

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

A3

FILE:

Office: WASHINGTON DISTRICT

Date:

MAR 12 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 Iran accredited by the Sultanate of Oman 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 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 applicant had failed to demonstrate that compelling reasons prevent her return to Iran. The field office director also noted that the Department of State issued its opinion on February 5, 2008 advising that it could not favorably recommend this matter.

On appeal, counsel for the applicant asserts that the applicant has presented compelling reasons that prevent her return to Iran and that as she is not a national of the Sultanate of Oman it is not possible for her to establish residency in the country that accredited her. Counsel submits documents in support of the appeal.

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 fails to establish the applicant's eligibility for consideration under section 13 of the 1957 Act. The record shows that the applicant initially entered the United States in 1979 and in July 1990 was employed by the Oman Embassy as an academic advisor in A-2 status. The record shows that the applicant was relieved of her duties as an academic advisor at the Oman Embassy in November 2002. Department of State records show that the applicant's A-2 status was terminated on December 1, 2002. The applicant filed the Form I-485, Application to Register Permanent Resident or Adjust Status on November 9, 2002, while still maintaining A-2 status. The AAO also finds that the applicant did not perform diplomatic or semi-diplomatic duties for the Sultanate of Oman, and that this is an additional reason precluding the approval of this application.¹ Accordingly, the applicant is ineligible to file for Section 13 consideration.

The field office director in this matter erroneously adjudicated the applicant's eligibility under Section 13 determining that she did not present evidence of compelling reasons preventing her return to Iran. As observed above, Section 13 is limited to those aliens who show compelling reasons demonstrating that the alien is unable to return to the country represented by the government which accredited the alien. In this matter, the applicant was not accredited by her native country, Iran, the country where she holds citizenship. As counsel noted, the applicant has no ties to the country that accredited her nonimmigrant classification in A-2 status in the United States. If Section 13 was applicable to the

¹ The AAO finds that the applicant was not eligible to file a Section 13 application prior to December 1, 2002, as she was maintaining legal status at that time and that she did not perform diplomatic or semi-diplomatic duties for the Sultanate of Oman. These issues will be discussed in detail later in this decision.

applicant's situation, the argument could be made that the applicant was indeed unable to return to the country that accredited her, the Sultanate of Oman, as she is not a citizen of that country, has not been a resident of that country, and apparently has no ties to that country. However, as noted above, the applicant is ineligible to file for Section 13 and she has not established evidence that she performed diplomatic or semi-diplomatic duties for the Sultanate of Oman, the country that accredited her. Although the field office director did not properly adjudicate the pertinent issues in this matter, remanding the matter would serve no purpose as the applicant was *prima facie* ineligible to apply for Section 13 prior to December 1, 2002.

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, as noted above, the applicant filed the Form I-485 on November 9, 2002. 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 the Sultanate of Oman, the applicant maintained status in the United States under section 101(a)(15)(A)(ii) of the Act until December 1, 2002. Thus, the applicant was ineligible to apply for adjustment of status under Section 13 until after December 1, 2002. The applicant's premature application requires denial of the application and the dismissal of this appeal.

The AAO also finds in addition to being *prima facie* ineligible to file for adjustment pursuant to Section 13, the applicant has not established that she performed diplomatic or semi-diplomatic duties for the Sultanate of Oman. 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 duties.

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 the Sultanate of Oman, the country that accredited her, but is a native and citizen of Iran and that the applicant was hired to work as an academic advisor to citizens of Oman coming to the United States as students. That the circumstances presented in this matter 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. In this matter, it does not.

In a sworn statement dated February 1, 2007, before a USCIS officer, the applicant declared that her duties were not diplomatic, that she worked at the cultural division of the Embassy of Oman. The AAO acknowledges that the applicant has provided a detailed list of duties performed to assist aliens from Oman coming to the United States as students. A review of these duties reveals that the duties are clerical and administrative and conform with the applicant's statement that the duties are not diplomatic. The AAO also finds no evidence to demonstrate that these duties comprised semi-diplomatic duties in support of the Sultanate of Oman's representative authority in the United States. 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 her. 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 the Sultanate of Oman in any official capacity. The AAO finds that the applicant has failed to demonstrate that, as a non-citizen employee, she was entrusted with duties of a diplomatic or semi-diplomatic nature.

As the applicant has failed to demonstrate that she performed diplomatic or semi-diplomatic duties, she is also ineligible for consideration under Section 13 on this ground. For this additional reason, the application may not be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *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).

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 she filed the application when she no longer maintained A-2 status and she has failed to establish that she 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 she 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.