



U.S. Citizenship  
and Immigration  
Services

(b)(6)

DATE: Office: WASHINGTON DISTRICT

**MAR 3 1 2014**

IN RE:

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.

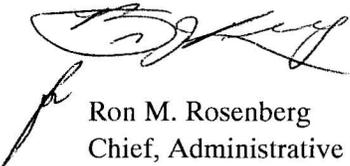
ON BEHALF OF APPLICANT:

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 Field Office Director, Washington, District Office and was appealed to the Administrative Appeals Office (AAO). The appeal was dismissed. The matter is now before the AAO on a motion to reopen and a motion to reconsider. The motion will be granted, the previous decision of the AAO will be withdrawn in part and affirmed in part. The application will remain denied.

The applicant is a native and citizen of Cameroon who is seeking to adjust her 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 the derivative spouse of an alien who performed diplomatic or semi-diplomatic duties under section 101(a)(15)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(A)(i).

The field office director denied the application for adjustment of status after determining that the applicant had failed to demonstrate that her spouse had ever failed to maintain diplomatic status. Citing *Matter of Aiyer*, 18 I&N Dec. 98, (Reg. Commr. 1981), the director noted that a dependent family member seeking adjustment of status under Section 13 is ineligible if the principal alien did not fail to maintain diplomatic status. The director found the applicant ineligible for benefits under Section 13 of the Act because she was still maintaining diplomatic status at the time she filed for adjustment of status. *Decision of Field Office Director*, dated August 19, 2011.

On September 25, 2012, the AAO, upon a *de novo* review of the evidence of record concurred with the determination made by the field office director. The AAO also found beyond the decision of the director that the applicant had failed to establish compelling reasons that preclude her return to Cameroon – a key requirement for adjustment of status under Section 13 of the Act. The AAO dismissed the appeal accordingly.

The record shows that the motion is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon motion. On motion, counsel asserts that the applicant is eligible for adjustment of status under Section 13 of the Act and that she has established compelling reasons that preclude her return to Cameroon.

The regulations at 8 C.F.R. § 103.5(a)(2) state, in pertinent part, that "[a] motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence." Based on the plain meaning of "new," a new fact is found to be evidence that was not available and could not have been discovered or presented in the previous proceeding.<sup>1</sup>

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<sup>1</sup>The word "new" is defined as "1. having existed or been made for only a short time . . . 3. Just discovered, found, or learned <new evidence> . . . ." *Webster's II New Riverside University*

A review of the evidence that the applicant submits on motion reveals no fact that could be considered "new" under 8 C.F.R. § 103.5(a)(2). All evidence submitted was previously available and could have been discovered or presented in the previous proceeding. However, the record contains documentation demonstrating that the applicant was no longer in status at the time she filed for adjustment of status.

The regulation at 8 C.F.R. § 103.5(a)(3) states, in pertinent part:

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

The motion to reconsider qualifies for consideration under 8 C.F.R. § 103.5(a)(3) because the applicant's counsel asserts that the director and the AAO made an erroneous decision through misapplication of law or policy.

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 Attorney General 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 Attorney General, in his discretion, may record the alien's lawful admission for permanent residence as of the date [on which] the order of the Attorney General approving the application for adjustment of status is made.

8 U.S.C. § 1255(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 case, counsel had argued on appeal that the applicant was no longer in diplomatic status at the time she filed her application. Distinguishing the case of *Matter of Aiyer*, 18 I&N Dec. 2877 (R.C. 1981) which was cited by the field office director in denying the application, counsel argued that the applicant's case should be resolved based on the holding in *Matter of Penaherrera*, 13 I&N Dec. 334 (BIA 1969). Counsel argued that the status of the applicant in this case, like the applicant in *Matter of Penaherrera*, *id.*, was terminated prior to filing the application to adjust status under Section 13 of the Act. Upon a thorough evaluation of the two cases and the evidence of record, the AAO now agrees with counsel that the applicant was not maintaining diplomatic status at the time she filed her application.

In *Matter of Aiyer*, the applicant was admitted into the United States in a G-1 nonimmigrant status as the derivative dependent child of his father, who was admitted in G-1 status and subsequently served as First Secretary of the Permanent Indian Mission to the United Nations in New York. The applicant's father served as the First Secretary from the date of his admission to the United States on April 15, 1973, until he was transferred in his employment with the Indian Diplomatic Corps to the position of Indian Ambassador to Laos on September 1, 1976. In that case, there was no indication that the employment and the status of the applicant's father was ever terminated, rather, the applicant's father continued his employment with the Indian government as the Ambassador to Laos. The applicant in *Aiyer* remained in the United States after his father was transferred to Laos and filed for adjustment of status on December 28, 1976, while his father was still a member of the Indian Diplomatic Corps. Consequently, the director denied the application because the applicant's father, from whom the applicant derived his G-1 status, did not fail to maintain his status and that the applicant was never eligible for the benefits from his father. The director found the applicant ineligible for benefits under Section 13 of the Act.

