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FILE: [Redacted] Office: WASHINGTON, D.C. Date: **AUG 05 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:



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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

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 Cameroon who is seeking to adjust her 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 immediate family member of an alien who performed diplomatic or semi-diplomatic duties under section 101(a)(15)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(A)(i).

The field office director denied the application for adjustment of status on the grounds that the applicant had failed to demonstrate that her father (now a U.S. citizen) had ever failed to maintain diplomatic status, that compelling reasons prevent her return to Cameroon, or that her adjustment would be in the national interest. *Decision of Field Office Director*, dated January 16, 2008. It is noted that the field office director, citing *Matter of Aiyer*, 18 I&N Dec. 98, (Reg. Commr. 1981), asserted that a dependent family member seeking adjustment of status under Section 13 is ineligible if the principal alien did not fail to maintain diplomatic status.

On appeal, counsel contends that the field office director erred in relying on *Aiyer*, a case in which, according to counsel, the regional commissioner exceeded his authority by contradicting precedent established by the Board of Immigration Appeals (BIA) in *Matter of Penaherrera*, 13 I&N Dec. 334 (BIA 1969). *Appeal Brief of Appellant Nathalie Guilidoh Etori* at 2. Counsel observes that in *Aiyer*, the regional commissioner stated that he agreed with the conclusion of the Secretary of State, as stated in the Secretary’s correspondence concerning the case, that “a dependent is not entitled to consideration unless the principal is applying for adjustment under Section 13.” *Id.* Counsel contends that the regional commissioner erred in “delegat[ing] its interpretation of a statute to” the Department of State, and cites the *Penaherrera* decision for the principle that “nothing in the statute . . . requires the principal diplomat to have failed to maintain status in order for a dependent to be eligible as long as the dependent failed to maintain status.” *Id.* Counsel also submits a copy of Form DS-2008 as evidence that the applicant’s father’s diplomatic status was terminated on August 31, 2001 and asserts that further evidence of the date of his termination should exist in his administrative file. *Id.* at 1. Counsel also states that the field office director erred in finding the applicant ineligible for adjustment of status under Section 13 because she failed to show that she would be subject to persecution in Cameroon. *See Form I-290B*. Counsel contends that Section 13 requires a showing of “compelling reasons” why an alien is unable to return to the country represented by the government that accredited the alien, rather than a showing that the alien will be persecuted there. *Id.* Counsel asserts, however, that the applicant has submitted “substantial evidence of persecution” to meet her burden of proof under the “compelling reasons” standard. *Appeal Brief* at 3.

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.

Counsel's argument that the applicant need not demonstrate that her father failed to maintain diplomatic status per the holding in *Penaherrera* is not, in fact, supported by that decision. In *Penaherrera*, decided in 1969, the BIA considered the Section 13 adjustment applications of the children of a former diplomat who had never applied for adjustment under Section 13 himself, but who had, subsequent to the termination of his diplomatic status in 1953, departed the United States in 1956, returned as a permanent resident that year and (after losing permanent resident status) again as a visitor in January 1962, and then departed the United States permanently in December 1962. 13 I&N Dec. at 334. Observing that the applicants were admitted to the United States under Section 101(a)(15)(A)(i) of the Act as the accompanying minor children of the principal alien and had never departed, the BIA held that since it had been established that the applicants' father, "because of his class of admission and his duties," would have been eligible for the benefits of Section 13 following termination of his diplomatic status, his loss of eligibility for such relief did not disturb nor in any way affect the eligibility of his children for adjustment of status under Section 13. 13 I&N at 335. Because the principal alien had failed to maintain his diplomatic status, the BIA in *Penaherrera* did not specifically address the issue raised by counsel. *Id.*

The holding in *Aiyer* is consistent with the holding in *Penaherrera*. Counsel has pointed out that in *Aiyer*, the regional commissioner indicated agreement with a statement made by the Secretary of State that a dependent is not entitled to consideration for adjustment of status under Section 13 unless the principal alien is also applying for adjustment under that provision. *Appeal Brief* at 2. If indeed this were the holding in *Aiyer*, it would contradict the result in *Penaherrera*, in which the BIA ordered the adjustment of status of dependent family members where the principal alien never applied for adjustment of status under Section 13. The AAO concludes, however, that while the regional commissioner in *Aiyer* concurred with the recommendation of the

Secretary of State that the applicant in that case was not eligible for adjustment of status under Section 13, he found the applicant ineligible because the applicant was the dependent of a principal alien who did not fail to maintain his status in the United States. *See* 18 I&N Dec. 100. Unlike the principal alien in *Penaherrera*, who remained in the United States for approximately three years after his employment as a diplomat ended, the principal alien in *Aiyer* had departed the United States prior without having his diplomatic status terminated. *Id.*

Thus, the holding in *Aiyer*, that applicants for adjustment of status under Section 13 who were admitted to the United States as the immediate family members under either section 101(a)(15)(A)(i) or (ii) or 101(a)(15)(G)(i) or (ii) of the Act, derive eligibility only if the principal alien failed to maintain his diplomatic status, is not inconsistent with the holding in *Penaherrera*. Likewise, the holding in *Penaherrera*, that dependent family members are eligible for adjustment of status under Section 13 even if the principal alien has not applied and is not eligible, if the principal alien would have been eligible at the time he failed to maintain diplomatic status, is not inconsistent with the holding in *Aiyer*.

