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FILE: Office: WASHINGTON DISTRICT Date: **FEB 20 2009**

IN RE: 

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.

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).

A handwritten signature in black ink, appearing to read "John F. Grissom".

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 Sri Lanka accredited by Nigeria 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 State Department had informed United States Citizenship and Immigration Services (USCIS) that the applicant's A-2 had not been terminated; that the applicant had not demonstrated that he performed diplomatic or semi-diplomatic duties for the country that had accredited him; that the applicant had failed to demonstrate that compelling reasons prevent his return to Sri Lanka¹; and that his adjustment of status would be in the national interest of the United States. The field office director also noted that the Department of State issued its opinion on March 6, 2008 advising of its recommendation that the applicant's request to change status be denied.

On appeal, counsel for the applicant observes that the applicant provided evidence that his employment with the Nigerian Embassy terminated on May 31, 2000 and that the applicant had no control over the Nigerian Embassy's failure to notify the State Department of the termination. Counsel asserts that the applicant's duties were semi-diplomatic and that the applicant provided compelling reasons for not returning to his home country of Sri Lanka. Counsel also contends that the applicant's adjustment of status would be in the national interest of the United States as the applicant's return to Sri Lanka where he faces a civil war and possible death would work against the national interest if the United States failed to offer protection to the applicant. Counsel also notes that the applicant has a minor United States citizen daughter who was born and raised in the United States and is a model student who would be unable to attend school in Sri Lanka.

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

¹As shall be discussed later in this decision, the compelling reasons that prevent the applicant's return must relate to the country represented by the government which accredited the applicant, not the country of the applicant's citizenship. Here, the country that accredited the applicant is Nigeria, not Sri Lanka.

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).

The first issue to be addressed is the director's conclusion that the applicant is ineligible for Section 13 benefits because the Nigerian government failed to notify the Department of State that his status was terminated.

The record shows that the applicant initially entered the United States on May 24, 1983 in B-2 classification. On March 30, 1988 he was issued an A-2 classification. In 1993 and again in 1996 he was issued an A-2 visa. He served as a driver/chauffeur for the Embassy of Nigeria, Washington, D.C. until May 31, 2000. *Letter from [REDACTED] for Ambassador of the Embassy of the Federal Republic of Nigeria*, dated May 31, 2000; *Letter from [REDACTED] for the Ambassador of the Embassy of the Federal Republic of Nigeria*, dated July 20, 2000; *Passports of [REDACTED] Sri Lankan Passport number [REDACTED] and [REDACTED]*. Although the record shows that the applicant did not work for the Nigerian Embassy subsequent to May 31, 2000, the Department of State records show that the applicant's A-2 status has not been terminated. Accordingly, the applicant is ineligible to file for Section 13 consideration.

The AAO acknowledges counsel's assertion that the applicant has no control over the failure of the Nigerian Embassy to notify the State Department of the termination of the applicant's status; however, an applicant for adjustment of status under Section 13 must have his or her status terminated prior to the date on which the adjustment application is filed. In this matter, the applicant filed the Form I-485 on September 22, 2000. 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 employment may have been formally terminated by the government of Nigeria, there is no evidence that the Secretary of State does not recognize the applicant as being entitled to that status. The field office director properly denied the application for adjustment of status under Section 13 for this reason.

Even if the field office director had found that the applicant's status had been terminated at the time the petition was filed, the applicant would still be ineligible for Section 13 benefits. 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.

This matter presents the unusual situation of an alien accredited by the government of a country in which the applicant is neither a native nor a citizen. The record reflects that the applicant is not a citizen of Nigeria, the

country that accredited him, but is a native and citizen of Sri Lanka and that he was hired to work as a driver at the Embassy of the Federal Republic of Nigeria in Washington, D.C. The legislative history for Section 13 shows 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 plain language of Section 13 requires only that an applicant demonstrate that there are “compelling reasons demonstrating . . . that the alien is unable to return to the *country represented by the government which accredited the alien*, rather than to the country or countries in which the applicant holds citizenship (emphasis added).

That the circumstances presented in this case are not specifically addressed in Section 13 or relevant regulations is consistent with the axiom, as stated in the Vienna Convention, that members of the diplomatic staff of a mission “should in principle be of the nationality of the section State.” *Vienna Convention, supra*, Art. 8. This further conforms to the general principle, as stated in Article 3 of the Vienna Convention, that a diplomat serves as a representative of the government that accredits the diplomat, and that a government will not generally entrust representation to non-citizens. Thus, in determining whether a particular duty is to be considered diplomatic or semi-diplomatic, the AAO has considered whether the performance of the duty involves the representative authority of the accrediting government.

The AAO also finds that the applicant did not perform diplomatic or semi-diplomatic duties for the Embassy of Nigeria. The AAO acknowledges that the common definitions of terms such as diplomat, diplomatic and diplomacy are varied and broad, and that in practice diplomacy may encompass many responsibilities and duties. Generally, a diplomat represents a country in its relations with other countries or international governing bodies. See *Vienna Convention, supra*, Art. 3; *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). Although the AAO recognizes the authority of the Vienna Convention, to which the United States is a signatory, the phrase “diplomatic and semi-diplomatic duties” as used in 8 C.F.R. § 245.3 must also be interpreted consistent with the language and intent of the regulation and Section 13. The inclusion of the term semi-diplomatic in 8 C.F.R. § 245.3 indicates that those accredited aliens not engaged in diplomatic duties, but who perform duties in direct support and furtherance of such activities, may also be considered for adjustment of status under Section 13. However, 8 C.F.R. § 245.3 provides that 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. It should also be noted that 8 C.F.R. § 245.3 does not provide that any duties not considered custodial, clerical or menial are necessarily diplomatic or semi-diplomatic.

In a sworn statement dated January 17, 2002, the applicant indicated that his official title at the Nigerian Embassy was “chauffeur” and that his duties were to drive the ambassador and other dignitaries. The applicant stated his belief that these duties were semi-diplomatic. On appeal, counsel for the applicant asserts:

[The applicant] drove the Ambassador and other key figures who were involved in diplomatic negotiations. He was privy to, and responsible for, highly confidential and politically sensitive information and documents as a chauffeur for the Nigerian Embassy. He was a highly trusted

personal courier for the Ambassador, conferring with and reporting directly to the Ambassador himself.

The AAO finds that counsel's description of the applicant's duties is not supported in the record. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 503. Neither letter authored by individuals at the Nigerian Embassy provided a description of the applicant's duties, other than noting that the applicant was a "driver." Thus, the record shows only that the applicant was a non-citizen employee with no representative duties or authority on behalf of the government that accredited him. The record demonstrates that the applicant drove the ambassador and other dignitaries acting as a chauffeur with no other duties. The record does not show that the applicant had any formal advisory or decision-making role at the Embassy, was involved in confidential communications, or represented Nigeria in any capacity. The AAO determines that the applicant has failed to demonstrate that, as a non-citizen employee, he was entrusted with duties of a diplomatic or semi-diplomatic nature.

As the applicant has failed to demonstrate that he performed diplomatic or semi-diplomatic duties, he is also ineligible for consideration under Section 13 on this ground. It is, thus, unnecessary to determine if there are compelling reasons why the applicant or the applicant's immediate family is unable to return to the country represented by the government that accredited the applicant, (Nigeria) or that adjustment of the applicant's status to that of an alien lawfully admitted to permanent residence 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. He has failed to establish that he was entrusted with duties of a diplomatic or semi-diplomatic nature. 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.