

PUBLIC COPY

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529-2090



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

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

A 3

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).


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 Zimbabwe 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, 8 U.S.C. § 1101(a)(15)(A)(i).

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 Zimbabwe. The field office director also noted that the Department of State issued its opinion on October 29, 2007 advising that the application to adjust status be denied.

On appeal, counsel for the applicant asserts that the field office director disregarded a preponderance of the evidence establishing the compelling reasons why the applicant and his family cannot return to Zimbabwe. Counsel suggests that the field office director did not review the applicant's personal declaration and extensive corroborating evidence submitted. Counsel questions the failure to issue a Request for Further Evidence (RFE) if the field office director believed that evidence was lacking in support of the application.

Preliminarily, the AAO finds that the field office director is not required to issue a RFE in every potentially deniable case. If the field office director determines that the initial evidence supports a decision of denial, the regulation at 8 C.F.R. § 103.2(b)(8) does not require solicitation of further documentation. Moreover, even if the field office director had committed a procedural error by failing to solicit further evidence, it is not clear what remedy would be more appropriate beyond the appeal process itself. The petitioner has in fact supplemented the record on appeal, and therefore it would serve no useful purpose to remand the matter simply to afford the petitioner the opportunity to supplement the record with new evidence.

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 turns to a review of 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 establishes the applicant's eligibility for consideration under Section 13. The applicant was admitted in A-1 status and served as the economic and consular counselor at the Embassy of the Republic of Zimbabwe in Washington, D. C. from January 2000 until the end of his tour in February 2005. The Zimbabwe Embassy notified the Department of State on February 15, 2005 that the applicant had left the Embassy after the end of his tour of duty. The applicant filed this Form I-485, Application to Register Permanent Resident or Adjust Status on March 24, 2005. Therefore, per the requirements of Section 13, the applicant was admitted to the United States in diplomatic status under 101(a)(15)(A)(i) of the Act but no longer held that status at the time of his application for adjustment on March 24, 2005.

In this matter, the applicant has presented evidence of the dire conditions in Zimbabwe including the political violence associated with the Mugabe government. Since the filing of the application and the

appeal, the AAO takes administrative notice that after protracted negotiations between the two main political parties in Zimbabwe, the opposition leader to the Mugabe government has been sworn in as prime minister, while Robert Mugabe continues in his role as president. This latest development, although it does not alleviate the continuous turmoil in the country and political instability amidst horrendous economic conditions including hyperinflation and unemployment and medical epidemics including AIDS and cholera, provides some hope to the people of Zimbabwe. The AAO takes notice of these dire conditions and the changes in the political landscape.

Regarding the applicant's specific situation, the record shows that subsequent to the end of the applicant's tour of duty at the Zimbabwean Embassy in the United States, ending February 15, 2005, the applicant tendered his resignation to the Secretary of Foreign Affairs of the Zimbabwe Embassy on March 5, 2005. The Foreign Ministry accepted the applicant's resignation on March 11, 2005 effective as of March 4, 2005. In a January 31, 2006 personal statement, the applicant set out his reasons for not returning to Zimbabwe. The applicant stated: "[b]ecause I am now a Jehovah's Witness and fully espouse the values of my religion, I am strictly apolitical," however, "because of my religious views, I am not willing to support the oppressive actions of the Zimbabwean government." The applicant explained that the atrocities of the Zimbabwean government became so glaring that he needed to distance himself from the government and resign. The applicant noted his belief that his resignation and remaining in the United States would be viewed as "oppositionist." The AAO observes that the applicant did not resign until after the completion of his tour of duty; thus, the applicant's distancing himself from the Mugabe regime did not occur until he was placed in the very real position of being returned to Zimbabwe. The AAO does not question the applicant's religious convictions and his desire to remain in the United States. The AAO questions the timing of the applicant's recognition of the atrocities taking place in his native country and his moral stand taken subsequent to the date of the end of his tour of duty.

The AAO acknowledges the applicant's statement that he would not participate in the Mugabe's government policy of awarding land to returning diplomats that had been forcibly seized from farmers. The applicant explained that his refusal to participate in gaining this land at the expense of the farmers would also be viewed as oppositionist. The applicant recited his fear of horrible repercussions to his family if he refused to participate in this forced land transfer. The AAO agrees that the Mugabe regime has been condemned internationally for its abuse of human rights and violence directed at oppositional factions. The applicant, however, has not provided substantive evidence that he would be targeted either for his resignation or his refusal to participate in the forced land exchange. The AAO does not find evidence in the record that individuals in similar positions have been targeted or would be targeted now as some regime change is now taking place. 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 record is insufficient to establish that the applicant in his role as a returning diplomat would be at greater risk of harm because of his past government employment, political activities or other related reason.

The applicant also contends that he and his daughter could not obtain necessary medical care in Zimbabwe. The applicant notes that he has diabetes and that his daughter, now age 20, suffered a stroke

when she was seven. The record does not include the applicant's medical records but includes a prescription record showing that the applicant has been given various prescriptions from May 2005 to December 2005. The record includes the medical records of the applicant's daughter including an assessment in February 1997, a year after her stroke wherein she is diagnosed as coping functionally well and concluding that "[f]unctionally she is able to do just about everything although there are some slight abnormal movement pattern both in the foot and the ankle and in the wrist and fingers." The record also includes the applicant's daughter's medical exams record for routine physical exams in 2004 that show no adverse diagnosis.

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 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. What Section 13 requires 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. In this matter, the applicant has expressed his desire to remain in the United States because of his speculation that his resignation from government service and his potential refusal to accept land obtained forcibly from others would be viewed as oppositionist and would result in repercussions.

In this matter, the applicant has expressed his desire to remain in the United States but has not demonstrated that he is unable to return to Zimbabwe based on compelling reasons related 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. The AAO acknowledges the hardships associated with relocating to Zimbabwe at this time. However, the general inconveniences and hardships associated with relocating to another country and a preference to remain in the United States do not demonstrate compelling reasons under Section 13. 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 Zimbabwe or other political entity there as required under Section 13. It is also noted that the State Department has objected to the applicant being granted adjustment of status and indicated that it does not believe that compelling reasons prevent the applicant's return to Zimbabwe. *See* Interagency Record of Request (Form I-566). The AAO therefore concludes that the applicant has failed to meet his burden of proof in demonstrating that there are compelling reasons that prevent his return to Zimbabwe. As the applicant has failed to demonstrate that there are compelling reasons

preventing his return to Zimbabwe, the question of whether adjustment of status would be in the national interest need not be addressed.

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 there are compelling reasons preventing his return to Zimbabwe. 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.