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U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

FILE: [redacted] Office: WASHINGTON DISTRICT Date: OCT 16 2008

IN RE: Applicant: [redacted]

APPLICATION: Application for Status as Permanent Resident Pursuant to Section 13 of the Act of September 11, 1957, 8 U.S.C. § 1255b.

ON BEHALF OF APPLICANT:

[redacted]

INSTRUCTIONS:

This is the decision 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, Chief
Administrative Appeals Office

DISCUSSION: The application was denied by the Field Office 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 India who is seeking to adjust his status to that of lawful permanent resident under section 13 of the Act of 1957 ("Section 13"), Pub. L. No. 85-316, 71 Stat. 642, as modified, 95 Stat. 1611, 8 U.S.C. § 1255b, as an alien who performed diplomatic or semi-diplomatic duties under section 101(a)(15)(A)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(A)(i).

The field office director denied the application for adjustment of status after determining that the applicant had failed to demonstrate that he performed diplomatic or semi-diplomatic duties, that compelling reasons prevent his return to India, or that his adjustment would be in the national interest. *Field Office Director's Decision*, dated March 14, 2008.

On appeal, counsel states that the applicant was denied multiple requests to extend his posting in the United States while his son completed treatment for thyroid cancer. *Counsel's Brief* at 3. Counsel contends that the Indian government "targeted" the applicant to make his life "torturous" when they "fired him, prosecuted him for following their instructions, took away all his benefits, encouraged the launching of fraud investigations against him with the Department of State and systematically tried to destroy him." *Id.* Counsel further asserts that the Indian government "took away [the applicant's] dignity, his pride, his immigration status to the extent that they could, slandered him in widely read newspaper magazines, refused him basic rights of Indian Citizenship by denying him passports, and a plethora of other horrors." *Id.* Counsel states that due to these actions by the Indian government, the applicant filed for adjustment of status under Section 13. *Id.* Specifically, counsel asserts that the Indian government refused the applicant a passport, had his name published as a deserter, prosecuted him for crimes he did not commit, and reported him to fraud divisions of the U.S. State Department. *Id.* at 4. Counsel contends that the Indian government began a "vicious campaign of unfounded prosecution found on an alleged "H-1" visa that never existed." *Id.*

Counsel also asserts that the field office director erred in finding that the applicant did not perform diplomatic or semi-diplomatic duties, as manifested by submitted documents showing the "complexity" of the applicant's position. *Counsel's Brief* at 4. Counsel observes that some important evidence was not submitted previously by the applicant's former counsel, but indicates that this has been rectified on appeal. *Id.* at 5. Finally, counsel asserts that the possession of special skills, knowledge, or a significant position are the proper factors to be considered in determining if the applicant's adjustment is in the national interest. *Id.* at 6. Counsel states that a "review [of] the lawsuits [the applicant] fought and continues to fight . . . and all the rebuttals he personally wrote speak volumes of his ability, skills, and special knowledge." *Id.*

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.

8 U.S.C. § 1255(b).

Pursuant to 8 C.F.R. § 245.3, eligibility for adjustment of status under Section 13 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 that 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 evidence of record, including the information submitted on appeal. In making a determination of statutory eligibility, U.S. Citizenship and Immigration Services (USCIS) is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii).

A review of the record shows that the applicant was last admitted in A-1 status on April 3, 2003 and served as an Attaché at the Indian Embassy in Washington D.C. until his status was terminated on April 5, 2004. *See Letter of* [redacted] *(Administration), Embassy of India, Washington, D.C.,* dated February 20, 2004; *Sworn Statement of Applicant,* dated December 9, 2005; *Form I-94.* The applicant applied for adjustment of status on April 30, 2004.

