



U.S. Citizenship
and Immigration
Services

To: REGIONAL DIRECTORS
SERVICE CENTER DIRECTORS
FIELD OFFICE DIRECTORS
NATIONAL BENEFIT CENTER DIRECTOR

From: Jonathan Scharfen /s/
Deputy Director

Date: July 31, 2007

Re: *Matter of Vazquez* (July 31, 2007)

As Deputy Director I hereby designate the attached decision of the Administrative Appeals Office (AAO) in *Matter of Vazquez* as a USCIS Adopted Decision. Accordingly, this decision is binding policy guidance on all USCIS personnel. This AAO decision provides guidance regarding the determination of Cuban citizenship for the purposes of adjustment under Pub. L. 89-732 (November 2, 1966), as amended, the Cuban Adjustment Act. In addition, the decision overrules *Matter of Buschini*, USCIS Adopted Decision 06-0004 (AAO, June 30, 2006).

USCIS personnel are directed to follow the reasoning in this decision in similar cases.



U.S. Citizenship
and Immigration
Services

FOR PUBLICATION

MATTER OF VAZQUEZ

In Cuban Adjustment Act Proceedings

A97 918 826

**Decided by the Chief, Administrative Appeals Office
July 31, 2007**

- (1) Applicants born in a country other than the Republic of Cuba and who hold the citizenship of that country may still establish Cuban citizenship for the purposes of adjustment under section 1 of Pub. L. 89-732 (November 2, 1966), as amended, the Cuban Adjustment Act, if they document their birth to a Cuban father or mother outside Cuba, as required by Article 29(c) of the Cuban Constitution. Individuals born outside Cuba whose Cuban citizenship is not documented with a Cuban passport, may establish Cuban citizenship for the purposes of adjustment under the Cuban Adjustment Act through the submission of a Cuban birth certificate issued by the Civil Registry of Cuba in Havana, or a Cuban consular certificate documenting their birth to at least one Cuban parent within the consular district served by the consulate.
- (2) Documentary requirements previously established by *Matter of Buschini*, USCIS Adopted Decision 06-0004 (AAO, June 30, 2006) are overruled and will no longer be followed by Citizenship and Immigration Services.

ON BEHALF OF PETITIONER:

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DISCUSSION: The Acting District Director, Miami, Florida, initially denied the application on May 16, 2006. The applicant appealed the decision to the Administrative Appeals Office (AAO) where it was rejected for lack of jurisdiction. Subsequently, the matter was reopened. On February 6, 2007, the District Director again denied the application and certified her decision to the AAO. The AAO subsequently issued a request for evidence to which counsel for the applicant responded on May 1, 2007. The district director's decision will be withdrawn. The application will be approved.

The applicant is a native of Venezuela who was admitted to the United States on January 23, 2001 as the beneficiary of an H-1B nonimmigrant visa petition. On November 17, 2003, he submitted an application to adjust status to that of lawful permanent resident pursuant to section 1 of Pub. L. 89-732 (November 2, 1966) as amended, the Cuban Adjustment Act (1966 Act).

The District Director denied the application to adjust status, finding that the applicant had not established that he was a citizen of Cuba and was, therefore, ineligible to adjust status under the 1966 Act. *Decision of the District Director*, February 6, 2007.

The applicant, through counsel, asserts that the applicant's birth certificate is proof that he is a citizen of Cuba and eligible to adjust status pursuant to the 1966 Act, and that Citizenship and Immigration Services' (CIS) denial of the instant application is based on a flawed interpretation of Cuban law. *Counsel's brief on appeal*, dated June 14, 2006.

The record of proceeding includes: (1) Form I-485, Application to Register Permanent Residence or Adjust Status, and supporting documentation, including a birth certificate issued to the applicant by the Cuban Civil Registry; (2) two requests for evidence issued by the Director, Texas Service Center, dated February 2 and March 30, 2005; (3) the applicant's responses to these requests; (4) a February 13, 2006 "memorandum of law" from applicant's counsel in support of the application and additional evidence; (5) the Acting District Director's May 16, 2006 denial of the Form I-485; (6) Form I-290B and supporting documentation, including a sworn declaration discussing Cuban and Venezuelan citizenship law from Professor Miguel A. Zaldivar Zaydin, a former Cuban and Venezuelan law practitioner; (7) the AAO's November 20, 2006 rejection of the appeal based on lack of jurisdiction; (8) the District Director's February 6, 2007 certification of her denial of the application; (9) the February 22, 2007 request for evidence issued by the AAO; and (10) counsel's May 1, 2007 response, with new evidence. The AAO reviewed the entire record in reaching its decision.

