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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: WASHINGTON DISTRICT Date: MAY 19 2005

IN RE: Petitioner: [redacted]

PETITION: Application for Status as Permanent Resident Pursuant to Section 13 of the Act of September 11, 1957

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the District Director, Washington, D.C., and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of The Philippines who is seeking to adjust his status to that of a lawful permanent resident under section 13 of the Immigration and Nationality Act (the Act) of 1957, Pub. L. No. 85-316, 71 Stat. 642, as modified, 95 Stat. 1611, as an alien who performed diplomatic or semi-diplomatic duties under section 101(a)(15)(A)(i) of the Act.

The district director denied the application for adjustment of status after determining that the applicant had failed to demonstrate he was unable to return to the Philippines and that his adjustment would serve U.S. interests.

On appeal, counsel contends that the district director erroneously concluded that the evidence provided by the applicant did not establish that he would be at risk if he returned to The Philippines. He further asserts that the following equities should be taken into consideration with regard to the applicant's adjustment application – the lack of family residing in The Philippines, his long-term residence in the United States, U.S. family ties, and his son's lack of familiarity with the education system in The Philippines.

Section 13 of the Act of September 11, 1957, as amended on December 29, 1981, by Pub. L. 97-116, 95 Stat. 1161, provides, in pertinent part:

> (a) Any alien admitted to the United States as a nonimmigrant under the provisions of either section 101(a)(15)(A)(i) or (ii) or 101(a)(15)(G)(i) or (ii) of the Act, who has failed to maintain a status under any of those provisions, may apply to the Attorney General for adjustment of his status to that of an alien lawfully admitted for permanent residence.
>
> (b) If, after consultation with the Secretary of State, it shall appear to the satisfaction of the Attorney General that the alien has shown compelling reasons demonstrating both that the alien is unable to return to the country represented by the government which accredited the alien or the member of the alien's immediate family and that adjustment of the alien's status to that of an alien lawfully admitted for permanent residence would be in the national interest, that the alien is a person of good moral character, that he is admissible for permanent residence under the Immigration and Nationality Act, and that such action would not be contrary to the national welfare, safety, or security, the Attorney General, in his discretion, may record the alien's lawful admission for permanent residence as of the date [on which] the order of the Attorney General approving the application for adjustment of status is made.

Pursuant to 8 C.F.R. § 245.3, eligibility for adjustment of status under section 13 of the 1957 Act is limited to aliens who were admitted into the United States under section 101, paragraphs (a)(15)(A)(i), (a)(15)(A)(ii), (a)(15)(G)(i), or (a)(15)(G)(ii) of the Act who performed diplomatic or semi-diplomatic duties and to their immediate families, and who establish that there are compelling reasons why the applicant or the member of the applicant's immediate family is unable to return to the country represented by the government which accredited the applicant, and that adjustment of the applicant's status to that of an alien lawfully admitted to permanent residence would be in the national interest. Aliens whose duties were of a custodial, clerical, or menial nature, and members of their immediate families, are not eligible for benefits under section 13.

The AAO now turns to a review of the record before the director at the time of his May 18, 1999 denial of the instant petition. In making a determination of statutory eligibility, Citizenship and Immigration Services (CIS) is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii).

The record establishes the applicant's eligibility for consideration under section 13 of the 1957 Act. On March 1, 1999, the Chief of the Diplomatic Liaison Division in the Visa Office at the Department of State certified, on Form I-88, the applicant's employment as 5th consul at the Philippines consulate in Los Angeles from December 13, 1981 until October 1, 1987. Therefore, per the requirements of section 13(a) of the 1957 statute, the applicant was admitted to the United States in diplomatic status under 101(a)(15)(A)(i) of the Act but no longer had that status at the time of his application for adjustment on November 10, 1987.

As a result, the only issue before the AAO is whether the record also establishes that the applicant, at the time of the director's decision, had compelling reasons that precluded his return to The Philippines and that his adjustment would have served U.S. national interests – the requirements of section 13(b) of the 1957 Act. At the time of filing, the applicant submitted an October 20, 1987 affidavit outlining his refusal to sign a February 22, 1986 declaration supporting the presidency of [redacted] over that of [redacted] and the reprisal taken against him as a result. He supported his assertions with copies of the declaration, an August 14, 1987 letter purportedly signed by former Philippine President [redacted] and several government cables related to personnel actions involving consulate staff.