Counsel asserts, however, that neither Section 13 nor 8 C.F.R. § 245.3 explicitly require that, to apply for adjustment of status, an alien admitted under either section 101(a)(15)(A)(i) or (ii) or 101(a)(15)(G)(i) or (ii) of the Act as the immediate family member of an accredited diplomat or official prove that the principal alien failed to maintain status, but only that the applicant, whether the applicant be the principal alien or a dependent alien, failed to maintain status. *Appeal Brief* at 2. Counsel contends that the regional commissioner exceeded his authority in *Aiyer* by announcing eligibility criteria not found in the statute, regulations, or case law. *Id.* However, it is not necessary for the AAO to reach the merits of this issue, as the evidence in the record, particularly the Form DS-2008 submitted by the applicant, demonstrates that the applicant's father failed to maintain diplomatic status as of August 31, 2001.

The record establishes the applicant's eligibility for consideration under Section 13. The applicant was last admitted in A-1 status on December 17, 1988. *See Form I-94, Departure Record*. Her father served as a Second Secretary at the Embassy of Cameroon in Washington, D.C. until his termination on August 31, 2001. *See Form DS-2008*. Therefore, per the requirements of Section 13, the applicant and her father were admitted to the United States in status under 101(a)(15)(A)(i) of the Act, the applicant's father performed diplomatic duties, and his status—and consequently, the applicant's status—had been terminated at the time of her application for adjustment on March 18, 2005.

The AAO now turns to the issue of whether the applicant is unable to return to the country represented by the government that accredited her. The AAO notes that the express language of 8 C.F.R. § 245.3—“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” (emphasis added)—allows for consideration both of reasons compelling to the principal alien and reasons compelling to dependent family members. In most cases, these reasons are the same or similar, and the principal alien articulates the compelling reasons why all the applicants are unable to return. However, as occurred in *Penaherrera*, it is possible for dependent family members to establish eligibility for adjustment of status under Section 13 even where the principal alien is not also an applicant, if the principal alien would have met the eligibility requirements. Unlike the eligibility requirements concerning status of admission, failure to maintain status and performance of semi-diplomatic or diplomatic duties, all eligibility criteria based on past events, the requirement that an applicant demonstrate

compelling reasons why he or she is unable to return to the country represented by the government that accredited the applicant refers to the current state of affairs in that country and the nature of the applicant's current relationship to the government and/or other entities or individuals in that country. Thus, in cases in which the principal alien has applied for adjustment of status under Section 13 along with his family members, but has subsequently died before the final adjudication of the applications, or been granted permanent resident status on some other ground, the AAO has considered evidence of the compelling reasons preventing the dependent family members from presently returning to the country represented by the government that accredited them.

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 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. 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. 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. 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 those diplomats that have been, in essence, rendered stateless or homeless by political upheaval, hostilities, etc., and are thus *unable* to return to and live in their respective countries.

The applicant has submitted newspaper articles concerning anti-government riots that have occurred recently in several cities in Cameroon, riots which have resulted in significant destruction and loss of life. The applicant has also submitted reports detailing the Cameroonian government's poor human rights record. However, this evidence is insufficient to demonstrate that the applicant is unable to return to the Cameroon for compelling reasons. There is no evidence that the government of Cameroon opposes the applicant's return to the country, or will seek to harm her for any particular reason articulated in the record. In a sworn statement dated December 22, 2005, the applicant stated that she feared persecution in Cameroon, but she did not provide any further details. The AAO acknowledges that the "compelling reasons" standard is a different standard than the persecution standards applicable in asylum or withholding of removal adjudications. Nevertheless, a reasonable fear of

persecution in the country represented by the government that accredited an applicant for adjustment of status under Section 13 is, in most cases, strong evidence that compelling reasons prevent his or her return there. The applicant has submitted evidence of political turmoil and government abuses in Cameroon, but she has failed to establish that she will be, or how she will be, affected by these conditions. The evidence does not show that the applicant has been rendered essentially “homeless” or “stateless” as a consequence of these conditions. Therefore, since the applicant has failed to demonstrate that she is unable to return to Cameroon because of compelling reasons, and therefore is not eligible for adjustment of status under Section 13, it is not necessary to address whether her adjustment of status would be in the national interest.

For the reasons discussed above, the AAO finds that the applicant is not eligible for adjustment under Section 13. She has failed to establish that there are compelling reasons preventing her return to Cameroon. Pursuant to section 291 of the Act, 8 U.S.C. 1361, the burden of proof is upon the applicant to establish that she is eligible for adjustment of status. The applicant has failed to meet that burden. Accordingly, the decision of the field office director will be affirmed.

ORDER: The decision of the field office director is affirmed. The appeal is dismissed.