Section 1 of the 1966 Act states, in pertinent part:

[N]otwithstanding the provisions of section 245(c) of the [Immigration and Nationality Act] the 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 [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 application for such adjustment, and the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence as of a date thirty months prior to the filing of such an application or the date of his last arrival into the United States, whichever is later

For the purposes of adjustment under the 1966 Act, the record establishes that the applicant was admitted to the United States as an H-1B worker on January 23, 2001 and that he was physically present in the United States for at least one year prior to filing the Form I-485. Accordingly, the only issue before the AAO is whether the record demonstrates that the applicant is a native or citizen of Cuba.

The applicant was born in Caracas, Venezuela on November 24, 1964 and is, therefore, not a Cuban native. He was, however, born to Cuban parents from whom, counsel contends, he has acquired Cuban citizenship. In support of the applicant's claim to citizenship, counsel has submitted: copies of Republic of Cuba, Civil Registry Certifications of Birth, with translations, for the applicant and his parents; the applicant's birth registration at the Cuban consulate in Caracas; the Cuban passports issued to the applicant's parents; the marriage certificate for the applicant's parents; prior AAO decisions, dated April 13 and April 20, 2004, where applicants were found to have established Cuban citizenship on the basis of Cuban birth certificates; the Department of State's Reciprocity Schedule for visa issuance to Cubans and a listing of documents available from the Cuban Ministry of Justice, including birth certificates (<http://travel.state.gov/visa/reciprocity>); two declarations from Professor Miguel Zaldivar Zaydin regarding Cuban citizenship requirements, supported by related sections of the Venezuelan and Cuban Constitutions, and Cuban law and regulation; two affidavits from Cuba-educated attorneys in support of Professor Zaldivar's citizenship analysis; and a March 12, 2007 letter from the President of the Havana Bar Association in Exile identifying Professor Zaldivar as an expert on Cuban constitutional law and the Cuban legal system in general.

The AAO now turns to a consideration of counsel's assertions in light of the evidence just noted.

In the brief filed with the rejected appeal, counsel contended, in part, that the District Director's denial of the instant application relied on a flawed interpretation of Cuban law provided by the Library of Congress. In rebuttal, he submitted a declaration from Professor Miguel Zaldivar who, after receiving a law degree from the University of Havana in 1954, worked within the Cuban legal system until September 1961 and, thereafter, in private legal practice in Venezuela. Since 1982, Professor Zaldivar has been a member of the Havana Bar in Exile, considered by that organization to be an expert on

the requirements of Cuban citizenship law and matters related to the functions and duties of the Cuban Civil Registry. Professor Zaldivar's review found the conclusions reached by the Library of Congress regarding Cuban citizenship requirements to be inaccurate, and based on Cuban law no longer in effect. He reiterated this legal analysis in a second declaration submitted by counsel in response to the AAO's request for evidence. The analysis is supported by Avelino J. Gonzalez, a former professor of law at the University of Havana School of Law and now a legal consultant in Miami on matters involving Cuban law; and Jose Fraga Ramirez, a 1992 law graduate from the University of Havana who analyzes Cuban constitutional, civil and administrative law for the Spanish law firm of J&A Garrigues, S.L.

In cases in which they must apply foreign law, U.S. Federal Courts and the Board of Immigration Appeals (BIA) have relied upon the expertise of the Law Library of the Library of Congress (Law Library). *See, Cheung Tai Poon v. INS, 707 F.2d 258, 259 (6th Cir.1983)*. *See, Matter of Hosseinian, 19 I&N Dec. 453, (BIA 1987); Matter of Nwangwu, 16 I&N Dec. 61, 62 (BIA 1976); Matter of Akinola, 15 I&N Dec. 359, 360 (BIA 1975)*. The AAO also seeks opinions from the Law Library when it must interpret foreign law. Such opinions are accorded considerable weight given the expertise of the source.

