



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE:

Office: NATIONAL BENEFITS CENTER

File:

SEP 05 2013

IN RE:

Applicant:

APPLICATION:

Application for Status as a Permanent Resident Pursuant to Section 13 of the Immigration and Nationality Act of 1957, Pub. L. No. 85-316, 71 Stat. 642, as amended.

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron M. Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The application was denied by the 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 Venezuela, 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 amended, 95 Stat. 1611, 8 U.S.C. § 1255b, as an alien who performed diplomatic or semi-diplomatic duties under section 101(a)(15)(G)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(G)(i).

The director denied the application for adjustment of status after determining that the applicant had not established that (1) compelling reasons prevent his return to Venezuela; (2) his adjustment of status is in the national interest of the United States; and (3) he filed an adjustment of status application while he was still maintaining diplomatic status. The director also noted that the U.S. Department of State has recommended that the applicant’s adjustment application be denied because the applicant had not presented compelling reasons why he cannot return to Venezuela. *Decision of the Director*, dated January 28, 2013.

The director also denied the application of the applicant’s spouse [REDACTED], his son [REDACTED], and his daughter [REDACTED] who each submitted an Application to Register Permanent Residence of Adjust Status (Form I-485), under Section 13 as dependent derivatives of the applicant. The director issued separate decisions denying these applications. These dependents each filed a separate Form I-290B, Notice of Appeal or Motion. The AAO will issue a separate decision for each of the dependents.

On appeal, counsel for the applicant asserts that the director “committed an abuse of discretion and reversible error in denying the instant I-485 application premised upon Section 13 of the immigration Act. The applicant complied with all the prerequisites of Section 13 including termination of employment with the Venezuelan Consulate and demonstrated sufficient compelling reasons why he cannot return to Venezuela.” Counsel submitted various country condition reports and information on Venezuela in support of the said appeal. Counsel then requests that the decision be overturned and the applicant be “granted the benefit of lawful permanent residence under Section 13 of the Immigration Act.”

The AAO has reviewed all of the evidence, and has made a *de novo* decision based on the record and the AAO’s assessment of the credibility, relevance and probative value of the evidence.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

¹The 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).

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).

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) 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 G-1 nonimmigrant status and served as a military adviser to the permanent mission of Venezuela to the [redacted]. The applicant served in this capacity from January 2008 until the termination of his diplomatic status on August 19, 2011. On appeal, counsel asserts that the applicant "complied with

all the prerequisites of Section 13 including termination of employment with the Venezuelan Consulate.” At his adjustment of status interview on August 29, 2012, the applicant stated that he terminated his position at the consulate in July 2010, but that he does not know when the State Department was notified of his termination.

The director noted in his decision that although the applicant claimed that he terminated his position at the consulate in July 2010, he nevertheless maintained his diplomatic status until August 19, 2011, the date on which the U.S. Department of State terminated his status based on notification they received from the government of Venezuela. Therefore, it appears from the record that the applicant maintained legal status in the United States under section 101(a)(15)(G)(i) of the Act through August 19, 2011. The applicant filed the Form I-485, Application to Register Permanent Residence or Adjust Status, on October 26, 2010. Therefore, when the applicant filed his Form I-485, on October 26, 2010, he was not eligible to apply for adjustment of status pursuant to section 13 of the Act. The applicant has submitted no evidence to establish that his status was terminated prior to October 26, 2010, the date he filed the adjustment application.

Therefore, based on the evidence of record, the AAO finds that the director properly determined that the applicant maintained diplomatic status until August 2011, and was not eligible to apply for adjustment of status pursuant to section 13 of the Act on October 26, 2010. The applicant has presented no evidence to overcome this finding.

Accordingly, the AAO determines that the applicant was admitted to the United States in diplomatic status under section 101(a)(15)(G)(i) of the Act, was maintaining that status at the time of his application for adjustment on October 26, 2010, and therefore was 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 performed diplomatic or semi-diplomatic duties, has established compelling reasons that prevent his return to Venezuela and whether his adjustment is in the national interest of the United States will not be addressed.

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 remains denied.