



U.S. Citizenship
and Immigration
Services

[REDACTED]

A3

DATE: Office: NATIONAL BENEFITS CENTER File: [REDACTED]

NOV 06 2012

IN RE: Applicant: [REDACTED]

PETITION: 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 PETITIONER:

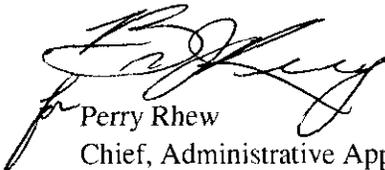
[REDACTED]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The application was denied by the Director (director), National Benefits Center and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The application will remain 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 director denied the application for adjustment of status after determining that the applicant had not established that compelling reasons prevent his return to the Philippines. The director also noted that the United States Department of State had recommended that his adjustment of status be denied because the applicant had not presented compelling reasons why he cannot return to the Philippines. *Decision of the Director*, dated July 13, 2012.

On appeal, counsel for the applicant asserts that the decision of the director to deny the applicant's adjustment of status was based on the erroneous conclusion that the evidence does not establish compelling reasons why the applicant cannot return to the Philippines. Counsel contends that the evidence of record "clearly and strongly, without contradiction," establishes that the applicant and his family have compelling reasons for not wanting to return to the Philippines, including but not limited to the substantial risks of serious and personal harm and death from terrorists who cannot be controlled by the government of the Philippines and from corrupt members of the government security forces and police. Counsel states that the applicant's family was also denied adjustment of status based on the denial of the applicant's application and indicates on the applicant's Form I-290B that only one filing fee is required.¹

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.

¹ Counsel indicated at Part 3 of the Notice of Appeal or Motion (Form I-290B) that the dependents' Form I-485's were denied solely because the I-485 submitted by the applicant was denied. He claims that only one filing fee is required for all applicants. The record does not include Form I-290B for each of the family members as required by the regulation. Pursuant to 8 C.F.R. § 103.3(a)(1), for each adverse decision, an applicant must submit a separate Form I-290B and associated fee. Accordingly, only the applicant's appeal will be addressed by the AAO.

(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.

In addition, an applicant for adjustment of status under Section 13 must not be maintaining diplomatic status in order to apply for adjustment under Section 13; thus, his or her status must be terminated prior to the date on which the adjustment application is filed. 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.

Pursuant to 8 C.F.R. § 214.2(a), an alien admitted under section 101(a)(15)(A)(ii) or 101(a)(15)(G)(i) or (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." 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. An application for adjustment of status under Section 13 filed while the applicant is maintaining diplomatic or semi-diplomatic status is properly denied. However, denial 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.

In this matter, the record reflects that the applicant was admitted in A-2 nonimmigrant status on April 4, 1989, and he served as a [REDACTED], October 1, 1993, the effective date of his resignation from this position. *Letter*

of Resignation from [REDACTED] dated August 18, 1993; a memo signed by [REDACTED] Seattle, Washington, dated August 19, 1993. These documents, while authored in August 1993, clearly indicated that the termination of the applicant from his diplomatic duties does not take effect until October 1, 1993. Therefore, the applicant maintained legal status in the United States under section 101(a)(15)(A)(ii) of the Act through October 1, 1993. The applicant filed the Form I-485, Application to Register Permanent Residence or Adjust Status, on September 16, 1993. Thus, when the applicant filed his Form I-485, on September 16, 1993, he was not eligible to apply for section 13 adjustment of status. Accordingly, the AAO finds that the applicant was not eligible to apply for adjustment of status pursuant to section 13 of the Act on September 16, 1993.

The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). Based upon a *de novo* review of the record, the AAO finds that the applicant was admitted to the United States in diplomatic status under section 101(a)(15)(A)(ii) of the Act, that the applicant was maintaining that status at the time of his application for adjustment on September 16, 1993, and that the applicant was therefore not eligible to apply for adjustment under Section 13 at the time of the filing.

As the applicant was not statutorily eligible to apply for adjustment of status under section 13 of the Act, the issues of whether the applicant has established compelling reasons that prevent his return to the Philippines and whether his adjustment is in the national interest of the United States will not be addressed. Consequently, the director's decision to deny the applicant's adjustment application on the basis that he failed to demonstrate compelling reasons preventing his return to the Philippines will be withdrawn.

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.

ORDER: The appeal is dismissed. The application remains denied.