The applicant's affidavit contended that his failure to sign the declaration – the only consulate officer who refused to do so – made him suspect in the eyes of the Aquino government and marked him for "recall to Manila or reassignment somewhere in the Third World." As proof of this, the applicant provided a copy of the cable transferring him to Lima, Peru, as well as three cables notifying other consulate personnel of promotions. The applicant asserted that his transfer to Peru violated a diplomatic rule that should have allowed him to remain in Los Angeles another two years and was punishment for his failure to sign the declaration.

The applicant also asserted that it was not just his diplomatic career that had suffered as a result of his actions, stating that he would be "harassed and intimidated as a result of [his] previous political action" if he had to return to the Philippines. In support of this statement, he provided a letter from former President [redacted] which concluded that the applicant, if returned to The Philippines, would face harassment, intimidation, threats and "a possible danger to his life" because of his political beliefs and opinions.

In his denial, the director found the letter from former President [redacted] to be unconvincing, as it was not written on presidential letterhead. He further noted that the applicant had failed to show that the type of treatment he stated he feared if returned to The Philippines had occurred during the Aquino administration. The director also noted that neither the applicant nor the purported letter from President Marcos discussed the applicant's political beliefs and opinions that would have placed him at risk if returned.

The AAO's review of the record does not find the applicant's concerns, as expressed in his 1987 affidavit, to be unrealistic or irrational, when viewed in the timeframe in which they were written – the year following the fall of the Marcos regime – and in light of the early transfer of the applicant to a diplomatic post considered to be undesirable. Further, the AAO does not concur with the director's reasoning in support of his decision. At the time of filing, the letter from [redacted] could not have been written on presidential letterhead as he was no longer the Philippine president and entitled to use such letterhead. Further, the director's finding that the applicant had not provided evidence of the mistreatment of political opponents during the Aquino administration fails to acknowledge that the applicant had submitted evidence of what he contended was his punitive transfer to Peru and the concurrent promotion of other consulate personnel. In dismissing the transfer and promotions as nothing more than a sign of a new government rewarding its supporters, the director appears to have wrongly relied on personal opinion, rather than country conditions information, to refute the applicant's evidence. Finally, the director found that the record failed to adequately describe the applicant's political beliefs and opinions,

which would place him at risk if returned to The Philippines. However, the AAO finds that the applicant's concerns were primarily based on the Aquino government's negative perception of him based on his refusal to sign a supporting declaration, not his own political opinions and beliefs. Therefore, his failure to discuss these beliefs and opinions did not undermine his stated concerns regarding the harm potentially facing him if returned to The Philippines.

The AAO's differing analysis of the evidence submitted by the petitioner at the time of filing does not, however, lead it to conclude that the record before it establishes compelling reasons that precluded the applicant's return to The Philippines in 1999. By the time the petitioner's application was adjudicated, his concerns about being harmed by the Aquino government were no longer relevant. The Aquino government was no longer in power, having been succeeded by the Ramos administration in 1992 and the Estrada administration in 1998. By 1999, former President [redacted] had been deceased for ten years, former First [redacted] had returned to The Philippines and, in 1992, had, herself, run for president. As a result, in 1999, the applicant's concerns about retribution at the hands of the Aquino government for his apparent support of former President Marcos could no longer be viewed as a compelling reason precluding his return to The Philippines.

With regard to the second prong of section 13(b) of the 1957 Act – the adjustment of the alien would serve the national interest – the AAO finds that the record at the time of adjudication failed to establish the applicant's adjustment would have been in U.S. interests. In a February 11, 1997 statement taken in connection with the instant application, the applicant, when asked how his adjustment would serve U.S. interests, stated that he was an entrepreneur and he could generate employment for others. While the AAO does not question the validity of this statement, it does not find that the applicant's pursuit of his business interests, in and of itself, establishes his eligibility for adjustment under section 13(b). Further, it finds no evidence in the record that would establish another basis for concluding that the applicant's adjustment would have served the U.S. national interest at the time of the director's decision.

On appeal, counsel contends that, in making its decision regarding the applicant's adjustment application, CIS should give consideration to the applicant's residence in the United States since 1981; his family ties to the United States, i.e., a daughter born in the United States in 1984; his son's unfamiliarity with any educational system other than that in the United States; and the absence of any family in The Philippines. The AAO does not agree. These equities cannot establish a basis for adjustment under section 13 of the 1957 Act when the applicant is not statutorily eligible for such adjustment.

For the reasons already discussed, the AAO finds that the applicant, although eligible for section 13 adjustment consideration did not, at the time of the director's adjudication of his application, establish either that compelling reasons prevented his return to The Philippines or that his adjustment would benefit U.S. national interests. 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. The applicant failed to meet that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.