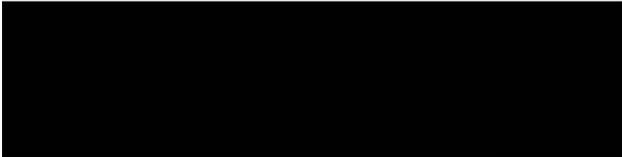


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**U.S. Citizenship
and Immigration
Services**

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



FILE:

Office: WASHINGTON DISTRICT

Date:

FEB 24 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. The matter is now before the Administration Appeals Office (AAO) on appeal. The appeal will be dismissed. The application will be denied.

The applicant is a native and citizen of the Philippines 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 on December 19, 2007 after determining that the applicant had not established: that he performed duties that were diplomatic or semi-diplomatic; that compelling reasons prevent his return to the Philippines; and that his adjustment of status would be in the national interest of the United States. Counsel for the applicant timely filed a Form I-290B, Notice of Appeal or Motion, checking the box that the documents submitted were in support of a motion to reopen and reconsider. However, counsel titled the brief submitted as a Motion to Reopen/Reconsideration/Appeal. On July 25, 2008, the field office director noted the new facts submitted and determined that the new facts were insufficient to warrant reopening the proceedings.

Counsel timely submitted a Form I-290B, indicating that he was filing an appeal of the director's decision to deny the motion to reopen/reconsider as the field office director had not given merit and due consideration to the documentary evidence and compelling reasons submitted. Counsel noted that a brief and/or additional evidence would be submitted within 30 days. As the record did not contain a brief or additional evidence in support of the appeal, on January 23, 2009, the AAO requested that counsel of record indicate whether he had submitted a brief or evidence and if he had to provide a copy to the AAO within five business days. In a response dated January 29, 2009, counsel for the applicant indicated that he did not file a brief or evidence in support of the appeal as he had indicated on the Form I-290B. Counsel also submitted a brief dated January 26, 2009 for consideration. As the AAO's facsimile clearly states: "this facsimile is not and should not be construed as requesting or permitting the petitioner and/or its counsel to submit a late brief and/or evidence in response to this request," the January 26, 2009 brief will not be considered. However, as the AAO reviews appeals on a *de novo* basis, the AAO will consider the documentary evidence submitted on motion/appeal and render a decision on the merits of this application. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

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.

Title 8 Code of Federal Regulations Part 245.3 states in pertinent part:

Any application for benefits under section 13 of the Act of September 11, 1957, as amended, must be filed on Form I - 485 with the director having jurisdiction over the applicant's place of residence. The benefits under section 13 are 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 Immigration and Nationality 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 which accredited the applicant and that adjustment of the applicant's status to that of an alien lawfully admitted for permanent residence would be in the national interest. 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 has considered the evidence regarding the applicant's duties as Consular Assistant for the Consulate General of the Philippines in Honolulu, Hawaii. The record includes two certifications from the Consul General of the Philippines, Honolulu, Hawaii, dated March 3, 2005 and January 14, 2008. The certifications describe the duties the applicant performed while employed as a Consular Assistant from September 1, 1996 to February 28, 2003. The description of duties provided is sufficient to establish the applicant performed semi-diplomatic duties for the Consulate. The field office director's decision is withdrawn as it relates to this element in the determination of the applicant's eligibility for this benefit.

The AAO finds upon review of the record, however, that the record does not include sufficient evidence to establish that compelling reasons prevent the applicant from returning to the Philippines. 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. 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.

In this matter, the applicant indicated in his sworn statement before a United States Citizenship and Immigration Services (USCIS) officer, dated June 28, 2006, that the compelling reason that prevented his return to the Philippines is a better education for his children. The field office director correctly determined that this is not a compelling reason as intended by Section 13.

On appeal/motion, counsel for the applicant submits an additional statement signed by the applicant on December 31, 2007. The applicant explains that he forgot to mention that an additional reason that prevented his return to the Philippines is the safety and security of his family. The applicant indicates that his father-in-law, at the end of February 2003, requested that he stay in the United States because persons were threatening his father-in-law and his family. The applicant notes that rebels, members of the communist party of the Philippines, are involved in bombings, murders, assassination of government officials and anyone against their cause. The applicant indicates his fear of returning to the Philippines since he was assigned to work in the United States, “the arch enemy of the communist rebels.” The applicant also notes that his father-in-law and other members of his wife’s family were murdered in October 2003 but that the local police did not catch the culprits and the case was transferred to the National Bureau of Investigation but that the case has never been solved.

The AAO finds that the applicant has not submitted substantive evidence showing that he is at greater risk of harm because of his past government employment, political activities or other related reason. The AAO has reviewed the applicant’s statements and claims on appeal as well as the described country conditions in the Philippines. The AAO notes that certain areas in the Philippines are more subject to turmoil than others and that threats and intimidation by thugs affiliated with certain political groups exist. The AAO has specifically considered the applicant’s information regarding his wife’s family, however the information provided does not include substantive evidence that the

applicant's wife's family was targeted for any particular reason. The matter was investigated and no information has been submitted to indicate that the murders of members of his wife's family were connected to the applicant's work for the Consulate General of the Philippines in the United States. The AAO acknowledges that the Philippine government continues to battle the communist rebels, but the record does not provide any specific evidence that the applicant would be a target of these rebels or other political group because of his past government employment. The applicant's fear is speculative and not substantiated in the record. The applicant has not provided compelling reasons related to political changes in the Philippines that render him as a diplomat and foreign representative "stateless or homeless" or at risk of harm following political upheavals in the country represented by the government which accredited them. 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 general inconveniences and hardships associated with relocating to another country and the applicant's desire for his children to have a United States education are also not compelling reasons under Section 13. It is further noted that the State Department has objected to the applicant being granted adjustment of status. *See* Interagency Record of Request (Form I-566). The record does not include the evidence necessary to establish that there are compelling reasons that prevent the applicant's return to the Philippines. The applicant has failed to meet his burden of proof in this regard. As the applicant has failed to demonstrate that there are compelling reasons preventing his return to the Philippines, 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 the Philippines. 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. The application is denied.