

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy
PUBLIC COPY



**U.S. Citizenship
and Immigration
Services**

A3

[Redacted]

FILE: [Redacted] Office: WASHINGTON DISTRICT Date: **MAR 12 2009**

IN RE: [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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

John F. Grissom, Acting 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 the Philippines 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)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(A)(ii).

The field office director denied the application for adjustment of status after determining that the applicant had failed to demonstrate that compelling reasons prevent his return to the Philippines as required under Section 13. The field office director also noted that the Department of State issued its opinion on April 29, 2008 advising that it could not favorably recommend this matter.

On appeal, counsel for the applicant submits a brief and additional documentation.

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 [Department of Homeland Security] 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 [Department of Homeland Security] 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 [Department of Homeland Security], in its discretion, may record the alien's lawful admission for permanent residence as of the date [on which] the order of the [Department of Homeland Security] approving the application for adjustment of status is made. 8 U.S.C. § 1255b(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 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 AAO now reviews 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 entered the United States on October 1, 1986 in A-2 status and began employment as a Consular Assistant with the Philippines Consulate General in Seattle, Washington and continued in that position until the Seattle office closed on October 1, 1993. The Department of State records show that it was notified of the termination of the applicant's A-2 status on September 30, 1993. The applicant filed the Form I-485, Application to Register Permanent Resident or Adjust Status, on September 8, 1993.¹

On appeal, counsel for the applicant asserts that the applicant has presented compelling reasons why the applicant and his family cannot return to the Philippines. Counsel contends that the Department of State's recommendation in this matter provides no evidentiary support for its denial and that the Department of State's Country Reports note that the Philippines security forces and anti-government insurgents continue to commit arbitrary and unlawful killings and that the Philippines continues to suffer economic instability. Counsel asserts that the applicant and his family's return to the Philippines would constitute banishment to a country in which no employment would be available to them, required medical treatment would be virtually unavailable, and exploitation, either by government forces or by the New People's Army and other organizations which the government is powerless to control, would be rampant.

As referenced above, the legislative history of Section 13 shows that Congress intended that "compelling reasons" relate to political changes that render diplomats and foreign representatives "stateless or homeless" or at risk of harm following political upheavals in the country represented by the government which accredited them. Section 13 requires that an applicant for adjustment of status under

¹ The AAO finds that the applicant was not eligible to file a Section 13 application prior to September 30, 1993, as he was maintaining legal status at that time. This issue will be discussed further below.

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 term “compelling” must be read in conjunction with the term “unable” to correctly interpret the meaning of the words in context. Thus, 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 interesting or attractive to them to remain in the United States rather than return to their respective countries.

In the applicant’s September 2, 1993 affidavit, the applicant declared that he feared for his personal safety and that of his family if they were required to return to the Philippines. The applicant noted that his fear was based on the unsettled political conditions in the Philippines and the failure of the Philippine government to control dissidents including the New People’s Army (NPA), a branch of the Communist Party of the Philippines. The applicant indicated that because of the extended period of time his family had been in the United States, they would be targeted for reprisal by the forces denigrating the United States, would be discriminated against, and would be considered to have been Americanized. The applicant indicated that he would be considered [REDACTED] because he had been appointed to his government position while the [REDACTED] regime was in power. The applicant also declared that it would be virtually impossible for his children to live in the Philippines because of the anti-American sentiment in the Philippines.

In the applicant’s January 30, 2001 sworn statement before an immigration officer, when asked if he believed he would be subjected to persecution if returned to the Philippines, the applicant noted that “he was not certain.”

On appeal, the applicant submits an additional affidavit dated August 4, 2008. The applicant declares that early in his career he was assigned to accompany [REDACTED] to record proceedings during state visits and provides a photograph of such an event. The applicant notes the changes in government since [REDACTED] was deposed in 1986 and observes that none of the governments have been able to control the NPA or improve the economic conditions of the country. The applicant reiterates his belief that if he and his family return to the Philippines they will be the target of the NPA and other groups opposing the government, they would be discriminated against, their lives and safety would be in danger because of his past association with [REDACTED], and they would be considered Americanized because of their long stay in the United States. The applicant also references his medical condition and provides his medical records showing he has a history of diabetes mellitus and chronic kidney disease that has been diagnosed as “close to requiring dialysis.” Also on appeal, counsel for the applicant submits excerpts from country condition reports on the Philippines from several sources. Counsel asserts that the applicant has provided compelling reasons that prevent the applicant and his family from returning to the Philippines.

