



U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: FEB 05 2010 Office: NATIONAL BENEFITS CENTER FILE:

IN RE: Applicant:

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: SELF-REPRESENTED

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,

Ron M. Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The application was denied by the Director, National Benefits Center (director). The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native of China and a citizen of Australia who is seeking to adjust his status to that of a 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 Form I-485, Application to Register Permanent Residence or Adjust Status after determining that the applicant had failed to demonstrate that he performed diplomatic or semi-diplomatic duties and that compelling reasons prevent his return to Australia. The director also noted that the United States Department of State issued its opinion on August 19, 2011, recommending that the applicant's adjustment of status to that of a lawful permanent resident be denied because the applicant did not perform diplomatic or semi-diplomatic duties and presents no compelling reasons why he cannot return to Australia. *Decision of the Director*, dated August 24, 2012.

On appeal, the applicant asserts that the director erred in denying his application because the director "failed to recognize the 'semi diplomatic' nature of my 10 year service as the Australian Representative as well as a research scientist attached to the [REDACTED] sector of [REDACTED]

The applicant also asserts that his "improved real estate portfolio" and "the extreme hardship that some twenty American families may suffer if they are deprived of the housing and employment opportunities provided by my business in the city of [REDACTED] represents extreme hardship for him. The applicant states that his success in scientific research will be in the best interest of the United States and that if he is granted permission to remain in the United States, he will have the time and resources to fully commercialize the research ideas for the benefit of the United States.

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).

A review of the record shows that the applicant was admitted in A-2 nonimmigrant status on August 13, 2004 to work for the [redacted] Office in [redacted] Illinois. See copy of U.S. nonimmigrant visa issued by Department of State on August 6, 2003. The applicant's tenure of employment was from June 2004 until termination in June or July 2007. The U.S. Department of State was notified of the applicant's termination of his A-2 nonimmigrant status on February 2007. The applicant filed his adjustment of status application on July 24, 2008. Accordingly, per the requirements of section 13(a) of the 1957 statute, the applicant was admitted to the United States under section 101(a)(15)(A)(ii) of the Act but no longer held that status at the time he filed his application for adjustment on July 24, 2008.

The issues before the AAO in the present matter are whether the record establishes that the applicant performed diplomatic or semi-diplomatic duties and that compelling reasons preclude his return to Australia – requirements set forth in section 13(b) of the 1957 Act.

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 does not establish the applicant's eligibility for consideration under section 13. The record indicates that the applicant was admitted into the United States in an A-2 nonimmigrant status to provide scientific services to the [REDACTED] office in [REDACTED] Illinois. Although the applicant was admitted in an A-2 status and he claimed at an interview before an Immigration Official on January 20, 2009, that he performed semi-diplomatic duties on behalf of the Australian government, the evidence of record does not support the applicant's claim.

A copy of an employment contract between the applicant and [REDACTED] [REDACTED] dated June 3, 2004, indicates that the applicant was employed by [REDACTED] specifically to provide scientific services to the [REDACTED]. The contract listed the applicant's duties and responsibilities as: (1) to operate, maintain and improve facility instruments; (2) to conduct leading-edge research; and (3) to work with the Australian scientific community to develop the commercial uptake of the facility.

On appeal, however, the applicant claims that he served as the Australian representative and research scientist at "the [REDACTED] from May 1998 to July 2007." In support of this claim, the applicant referred to the contract with [REDACTED]. The applicant stated that his duties were more than technical in nature, that they are semi-diplomatic. The applicant referred to sections of the contract in support of his assertion that he performed semi-diplomatic duties. Specifically, the applicant claimed that part of his role was to develop a community of collaborators and users that was responsible for disseminating specialist knowledge across the team, monitor and review their work, coordinate cross-divisional and external collaboration, coordinate with and manage others, forecast and allocate project resources and tasks, lead negotiations, and manage and motivate the team. The applicant further stated that he worked in a highly collaborative way, building and maintaining productive working relationships within [REDACTED] and with external suppliers and partners, interacted with staff of varying backgrounds and experiences, worked consultatively with all internal and external stakeholders, persuaded and influenced others and established productive working relationships with all stakeholders. The applicant contends that these responsibilities and his actual performance during his tenure at [REDACTED] are semi-diplomatic duties as reflected in the A-2 visa he held during that period.

Contrary to the applicant's assertions, the duties and responsibilities he enumerated above are technical and administrative duties and not diplomatic or semi-diplomatic. While the record shows that the applicant obtained classification under section 101(a)(15)(A)(ii) of the Act, and no longer maintained that status at the time he filed for adjustment of status, the director determined that the applicant did not perform duties of a diplomatic or semi-diplomatic nature. The AAO concurs in this determination.

