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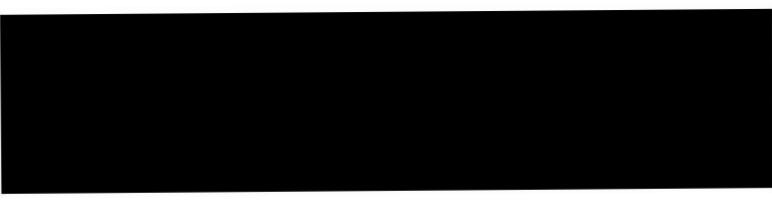


FILE: [Redacted] Office: WASHINGTON DISTRICT Date: JUN 20 2008

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The applicant is a native and citizen of Malaysia 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 (the Act), 8 U.S.C. § 1101(a)(15)(A)(i).

The field office director denied the application for adjustment of status after determining that at the time he applied for adjustment under Section 13, the applicant was still maintaining diplomatic status. *Decision of Field Office Director* dated January 4, 2008. The field office director also observed that the applicant was absent from the United States without advance parole at the time he filed his adjustment application, and that such absence constitutes an abandonment of the application. *Id.*

On appeal, counsel contends that the denial is based on legal error. *Brief in Support of Appeal* at 3. Counsel asserts that as Congress has chosen in recent years “to inflict the most drastic possible immigration consequences on those who are here without valid status,” it is irrational to require that an applicant for adjustment of status under Section 13, an “ameliorative” statute, be without legal status at the time of filing. *Id.* Counsel states that the regulation controlling adjustment of status under Section 13 is 8 C.F.R. § 245.3, and that this regulation does not require the termination of diplomatic status before the filing of an application for adjustment under Section 13. *Id.* at 4. Counsel contends that the only additional requirement for aliens maintaining diplomatic status to adjust to permanent resident status is imposed by the regulations at 8 C.F.R. §§ 247.11 and 247.12, which mandate the execution of “a written waiver of all rights, privileges, exemptions, and immunities under any law or any executive order...” *Id.* at 4-5. Counsel asserts that to require an applicant for adjustment of status under Section 13 to not be maintaining diplomatic status at the time of filing is not “sound policy” as it contradicts Section 245(c) of the Act, which prohibits adjustment of status to those who are in unlawful status on the date the adjustment application is filed. *Id.* at 6. Counsel contends that imposing such a requirement transforms what was intended to be a special benefit for diplomats to a special penalty, and amounts to an abuse of discretion by USCIS. *Id.* at 7. Counsel states that the field office director failed to provide a reasoned explanation for the denial. *Id.* at 8. Counsel also asserts that the denial is based on the factual error that the applicant was not physically present in the United States at the time he filed his adjustment application. *Id.* 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).

Contrary to the assertions of counsel, the plain language of Section 13 requires that an alien must fail to maintain diplomatic or semi-diplomatic status in order to be considered for adjustment of status under this provision, which is consistent with the congressional intent to grant permanent resident status to former diplomats or foreign representatives rendered “stateless or homeless” following political upheavals in the country represented by the government which accredited them. *See* Statement of Senator John F. Kennedy, *Analysis of Bill to Amend the Immigration and Nationality Act*, 85th Cong., 103 Cong. Rec. 14660 (August 14, 1957). An applicant for adjustment of status under Section 13 must not be maintaining diplomatic status in order to *apply* for adjustment on this basis. Once the applicant establishes eligibility to apply by virtue of having had such status terminated, the criteria provided in part b of Section 13 are reviewed to determine if the applicant is eligible to be adjusted to lawful permanent resident status. The regulations cited by counsel, which pertain to adjustment of status generally, do not exempt an applicant for adjustment under Section 13 from meeting the threshold filing requirement as stipulated in the statute itself.

The applicant has not disputed that he was maintaining diplomatic status at the time he filed his adjustment application on or about April 18, 2002. The record contains a letter from the applicant dated April 10, 2002 (the same date he signed his Form I-485 adjustment application) in which he stated that he was then Consul General of Malaysia in Los Angeles, California and expected to be reassigned to another diplomatic post in August 2002. Pursuant to 8 C.F.R. 214.2(a), an alien admitted under section 101(a)(15)(A)(i) 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)(i) of the Act rests exclusively with the State Department. There is no evidence in the record indicating that the applicant’s diplomatic status had been formally terminated at the request of the State Department as of April 18, 2002.

An application for adjustment of status under Section 13 filed while the applicant is maintaining status under section 101(a)(15)(A)(i) or (ii) or 101(a)(15)(G)(i) or (ii) of the Act is properly rejected. However, rejection of the application on this ground does not preclude the applicant from filing a new application once the requirement for applying—failure to maintain status—has been met. The AAO concurs with the field office director that the applicant was admitted to the United States under 101(a)(15)(A)(i) of the Act, was maintaining that status at the time of his application for adjustment on April 18, 2002, and therefore was not eligible to apply for adjustment under Section 13 at the time of filing.

As stated above, the applicant is not eligible for consideration under Section 13 because he was still maintaining status under 101(a)(15)(A)(i) of the Act at the time of filing. In addition, as asserted by the field office director,

the applicant was not in the United States at the time his application for adjustment of status was filed on April 18, 2002. Service records show that he departed the United States at Los Angeles on April 11, 2002 on board Malaysian Airlines flight 95. He returned to the United States on board All Nippon Airways flight 94 on May 22, 2002. As noted by the Field Office Director, an applicant for adjustment of status must be physically present in the United States. *See* 8 C.F.R. § 245.1(a). For this additional reason, this application may not be approved.

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.