The AAO has reviewed the applicant's statements and claims on appeal as well as the described country conditions in the Philippines. The AAO acknowledges that certain areas in the Philippines are more subject to turmoil than others and that the Philippine government continues to battle the communist party and other extremists. The AAO also observes that the Philippines continues to struggle economically and that kidnapping and corruption still exists. However, the applicant has not provided compelling reasons related to political changes in the Philippines that render him as a former diplomat and foreign representative "stateless or homeless" or at risk of harm following political upheavals in the country represented by the government which accredited him. The applicant in this matter continued his employment with the Philippine Consulate in Seattle after [REDACTED] was deposed in 1986. His fear that he would be associated with [REDACTED] and thus would be discriminated against and would not be safe is not substantiated in the record. The applicant has not provided evidence that others in similar positions have been targeted due to work for the Philippine government in the United States. The AAO finds that the record does not include evidence showing that the applicant is at greater risk of harm because of his specific past government employment, political activities or other related reasons. 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)). The applicant's fear is speculative and not substantiated in the record.

The AAO also notes that the State Department has objected to the applicant being granted adjustment of status indicating that it does not believe that compelling reasons prevent the applicant's return to the Philippines. See Interagency Record of Request (Form I-566). Although counsel finds that the Department of State's recommendation is incongruous with its country reports, counsel misunderstands the intent of Section 13. The AAO acknowledges that the country reports show that the Philippine government continues to struggle with democratic principles and the rule of law, but it is not the general conditions in the Philippines from which Section 13 seeks to shield returning diplomats. Rather, Section 13 is intended to shield the returning diplomat from the specific actions of the government of the country that accredited the diplomat for his service to the prior regime. In this matter, the applicant has not shown specific actions against him or others similarly situated that establish the Philippine government or opposition groups that the Philippine government cannot control targets or will target him for his past service to the Philippine government under [REDACTED] and [REDACTED]

The AAO has also considered counsel's assertions and the applicant's statements regarding the applicant and his family's cultural and social assimilation in the United States, as well as the financial hardship that would be caused by returning to the Philippines. However, obtaining employment commensurate with that in the United States and the other general inconveniences and hardships associated with relocating to another country after living in the United States for a length of time are not reasons that make the applicant unable to return to the Philippines as prescribed by Section 13. Similarly, the applicant has not provided probative evidence that he would be unable to receive medical care for his medical condition in the Philippines. To reiterate, the applicant has not provided compelling reasons related to political changes in the Philippines that render diplomats and foreign representatives "stateless or homeless" or at risk of harm following political upheavals in the country

represented by the government which accredited them. The evidence of record does not show that the applicant is unable to return because of any action or inaction on the part of the government of the Philippines or other political entity there as required under Section 13. The record does not include the evidence necessary to establish that there are compelling reasons that prevent the applicant's return to the Philippines. The applicant has failed to meet his burden of proof in this regard. As the applicant has failed to demonstrate that there are compelling reasons preventing his return to the Philippines, the question of whether adjustment of status would be in the national interest need not be addressed.

Beyond the decision of the director, the AAO determines that the applicant was not eligible for consideration under Section 13 when he filed the Form I-485. The plain language of Section 13(a) requires that an alien not be maintaining status in order to *apply* for adjustment of status. Once the applicant has established that initial eligibility criteria and has applied, then the criteria found in Section 13(b) are considered in determining if the applicant is eligible to be adjusted to permanent resident status. Pursuant to 8 C.F.R. § 214.2(a), an alien admitted under section 101(a)(15)(A)(ii) of the Act maintains that status "for the duration of the period for which the alien continues to be recognized by the Secretary of State as being entitled to that status." Thus, the authority to determine the date of termination of status under section 101(a)(15)(A)(ii) of the Act rests exclusively with the State Department.

In this matter, the Department of State records indicate that the applicant's A-2 status was terminated September 30, 1993. The applicant indicates that he resigned from the Philippine Foreign Service on October 1, 1993 and believes that his service terminated when the Philippine Consulate in Seattle, Washington closed on October 1, 1993. The applicant filed the Form I-485 on September 8, 1993. Accordingly, the applicant was in status in the United States under section 101(a)(15)(A)(ii) of the Act when he filed the Form I-485. As the application for adjustment of status under Section 13 was filed while the applicant was maintaining diplomatic or semi-diplomatic status, the applicant is ineligible for consideration pursuant to Section 13. For this additional reason, the application must be denied.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Field Office Director does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

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 his authorized status in the United States was terminated prior to filing the Form I-485 application and he has failed to establish that there are compelling reasons preventing his return to the Philippines. 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.