



U.S. Citizenship  
and Immigration  
Services

(b)(6)

[Redacted]

DATE **SEP 13 2013** Office: NATIONAL BENEFITS CENTER FILE: [Redacted]

IN RE: Applicant: [Redacted]

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 APPLICANT:

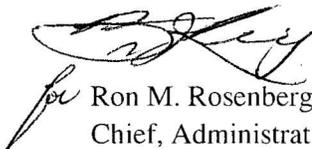
[Redacted]

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 (director). The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Kenya 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 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 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 Kenya. The director also noted that the U.S. Department of State issued its opinion on January 16, 2013, recommending that the applicant's adjustment of status application be denied because the applicant had no qualifying position and that he provided no compelling reasons that preclude his return to his country. *Decision of the Director*, dated February 6, 2013.

The director also denied the application of the applicant's spouse [REDACTED] his sons [REDACTED], and [REDACTED], who each submitted an Application to Register Permanent Residence or Adjust Status (Form I-485) under Section 13 as derivative dependents 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 erred in finding that the applicant did not perform diplomatic or semi-diplomatic duties. Counsel also asserts that the director "simply and arbitrarily" relied only on the applicant's job designation without reviewing his actual duties as contained in the documents and the evidence he submitted. Counsel claims that the director failed or neglected to review the content of the affidavits and other documents the applicant submitted in support of his application. Counsel submits a brief and other documentation in support of the appeal.

Section 13 of the Immigration and Nationality Act of September 11, 1957, Pub. L. No. 85-316, 71 Stat. 642, as amended 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 and 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 G-1 nonimmigrant status on January 1, 2003, and thereafter served as a [REDACTED] for the Kenyan Permanent Mission to the United Nations in New York until September 30, 2003. *Statement from Justus Oluoch Tindi*, dated September 16, 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)(G)(i) of the Act but no longer held that status at the time he filed his application for adjustment on September 25, 2008.

The issue before the AAO in the present matter is whether the record establishes that the applicant performed diplomatic or semi-diplomatic duties while employed as a [REDACTED] for the Kenyan Permanent Mission to the United Nations in New York.

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).

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A review of the record does not establish the applicant's eligibility for consideration under Section 13 of the Act because the applicant failed to demonstrate that he performed diplomatic or semi-diplomatic duties as a [REDACTED] for the Kenyan government. As indicated above, the applicant was admitted in G-1 status and served as a [REDACTED] for the Kenyan Permanent Mission to the United Nations in New York. The applicant claimed at his adjustment of status interview that his duties were diplomatic or semi-diplomatic because he had "a broad spectrum of duties" including planning and organizing receptions and developing friendliness between Kenya and other nations. The applicant claimed that he was active in negotiations between nations but failed to provide details of the nature and extent of his involvement in negotiation between Kenya and other nations. In his statement of September 16, 2008, the applicant only stated that he was a "principal – [REDACTED] working for the Kenyan Mission to the United Nations." On appeal however, counsel asserts that the detailed description of the applicant's duties which has been submitted in the record shows that the applicant's duties were more than [REDACTED] duties and included the promotion and development of cultural and friendly relations between Kenya and other nations. *Counsel's brief* at page 5. Counsel claims that the applicant performed "high level managerial and secretarial functions including budgeting, translating, and record-keeping, and so on to assist his superior with their diplomatic assignment." *Id* at page 6. Counsel contends that the applicant's duties were semi-diplomatic in nature. The record contains a copy of "Duties and Responsibilities" dated September 24, 2001, from Permanent Mission of Kenya to the United Nations, addressed to the applicant.

The AAO finds counsel's assertions not persuasive. The record does not contain substantive evidence to support counsel's expansion of the applicant's duties and responsibilities, to include performance of "high level managerial and secretarial functions in support of his superior's diplomatic assignments." The record does not contain sufficient information regarding the "other managerial duties not directly connected with [the applicant's] department" that is listed as number 12 of his duties and responsibilities. Although counsel equated the duties performed by the applicant as semi-diplomatic duties, the applicant does not provide information detailing his actual responsibilities or why his government represented to the United States that he would be performing duties of a [REDACTED]. Without the necessary documentation describing the applicant's actual responsibilities and duties, the AAO is unable to conclude that the applicant's duties were semi-diplomatic duties rather than clerical, technical, menial or administrative duties. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). 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 record shows that although the applicant obtained classification under section 101(a)(15)(G)(i) 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 with this determination.<sup>1</sup> The AAO acknowledges that the terms

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<sup>1</sup> It is also noted that the U.S. Department of State has recommended that the applicant's request for adjustment of status be denied because the applicant has no qualifying position. See Interagency Record of

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. Whereas ambassadors, public ministers, and career diplomatic or consular officers are admitted under section 101(a)(15)(A)(i) of the Act, those admitted under section 101(a)(15)(G)(i), such as the applicant, are described only as "other officials and employees" accepted on the basis of reciprocity. These "non-diplomatic" employees are nevertheless afforded the rights and immunities of diplomatic staff. See *Vienna Convention, supra*, Art. 37. In the case of non-diplomatic employees who are admitted pursuant to section 101(a)(15)(A)(ii) of the Act, USCIS must evaluate the position held and its attendant duties to determine whether the applicant is eligible under Section 13. To establish eligibility for Section 13 the applicant must perform some diplomatic or semi-diplomatic duties, not duties that only relate to clerical, administrative, custodial, or technical support of the Consulate or Embassy.

In this matter, the AAO finds that the applicant's duties are not diplomatic or semi-diplomatic. The record does not show that the applicant had any formal advisory or decision-making role at the Mission or that he had authority to represent Kenya before any state or federal government agencies of the United States or other international governments or that he provided direct support for these activities. Accordingly, the record in this matter is insufficient to find that the applicant performed diplomatic or semi-diplomatic duties.

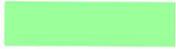
For the reasons discussed above, the AAO finds that the applicant is not eligible for adjustment of status under Section 13. He has failed to establish that he performed diplomatic or semi-diplomatic duties. As the applicant has failed to establish his eligibility for adjustment of status under section 13, the issue of whether he has established compelling reasons that prevent his return to Kenya or whether his adjustment of status will be in the national interest of the United States will not be discussed.<sup>2</sup> 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.

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Request (Form I-566).

<sup>2</sup> 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).



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*NON-PRECEDENT DECISION*

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**ORDER:** The appeal is dismissed.