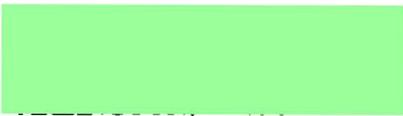




U.S. Citizenship  
and Immigration  
Services

(b)(6)



DATE: Office: NATIONAL BENEFITS CENTER File:

MAR 28 2013

IN RE: Applicant:

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:



A3  
I485 Diplomat  
Section 13

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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 (director), National Benefits Center and a subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen and reconsider. The motion will be granted. The previous decisions will be affirmed and 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 November 6, 2012, the AAO withdrew the director's decision to deny the application after determining that at the time the applicant applied for adjustment of status under Section 13, the applicant was still maintaining diplomatic status. The AAO dismissed the applicant's appeal on this ground.

In requesting the AAO to reconsider its decision, counsel asserts that the decision to deny the applicant's Section 13 adjustment of status application is based "solely upon the erroneous conclusion that the applicant was still in diplomatic status at the time he filed his application." Counsel claims that the applicant was no longer performing diplomatic duties at the time he filed his application on September 16, 1993, and as such was not maintaining diplomatic status. Counsel states that "if [the applicant] was not performing his diplomatic duties on September 16, 1993, the application of basic tenets of immigration law would clearly establish that he was not maintaining his status regardless of what the regulation might provide." Counsel claims that neither statute nor regulation requires that, at the time of filing of an application for adjustment, an applicant's diplomatic status be terminated.

In addition, counsel states:

The applicant's major contention is that the governing Section 13 statute does not require that the permanent resident applications be filed when the applicant is not maintaining status... The status does not state that the applicant may file for permanent resident status when not maintaining diplomatic status and that interpreting the status to require the applicant not to be maintaining status when the permanent resident application is filed leads to absurd results.

Counsel indicated that "it is equally absurd that for 19 years the applicant's pending Section 13 application has been validated by the Service by issuing him work authorization based on the Section 13 application, only to now dismiss the application based upon alleged premature filing."

On motion, the applicant acknowledged that his resignation from his consular position at the Consulate General of the Philippines in [REDACTED] did not take effect until October 1, 1993. However, the applicant claims that at the time he tendered his resignation letter in August 1993, that he was no longer doing his diplomatic duties and believes that "there is a good possibility I had ceased doing my diplomatic duties before our applications for permanent residence were filed on September 19, 1993."

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.

(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).

Contrary to the assertions of counsel, the plain language of Section 13(a) requires that an alien not be maintaining status in order to *apply* for adjustment of status. Once the applicant has established that initial eligibility criteria and has applied, then the criteria found in Section 13(b) are considered in determining if the applicant is eligible to be adjusted to permanent resident status. Counsel has cited no other authority to support his interpretation of Section 13. The AAO determines that an applicant for adjustment of status under Section 13 must not be maintaining diplomatic status in order to apply for adjustment under Section 13, and that his or her status must therefore 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)(i) 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 Consular Assistant for the Consulate General of the Philippines in [REDACTED] until 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], [REDACTED], Consul Acting Principal Officer, Consulate General of the Philippines, [REDACTED], [REDACTED] dated August 19, 1993.* The applicant's resignation letter, while authored in August 1993, clearly indicated that he wanted the termination of his consular position to become effective as of October 1, 1993. A copy of "Protocol Person Detail" from U.S. Department of State indicated that the applicant's position as a Consular Assistant at the Consulate General of the Philippines, [REDACTED] was terminated by the Department of State on September 30, 1993. Thus, the applicant maintained his diplomatic status from April 2, 1989 until that status was terminated on September 30, 1993 as determined and reported by the U.S. Department of State. Therefore, notwithstanding the date on which the applicant believed his employment may have been formally terminated by his resignation, the applicant maintained diplomatic status in the United States under section 101(a)(15)(A)(ii) of the Act through September 30, 1993.

Counsel's contention on motion that a grant of employment authorization to the applicant is a validation of his eligibility to file for adjustment of status regardless of his diplomatic status at the time of filing is not persuasive. The applicant's eligibility for employment authorization has no bearing on his eligibility under Section 13. The applicant was granted and continued to receive employment authorization through the pendency of his application for adjustment of status under section 245 of the Act but not because he is eligible for a benefit under Section 13.

The AAO affirms its previous decision that the applicant was admitted to the United States in diplomatic status under section 101(a)(15)(A)(ii) of the Act, was maintaining that status at the time of his application for adjustment on September 16, 1993, and therefore was not eligible to apply for adjustment under Section 13 at the time of the filing. 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 motion is dismissed. The application remains denied.