Previously, as evidenced by the 2004 decisions submitted by counsel, the AAO determined a Cuban birth certificate to be proof of Cuban citizenship, basing its decision on the findings of a 2004 Law Library report. Subsequently, the Law Library in opinions dated July 7, 2005 and February 1, 2006 identified a residency requirement for citizenship and indicated that Cuban birth certificates were insufficient to establish citizenship, absent specific language certifying the referenced individual to be a Cuban citizen.¹ An adopted decision issued by the AAO on June 30, 2006 reflected this new information. While noting that the citizenship requirements imposed on individuals born outside Cuba to a Cuban parent were unclear, the AAO found the information provided by the Law Library to warrant requiring applicants for adjustment under the 1966 Act to

¹ In 2004, the Law Library responded to an AAO inquiry indicating that a Cuban birth certificate issued by a Cuban consulate was proof that the bearer of such a document was a Cuban citizen. LL File No. 2004-01259. On July 7, 2005, the Law Library indicated that individuals born outside Cuba to one Cuban citizen parent must have been physically present in Cuba for at least three months to be eligible to apply for citizenship. LL File No. 2005-01947. A third response, provided by the Law Library on February 1, 2006, summarized the two previous reports and provided a more complete analysis of Cuban law and practice regarding the acquisition of citizenship by an individual born outside Cuba to a Cuban parent. LL File No. 2006-02421. In explaining its seemingly contradictory 2004 and 2005 responses regarding the acquisition of citizenship, the Law Library noted that its 2004 response indicating that a Cuban birth certificate was proof of citizenship was not intended to apply to all Cuban birth certificates, only to the birth certificate it had reviewed in that inquiry, which specifically stated that the bearer was a Cuban citizen. LL File No. 2006-02421.

submit more than a birth certificate to establish Cuban citizenship. The decision indicated that, if submitted as sole proof of citizenship, a Cuban Civil Registry document, a Cuban consular certificate of citizenship or other document must be signed by “a Cuban official with appropriate authority over the registration of citizens **indicating that a named individual is a citizen** [emphasis added].” *Matter of Buschini*, USCIS Adopted Decision 06-0004 (AAO, June 30, 2006).

The AAO’s revised assessment, in *Matter of Buschini*, of the evidentiary value of Cuban birth certificates was based on the Law Library’s research into what legal formalities must be fulfilled by those seeking to acquire Cuban citizenship under section 29(c) of the Cuban Constitution:

ARTICLE 29. Those considered Cuban citizens by birth are:

...

(c) those born outside of Cuba of Cuban father or mother, provided that they comply with **the formalities of law** [emphasis added].

The Law Library reported that an unidentified official at a Cuban consulate in Mexico had indicated that Cubans born outside of Cuba to Cuban parents did not acquire citizenship automatically by registering their birth, but were required to be physically present in Cuba for three months before applying to become a citizen. It found further evidence of a residency requirement for Cuban citizenship in a 2004 Cuban report to the United Nations, which responded to a 2001 counter-terrorism resolution (No. 1373):

In Cuba legislative provisions relating to the granting of citizenship or other civil rights are contained in the Republic’s Constitution; Law No. 59/187, Civil Code; Law No. 51/85 on the Registration of Civil Status; Resolution No. 157/85, which provides its regulations; Decree No. 358 of 4 February 1944 on Citizenship Regulations and its supplementary provisions.

Relying on the Government of Cuba’s reference to Decree 358 in the 2004 report as one of the bodies of law regulating Cuban citizenship, the Law Library found Articles 3(b) and 5(4) of Decree 358 to impose a residency requirement when individuals born abroad to Cuban parents seek to acquire Cuban citizenship:

ARTICLE 3. The following are Cubans by birth:

...

b) those born on foreign territory, of Cuban father or mother, **by sole act of taking up residence in Cuba** [emphasis added].

...

ARTICLE 5. a Certificate of Nationality shall be issued to Cubans by birth included in section b) of article 3 of this Regulation, if the following requirements have been satisfied:

...

4) Statement issued by the Municipal Mayor of their domicile, if the individual lives outside of [Havana], verifying their actual place of residence. If the individual resided in the municipal terminal of [Havana] the statement shall be issued by the Police Capitan [sic] whose jurisdiction corresponds with that of the petitioner. **The petitioner should be actually physically located in Cuba** [emphasis added].

The Law Library noted that Decree 358 did not require three months of residence in Cuba as indicated by the Cuban consular official in Mexico, nor identify any specific length of residence for acquiring citizenship. The Law Library also reported that it had found no law or regulation with a three-month residency requirement.

In his declarations, Professor Zaldivar asserts that the legal formalities referenced by section 29(c) of the Cuban Constitution do not include the residency requirement identified by the Law Library, that registering an individual's birth at a Cuban consulate satisfies the legal formalities of section 29(c) of the Cuban Constitution. In support of his position, he points to the following sections of Cuban law and regulation governing citizenship – Law 51 and its implementing regulations, Resolution 157, enacted in 1985:

Cuban Law No. 51

WHEREAS: The Law of the Registry of Civil Status, in force in our country for over one hundred years, has been modified and complemented by diverse and profuse legislation that makes difficult its interpretation and application, for which reason it proves convenient to reunite in one single text the Norms that govern this activity.