In this case, the record reflects that the applicant's spouse and his family were admitted into the United States in an A-1 nonimmigrant status on September 22, 1997, and that the applicant's spouse thereafter served as [REDACTED] in Washington, D.C. until his employment was terminated on August 18, 2008.<sup>2</sup> The record indicates that the United States Department of State was notified of the employment termination and terminated the diplomatic status of the applicant's spouse on September 9, 2008. Accordingly, as the applicant derives her status from her spouse, the status of the applicant also terminated as of September 9, 2008.

The record shows that the applicant filed the Form I-485, Application to Register Permanent Residence or Adjust Status, on October 4, 2010. Based on the evidence of record, the applicant's spouse through whom she derived her A-1 classification as a dependent was no longer in diplomatic status as of October 4, 2010. His status had been terminated by the U.S. Department of State on September 9, 2008. Therefore, when the applicant filed her Form I-485, on October 4, 2010, the individual through whom she had derived her A-1 classification would have been eligible to apply for section 13 adjustment of status. As such, the applicant was also eligible to apply for adjustment of status under Section 13 of the Act on October 4, 2010. As the applicant was eligible to apply for adjustment of status, the decisions of the field office director dated August 19, 2011 and the AAO's decision of September 25, 2012, that the applicant was not eligible to apply for adjustment of status under Section 13 of the Act because she was still maintaining diplomatic status is hereby withdrawn.

The AAO will affirm its determination that the applicant had failed to establish compelling reasons that prevent her return to Cameroon. We note that the applicant's stated reasons for not wanting to return to Cameroon are not compelling reasons under Section 13. As discussed above, 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.

On motion, counsel asserts that the applicant cannot return to Cameroon because two of her children were diagnosed with autism. Counsel claims that in Cameroon, persons with disabilities are seriously discriminated against and suffer from a lack of proper government assistance in providing adequate medical care and services. Counsel also claims that country condition information on Cameroon indicates that the applicant's autistic children would face many challenges, including mistreatment and harassment rising to the level of persecution. Counsel further claims that there are a scarcity of facilities for persons with disabilities and lack of public assistance. Counsel states that living with her two autistic children in Cameroon would result in serious psychological, emotional, and financial hardship for the applicant. Counsel presents these difficulties as compelling reasons that preclude the applicant from returning to Cameroon.

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<sup>2</sup> While the record shows that the applicant's spouse entered the United States as an A-1 nonimmigrant on August 24, 2008, such entry was not valid because the applicant's employment had been terminated and the U.S. Department of State had been notified of the termination. The applicant's spouse, at the time of his last entry into the United States, was no longer an accredited diplomat representing the government of Cameroon.

The AAO disagrees. 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. According to the American Heritage Dictionary, Fourth Edition, a dictionary cited by counsel for the meaning of the term “compelling,” the plain meaning of the term “unable” is “lacking the necessary power, authority, or means.” 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 reasons for remaining in the United States are compelling, or that it is keenly 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.

The AAO acknowledges the hardship to the applicant and her children if they return to Cameroon, given the serious medical condition of her children. However, the general inconveniences and hardships associated with relocating to another country are not compelling reasons under Section 13. 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 Cameroon or other political entity there as required under Section 13. The AAO notes that the applicant has not submitted evidence showing that she is at greater risk of harm because of her spouse’s past government employment, political activities or other related reason. The AAO therefore concludes that the applicant has failed to meet her burden of proof in demonstrating that there are compelling reasons that prevent her return to Cameroon. As the applicant has failed to demonstrate that there are compelling reasons preventing her return to Cameroon, the question of whether adjustment of status would be in the national interest need not be addressed.

For the reasons discussed above, the AAO finds that the applicant is not eligible for adjustment under Section 13. She has failed to establish that there are compelling reasons preventing her return to Cameroon. Pursuant to section 291 of the Act, 8 U.S.C. 1361, the burden of proof is upon the applicant to establish that she is eligible for adjustment of status. The applicant has failed to meet that burden. Accordingly, the motion will be dismissed.

Motions for the reopening or reconsideration of immigration proceedings are disfavored for the same reasons as petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. See *INS v. Doherty*, 502 U.S. 314, 323 (1992)(citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden." *INS v. Abudu*, 485 U.S. at 110. With the current motion, the movant has not met that burden. The motion will be dismissed.

The burden of proof in these proceedings rests solely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. The applicant has not sustained that burden. Accordingly, the motion is granted. The AAO’s decision is withdrawn as it relates to the applicant’s eligibility to file for adjustment of status under Section 13 of the Act. The AAO’s decision will be reaffirmed as it relates to the applicant’s failure to establish compelling reasons that preclude her return to Cameroon.

**ORDER:** The motion is granted. The AAO's decision on September 25, 2012 is withdrawn in part and affirmed in part. The application will remain denied.