The field office director erred in finding that the applicant's duties were not diplomatic or semi-diplomatic. The terms diplomatic and semi-diplomatic are not defined in Section 13 or pertinent regulations. The AAO acknowledges that the standard definitions of terms such as diplomat, diplomatic and diplomacy are varied and broad, and that, in practice, diplomacy may encompass many responsibilities and duties. The essential role of a diplomat is the representation of a country in its relations with other countries. *See American Heritage Dictionary of the English Language, 4th Edition, 2000* (Diplomat: One, such as an ambassador, who has been appointed to represent a government in its relations with other governments); *Black's Law Dictionary, 8th Edition, 2004* (Diplomacy: The art and practice of conducting negotiations between national governments). The inclusion of the term semi-diplomatic in 8 C.F.R. § 245.3 indicates that those who did not engage in overt negotiation or representation, but who performed duties in direct support of such activities, may also be considered for adjustment of status under Section 13 unless their duties were merely custodial, clerical or menial.

In his sworn statement, the applicant states that he was an "attaché for commerce supervising staff working on textile visas and child labor issues, and meeting with U.S. businessmen to confer about trade and outsourcing." This description indicates that the applicant acted on behalf of the government of India in support of diplomatic activities and in its dealings with citizens of foreign countries. The AAO finds that such duties are semi-diplomatic and diplomatic in nature. Accordingly, the field office director's determination that the applicant did not perform diplomatic or semi-diplomatic duties is withdrawn.

However, the AAO concurs with the field office director's determination that the applicant has failed to establish compelling reasons that render him or his family members unable to return to India. A well-established "commonsense" canon of statutory construction provides that the meaning of a word in a statute is given more precise content by the neighboring words with which it is associated. *U.S. v. Williams*, 128 S.Ct. 1830, 1839 (May 19, 2008). In interpreting the language of a statute, courts use the ordinary meaning of terms unless context requires a different result. *Gonzalez v. Carhart*, 550 U.S. 124, 127 S.Ct. 1610, 1631 (2007). Section 13 requires that an applicant for adjustment of status under this provision have "compelling reasons demonstrating that the alien is *unable* to return to the country represented by the government which accredited the" applicant. (Emphasis added). The phrase "compelling reasons" must be read in conjunction with the term "unable" to correctly interpret the meaning of the words in context. Reasons that are compelling are those that render the applicant unable to return, rather than those that merely make return undesirable or not preferred from the applicant's perspective. According to the American Heritage Dictionary, Fourth Edition, the plain meaning of the term "unable" is "lacking the necessary power, authority, or means." Thus, the "compelling reasons" standard is not a merely subjective standard. Aliens seeking adjustment of status under Section 13 generally assert the subjective belief that their reasons for remaining in the United States are compelling, or that it is attractive to them to remain in the United States rather than return to their respective countries. What Section 13 requires, however, is that the reasons provided by the applicant demonstrate compellingly that the applicant is unable to return to the country represented by the government which accredited the applicant.

Furthermore, even where the meaning of a statutory provision appears to be clear from the plain language of the statute, it is appropriate to look to the legislative history to determine "whether there is 'clearly expressed legislative intention' contrary to that language, which would require [questioning] the strong presumption that Congress expresses its intent through the language it chooses." *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 433, fn. 12 (1987). The legislative history for Section 13 reveals that the provision was intended to provide adjustment of status for a "limited class of . . . worthy persons . . . left homeless and stateless" as a consequence of "Communist and other uprisings, aggression, or invasion" that have "in some cases . . . wiped out" their governments. Statement of Senator John F. Kennedy, *Analysis of Bill to Amend the Immigration Nationality Act*, 85th Cong., 103 Cong. Rec. 14660 (August 14, 1957). The phrase "compelling reasons" was added to Section 13 in 1981 after Congress "considered 74 such cases and rejected all but 4 of them for failure to satisfy the criteria clearly established by the legislative history of the 1957 law." H. R. Rep. 97-264 at 33 (October 2, 1981). The legislative history supports the plain meaning of the language in Section 13 that those eligible for adjustment of status under Section 13 are former diplomats that have been rendered essentially stateless or homeless as a consequence of political conflict and are thus *unable* to return to and live in their countries.