...

ARTICLE 3. Birth, marriage, death, the acquisition, loss or recuperation of Cuban citizenship and all acts or actions that constitute or affect the civil status of persons shall be inscribed in the Registry of Civil Status and within the boundaries that this Law and its Regulations establish.

The actions or acts that constitute or affect the civil status of persons, and the documents in which they are recorded, in order to have probative value shall be inscribed or annotated previously in the Registry of Civil Status.

ARTICLE 4. In the inscriptions of birth, or in any other document or certification of the Registry of Civil status, it shall not be permitted to consign any declaration differentiating births, or relating to the civil status of the parents or the qualification of the filiations of the child.

...

ARTICLE 20. [T]he consular offices of Cuba shall record the actions and acts related to the civil status of Cubans and children of Cubans abroad, which shall be transcribed in the office of the Special Registry.

...

ARTICLE 31. The entries of the Registry of Civil Status shall constitute the proof of the civil status of persons.

...

ARTICLE 79. The registrar of civil status shall register or annotate . . . the acquisition, loss or recuperation of citizenship

The registration shall be performed in the office of the Registry of Civil Status corresponding to the domicile of the person or, in its absence, in the Special Registry of Civil Status.

Resolution No. 157

WHEREAS: Law No. 51 . . . establishes a new technical-administrative ordering of the activity and function pertaining to the registry of the civil status, that requires complementary rules that contribute to the compliance therewith.

...

ARTICLE 4. The Cuban consular or diplomatic functionaries abroad . . . shall observe the formalities and prescription established in the law and in this regulation

...

ARTICLE 77. When the birth does not take place in a unit of the National Health Care System, the declaration of birth shall be done before the registrar, in this case the official solicitation form for registration of birth shall be filled out in the office of the registrar

...

ARTICLE 88. The late registration of Cuban children born abroad, shall be adapted to the procedures and requirements that this section establishes

. . . .

Professor Zaldivar contends that the law and regulation just cited establish the registration of an individual's birth at the Cuban consulate located in the country where he or she was born as the only legal formality that must be observed to obtain Cuban citizenship. He points to Article 20 of Law 51 as providing the authority of Cuban consular offices to register events and acts related to the civil status of Cuban citizens, while Article 4 of Resolution 157 requires the consular offices registering these events to follow the formalities and legal requirements provided by Law 51 and its regulations. His declaration indicates that once registration at the consulate is completed, the administrative record and a certified copy of the birth certificate must be submitted to the National Civil Registry in Cuba to verify the authenticity of the information. The birth is recorded with the Civil Registry of the State in Cuba if all legal requirements and formalities have been satisfied.

Professor Zaldivar identifies the Civil Registry as the central office of vital records in Cuba and responsible for documenting the civil status of Cuban citizens by birth, regardless of whether they were born in or outside Cuba. He points to Article 31 of Law 51 – “The entries of the Registry of Civil Status shall constitute the proof of the civil status of persons.” – as proof that a Cuban birth certificate issued in Cuba by the Cuban Civil Registry is evidence that the individual named on the certificate is a Cuban citizen.

With regard to the Law Library's reliance on Decree 358 based on the reference made to it in the 2004 Cuban report previously noted, Professor Zaldivar questions the use of the report as a “source of law and/or as an accurate interpretation of . . . Cuban legislation.” He further asserts that the residency requirement in Article 3 of Decree 358, enacted in 1944, is incompatible with the current Cuban Constitution. Cuban law requires the Constitution be given precedence, citing the 1976 Cuban Law on Constitutional Transition:

[T]he laws, law-decrees, decree-laws, accords-laws, decrees and other legal dispositions passed before the 24th of February 1976 shall stay in force so long as they are compatible with the Constitution, while . . . they are not legally modified or derogated.

Professor Zaldivar also takes issue with the Law Library's finding that Article 5(4) of Decree 358 is proof of a residency requirement for citizenship, noting that Article 5 addresses the process for obtaining a Nationality Certificate, not citizenship. Nationality Certificates, he contends, were issued in Cuba during the 1940s and 1950s to individuals who sought them for certain administrative purposes, including the filing of a petition based on constitutional grounds before the Cuban Supreme Court. A Nationality Certificate, Professor Zaldivar states, documented its holder as a citizen of Cuba with active political rights.

Based on his knowledge of Cuban law governing civil status or citizenship, Professor Zaldivar concludes that the applicant's birth certificate issued by the Cuban Civil Registry (Application #6778) establishes him as a citizen of Cuba.

