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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

A3

DATE: FEB 09 2012

Office: WASHINGTON DISTRICT OFFICE

IN RE:

Applicant: [REDACTED]

PETITION: 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 PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,


Perry Rhew
Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Venezuela born on September 20, 1978, 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 the dependent of 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 at the time the applicant applied for adjustment under Section 13, the applicant's mother was still maintaining diplomatic status; thus was not statutorily eligible to apply. The applicant contends on appeal that he had been denied employment authorization because he no longer qualified for A-2 derivative status due to his age. The applicant thus asserts that as he no longer qualified for derivative status he was eligible to apply for adjustment of status pursuant to section 13.

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 [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.

In addition, an applicant for adjustment of status under Section 13 must not be maintaining diplomatic status in order to apply for adjustment under Section 13; thus, his or her status must be terminated prior to the date on which the adjustment application is filed. 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." Therefore, 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. Notwithstanding the date on which the applicant's mother's employment may have been formally terminated by the government of Venezuela, she maintained status in the United States under section 101(a)(15)(A)(ii) of the Act through December 31, 2004.

In this matter, the applicant filed the Form I-485, Application to Register Permanent Residence or Adjust Status, on August 27, 2003. On that date, his mother through whom he derived his A-2 classification as a dependent,¹ worked as an administrative officer for the Venezuelan Air Force Acquisition Office in a nonimmigrant A-2 classification. The record shows that the applicant's mother continued to work as an A-2 nonimmigrant until December 31, 2004. Thus, when the applicant filed his Form I-485, on August 27, 2003, the individual through whom he had derived his A-2 classification was not eligible to apply for section 13 adjustment of status. As the applicant's eligibility to apply for section 13 adjustment is only available through his mother's eligibility, the director properly determined that the applicant was not eligible to apply for adjustment of status pursuant to section 13 of the Act on August 27, 2003.

The applicant's contention on appeal is without merit. The applicant's eligibility for employment authorization, as the dependent of an individual in A-2 classification, is governed by the regulation at 8 C.F.R. § 214.2(a). The applicant's ineligibility for employment authorization under the regulation because of his age or marriage has no bearing on his eligibility under Section 13. As the applicant entered the United States as an immediate family member of an alien accorded A-2 classification pursuant to section 101(a)(15)(A)(ii) of the Act and the principal alien, his mother, had not terminated her A-2 classification as of August 27, 2003, the applicant as the derivative alien of his mother's classification also was not eligible to apply.

¹ Section 101(a)(15) of the Act defines the term "immigrant" as every alien except an alien who is within one of the following classes of nonimmigrant aliens: (A)(ii) upon a basis of reciprocity, other officials and employees who have been accredited by a foreign government recognized de jure by the United States, who are accepted by the Secretary of State, and the *members of their immediate families*. [Emphasis added.]

As the applicant was not statutorily eligible to apply for adjustment of status pursuant to section 13 on August 27, 2003, the issues of the applicant's mother's work and whether her work constituted diplomatic or semi-diplomatic duties and whether the applicant has established compelling reasons that prevent his return to Venezuela will not be addressed.

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.

ORDER: The appeal is dismissed. The application remains denied.