The applicant's desire that his son benefit from the advanced medical care available in the United States is, in and of itself, not a compelling reason under Section 13. However, the applicant has claimed that as a consequence of his efforts to extend his posting in the United States so that his son could receive appropriate

medical treatment, he has been subjected to horrific treatment by the Indian government and would be arrested and harassed if he returned to India. The applicant has submitted extensive evidence of his dealings with the Indian Embassy in Washington, D.C., the Ministry of External Affairs (MEA) and other branches of the Indian government. The entire record has been reviewed in rendering a decision on appeal.

The record reflects that the applicant was initially granted an extension of six months (September 20, 2003 to March 20, 2004) to his term in the United States by the MEA in New Delhi, India. Prior to the expiration of his extended term on March 20, 2004, the applicant requested an additional extension or leave to remain in the United States. The applicant's requests were denied on the basis that medical treatment for his son was available in India. In February 2004, the applicant sought review in the Central Tribunal (CAT) in New Delhi. So began a series of proceedings, none of which resulted in decisions favoring the applicant, in which the applicant requested extensions or leave so that he could remain in the United States and appealed decisions denying him the benefits he requested.

On April 5, 2004, the Indian Embassy notified the applicant that his term at the Embassy had expired. On April 11, 2004, the newspaper India Today published an article stating that the applicant "deserted his post and did not return to the MEA after his posting ended. Disciplinary proceedings are being instituted against him." On October 20, 2004, the applicant and his family were denied passports by the Indian Embassy on the grounds that "ordinary passports cannot be issued . . . as [the applicant] and his family have been staying illegally in the United States in violation of local rules/regulations and they will not be issued any type of visa now by the United States authorities." *Memorandum of* [redacted]*, Administrative Officer, Ministry of External Affairs, New Delhi, India* dated October 20, 2004. The Embassy indicated that the applicant and his family could be issued "emergency certificates" and "tickets" to allow them to return to India.

In February 2006, the MEA initiated disciplinary proceedings against the applicant, charging him with lack of devotion to duty and conduct unbecoming of a government servant for remaining on unauthorized absence in the United States and failing to comply with instructions directing him to report for duty in New Delhi. The applicant was also charged with obtaining an H-1B visa without prior permission from the MEA contrary to rules of conduct. Hearings were conducted before an MEA Inquiry Officer (IO) at which the applicant submitted documents and presented a defense to the charges. In a decision dated February 19, 2007, the IO determined that the MEA was not required to meet any of the applicant's demands, and that his conduct warranted a finding of lack of devotion to duty and conduct unbecoming a government servant. Noting the applicant's testimony that he had applied for adjustment of status rather than an H-1B visa, The IO found that the charge concerning the applicant's status in the United States had not been proven. On January 1, 2008, the MEA issued a notification that it had accepted the applicant's voluntary retirement.

Based on the record, the AAO concludes that the applicant has failed to prove that compelling reasons prevent his return to India. The record does not show that the applicant will be arrested or harassed by the government or others in India. Although the Indian government ultimately denied the applicant's requests to extend his posting in the United States, the record reflects that the applicant was given numerous opportunities to present his case and his submissions were given serious consideration. The AAO determines that the evidence does not support the applicant's claims that he has been mistreated by the Indian government.

Furthermore, though the record reflects that the Indian government has refused to issue the applicant a passport in accordance with its laws and procedures concerning diplomatic personnel, it does not indicate that it has repudiated or denied his citizenship. The Indian government has indicated that it will issue the applicant and his family travel documents allowing them to return to India. The applicant has asserted that he will be arrested when he presents these "emergency certificates" upon arriving in India, but there is no evidence to support this assertion beyond the applicant's own testimony. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *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 the applicant has failed to demonstrate compelling reasons why he is unable to return to India, it is unnecessary to address whether his adjustment is in the national interest.

For the reasons discussed above, the AAO finds that the applicant is not eligible for adjustment under Section 13. He has failed to establish that there are compelling reasons preventing his return to India. 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 has failed to meet that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.