United States for asylum.<sup>118</sup> If he had established his residency in the United States, he would have been subject to MLB's amateur draft or a lottery.<sup>119</sup> In either case, he would only have been able to negotiate with one team.<sup>120</sup> By establishing residency in another country, he became a free agent and was able to negotiate with any major-league team that was interested in signing him.

The millions received by Livan and Orlando Hernandez as a result of signing contracts as free agents may appear to be a sufficient incentive to risk life and limb. The granting of free agency to Cuban ballplayers creates a feeding frenzy for their services. But, unlike traditional free agents who have a well-documented and extensive history of accomplishment, the Cuban version of a free agent is relatively unknown and untested against MLB-caliber competition. MLB owners, who are so adamantly against free agency as a group, disintegrate into competing factions who greedily outbid rival owners in an attempt to secure the services of an untested unproven free agent. The pity and shame of it, is that Cuban ballplayers must choose between their families and playing in the MLB.

## **VII. Conclusion**

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

<sup>117</sup> *Id.*; see also Farrington, *supra* note 45.

<sup>118</sup> AP, *Cuban Players Change Plans. The Baseball Players Want Asylum in the Bahamas so They Can Negotiate with U.S. Teams*, ORLANDO SENTINEL, Jan. 2, 1998, at D2.

<sup>119</sup> *Id.*; see also, AP, *A.M. Briefing; Baseball: Castro Criticizes Cuban Players in the Majors*, SEATTLE TIMES, Nov. 25, 2005, at C9 (“Castro remarked on those who cannot resist the millions of the major league and acknowledged baseball is the spirit in which we have been beaten the most when it comes to defections....”).

The economic embargo, which tightly regulates virtually all commerce between the United States and Cuba, is the primary reason for the preservation of the current system of Cuban baseball defections. This embargo, now known as the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1994,<sup>121</sup> is commonly referred to as the Helms-Burton Act.<sup>122</sup> The embargo mandates strict enforcement of the Cuban Assets Control Regulations (CACRs) which prohibit “transactions incident to travel to, from, and within Cuba” as well as any “payment or transfer” to any Cuban national.<sup>123</sup> The embargo prohibits MLB teams from conducting business in Cuba, such as scouting or signing players, and from sending all but a small portion of their earnings back to their families in Cuba.<sup>124</sup> The embargo essentially forces the Cuban ballplayer to renounce his citizenship as a prerequisite to playing for an MLB club.<sup>125</sup>

Defecting Cuban ballplayers that establish residency in another country, can, with the assistance of their new team, apply and obtain visas pursuant to immigration laws that regulate foreign athletes who want to play in America.<sup>126</sup> For those who defect, the “Wet Feet, Dry Feet”

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<sup>120</sup> *Id.*

<sup>121</sup> Cuban Liberty and Democratic Solidarity (Libertad) Act, Pub. L. No. 104-114, 110 Stat 785 (1994).

<sup>122</sup> Estevez, *supra* note 34 at 1292; see also Matthew A. Pingeton, *United States Immigration Policy: Detaining Cuban Refugees Taken From the Sea*, 8 J. TRANSNAT'L L. & POL'Y 329 (1999); Alberto Perez, Note, *Wet Foot, Dry Foot, No Foot: The Recurring Controversy Between Cubans, Haitians, and the United States Immigration Policy*, 28 NOVA L. REV. 437 (2004); see also Frankel, *supra* note 23, at 393.

<sup>123</sup> Frankel, *supra* note 23, at 393.

<sup>124</sup> *Id.* at 393-94.

<sup>125</sup> Cuban Liberty and Democratic Solidarity (Liberated) Act of 1996, 22 U.S.C. §§ 6021-91 (2003).

<sup>126</sup> See 22 U.S.C. § 6032(c) (The Cuban Assets Control Regulations (CACRs), 31 C.F.R. §§ 515 101-901 (2003), were implemented in 1963 by the Kennedy Administration pursuant to authority granted by the Trading with the Enemy Act, 50 U.S.C. app. § 5 (b)(1)(2003). An exception to the general rule allows Cuban immigrants and others to send \$300 every three months to Cuban households. 31 C.F.R. §515.570(a) Cubans in MLB routinely violate the \$300 # rule—however, those convicted of violating the embargo restrictions can face up to \$100,000 in fines and/or ten years in prison. 31 C.F.R. § 515.701.).

rule returns Cubans who are interdicted at sea, but allows those who reach the United States to remain.<sup>127</sup> These rules allow ambitious agents to exploit MLB's loop-hole and put Cuban ballplayers in a position to seek the economic nirvana of free agency.

By establishing residency in the Dominican Republic, Cuban ballplayers will avoid the draft or lottery.<sup>128</sup> The MLB ruled that Cubans who establish foreign residency would be allowed to sign with any team as free agents.<sup>129</sup> Because of this, these players will be able to secure much more lucrative contracts than those who are drafted and required to negotiate exclusively with only one team.<sup>130</sup>

The fact that some Cuban ballplayers tickle the imagination of greedy, short-sighted owners and are transformed Pygmalion-like from near poverty to instant millionaire status, as a result of free agency, is probably a reasonable benefit in comparison to their permanent and irrevocable loss of family and country. The fault lies with the hypocrisy of the immigration laws as it affects Cuban nationals *qua* baseball celebrities. It is probably no coincidence that Fidel Castro is especially proud of his Cuban National team. Is this yet, not another example of sticking it to the man?

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<sup>127</sup> Frankel, *supra* note 23, at 394; *See also* 8 U.S.C. § 1101 (a)(15)(O)-(P) (2003); *see also* Greller, *supra* note 20, at 1655-66.

<sup>128</sup> *See* Frankel, *supra* note 23, at 399; Cwiertny, *supra* note 49, at 415-19; and Sawczyn, *supra* note 34, at 346-49.

<sup>129</sup> Frankel, *supra* note 23, at 399.

<sup>130</sup> *Id.*; *see also* Murray Chass, *New Route to Majors for Cuban Defectors*, N.Y. TIMES, Dec. 7, 1995, at B24.