The AAO acknowledges that the terms diplomatic and semi-diplomatic are not defined in Section 13 or pertinent regulations and that the standard definitions of terms such as diplomat, diplomatic and diplomacy are varied and broad, and that, in practice, diplomacy may encompass many responsibilities and duties. The AAO finds, however, that the essential role of a diplomat is the representation of a country in its relations with other countries. *See 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* (Diplomacy: The art and practice of conducting negotiations between national governments). Both section 101(a)(15)(A) of the Act and the Vienna Convention recognize that certain accredited employees or officials admitted to serve within embassies or other diplomatic missions are not "diplomatic" staff. The Vienna Convention refers to such personnel as administrative and technical staff, service staff, or personal servants. *The Vienna Convention on Diplomatic Relations*, Art. 1 (April 18, 1961), 500 U.N.T.S. 95. These "non-diplomatic" employees are nevertheless afforded the rights and immunities of diplomatic staff. See *Vienna Convention, supra*, Art. 37. In the matter of non-diplomatic employees who are admitted pursuant to section 101(a)(15)(G)(i) of the Act, USCIS must evaluate the position held and its attendant duties to determine whether the applicant is eligible under Section 13.

In this case, the applicant's assertions on appeal that his duties are semi-diplomatic in nature are not supported by the record and thus, not persuasive. 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 AAO notes the duties as described in the contract with [REDACTED] are technical and administrative in nature and not diplomatic or semi-diplomatic. The contract does not confer any diplomatic role or responsibilities to the applicant. The contract does not indicate that the applicant represented or served the government of Australia as a member of that country's diplomatic corps or that he represented the Australian government in a semi-diplomatic capacity. The record does not demonstrate that the applicant had any formal advisory or decision-making role within his country's diplomatic corp. Accordingly, the applicant has failed to establish that he was entrusted with duties of a diplomatic or semi-diplomatic nature.

The AAO also concurs with the director's determination that the applicant failed to establish compelling reasons that prevent his return to Australia. The applicant's stated reasons for not wanting to return to Australia are not compelling reasons as specified under section 13.

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.

In the applicant's January 20, 2009 sworn statement before an Immigration Services Officer, the applicant stated the compelling reasons that prevent his return to Australia as "my real estate investments and better scientific opportunities." On appeal, the applicant states that he wants to

remain in the United States “so that I can achieve economic independence in as short as a year or two, for the benefit and wellbeing of many American workers and their families, as well as the health and wealth of my own family.”

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 reason 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. What Section 13 requires, however, 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. Even where the meaning of a statutory provision appears to be clear from the plain language of the statute, it is appropriate to look to the legislative history to determine “whether there is ‘clearly expressed legislative intention’ contrary to that language, which would require [questioning] the strong presumption that Congress expresses its intent through the language it chooses.” *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 433, fn. 12 (1987). The legislative history supports the plain language in Section 13 that those eligible for adjustment of status under Section 13 are those diplomats that have been, in essence, rendered stateless or homeless by political upheaval, hostilities, etc., and are thus, *unable* to return to and live in their respective countries.

The AAO notes the applicant’s reasons for wanting to remain in the United States; however, economic independence is not a compelling reason within the meaning of section 13. 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. The general inconveniences and hardships associated with relocating to another country are not compelling reasons under Section 13. It is also noted that the State Department has recommended that the applicant’s adjustment of status be denied because the applicant has presented no compelling reasons that prevents his and his family’s return to Australia. See *Interagency Record of Request* (Form I-566). 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 Australia or other political entity there as required under Section 13. The applicant has submitted no evidence showing that he is at greater risk of harm because of his past government employment, political activities or other related reason.

Based on the evidence of record, the AAO concludes that the applicant has failed to meet his burden of proof in demonstrating that there are compelling reasons that prevent his return to Australia. The applicant has failed to demonstrate that the government of Australia will not allow his return to that

country or that his past employment as a Research Scientist for the [REDACTED] in [REDACTED] Illinois, places him and his family in danger and renders them unable to return to Australia. Accordingly, the applicant has failed to demonstrate that he or any member of his immediate family have compelling reasons as contemplated under Section 13 that prevent them from returning to Australia. As the applicant has failed to demonstrate that there are compelling reasons preventing his return to Australia, the question of whether adjustment of status would be in the national interest of the United States 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 he performed diplomatic or semi-diplomatic duties and that there are compelling reasons that prevents his return to Australia. 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.