The AAO finds Professor Zaldivar's explanation of Cuban law as it applies to the acquisition of Cuban citizenship by individuals born outside Cuba to be persuasive. While it notes the Government of Cuba's reference to Decree 358 in the 2004 report to the United Nations and the three-month residency requirement stated by the Cuban consular officer in Mexico, neither is proof that an individual born to a Cuban parent outside Cuba must establish residency in Cuba in order to qualify for citizenship. Both are inconsistent with section 29(c) of the Cuban Constitution. Both are also inconsistent with Law 51, which in its 1985 preamble states its consolidation of all Cuban laws governing citizenship. The 1976 Law on Constitutional Transition stipulates that Cuban decrees enacted prior to February 24, 1976 will, unless they have been legally modified or derogated, remain in force only if they are compatible with the Constitution.

Enacted in 1944, the residency requirement of Decree 358 is not compatible with section 29(c) of the current Cuban Constitution, and the Law Library has indicated it was unable to find that Decree 358 has been updated. Accordingly, it appears that the residency requirement of Decree 358 is no longer in force, even if it were determined that its provisions had not been superseded by those of Law 51. The statements made by the consular officer regarding a three-month residency requirement for citizenship are not supported by evidence. The Law Library reported that it was unable to identify any law or regulation requiring three months of physical presence in Cuba as a requirement for citizenship. Accordingly, the consular officer's statements will be discounted. Going on record without supporting documentary evidence is not sufficient for the purposes of meeting the burden of proof in this proceeding. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

As noted in *Matter of Buschini*, the AAO issues decisions in a manner consistent with its best understanding of the law at the time that a decision is made. At that time, based on the information available, the AAO determined that Cuban birth certificates alone were insufficient to establish citizenship, absent a specific statement identifying the named individual as a Cuban citizen. In light of the more complete understanding of Cuban law provided by Professor Zaldivar's declarations, the AAO now concludes that an individual born outside Cuba whose birth has been registered with a Cuban consulate has complied with the legal formalities of section 29(c) of the Cuban Constitution and is a citizen of Cuba for the purposes of adjustment under the 1966 Act. Proof of that citizenship can be provided by a birth certificate issued by the Cuban Civil Registry in Havana. Like a Cuban passport, the Civil Registry certificate in and of itself establishes Cuban citizenship.

Pursuant to section 291 of the Act, 8 U.S.C. 1361, the burden of proof is upon the applicant to establish that he is eligible for adjustment of status. In the present case, the applicant has

provided proof that he holds a birth certificate issued by the Civil Registry of Cuba, which indicates that his birth was entered into the Civil Registry as of September 24, 2003. Therefore, he has met his burden of proof and has established that he is a citizen of Cuba. The district director did not, however, make any findings concerning whether the applicant is, otherwise, eligible for adjustment under the provisions of the 1966 Act. Nor did the director address whether the applicant merits a favorable exercise of discretion. The AAO has reviewed the record of proceedings, however. On the basis of this review, the AAO concludes that the applicant is otherwise eligible for adjustment, and also merits a favorable exercise of discretion. The application in the present case, therefore, will be approved.

Moreover, the evidence from Professor Zaldivar establishes that the only step necessary for a child born outside of Cuba to acquire Cuban citizenship, based on the fact that at least one parent was a Cuban citizen at the time of the child's birth, is for the birth to be registered at a Cuban consulate located in the country of the child's birth. For this reason, any applicant under the 1966 Act who submits a Cuban consular certificate documenting his or her birth within the consular district served by that consulate to at least one Cuban parent must be viewed as having established by a preponderance of evidence that he or she was a Cuban citizen at birth. In the absence of evidence establishing that the applicant has lost Cuban citizenship, the applicant must be considered to be a Cuban citizen for the purposes of adjustment under the 1966 Act. The residency requirement for Cuban citizenship raised in the Law Library reports and addressed in *Matter of Buschini* has been persuasively rebutted. Accordingly, *Matter of Buschini* is overruled and will no longer be followed by the AAO.

As of this date, a Cuban consular certificate indicating that a person was born abroad to parents, at least one of whom was a Cuban citizen at the time of the person's birth, establishes that the person, himself or herself, was also a Cuban citizen at birth. In the absence of evidence that the person thereafter lost Cuban citizenship, the consular certificate will be sufficient to establish that the person is a Cuban citizen for the purposes of adjustment of status under the 1966 Act.

ORDER: The district director's February 6, 2007 decision is withdrawn. The application is approved.