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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

DATE: Office: NATIONAL BENEFITS CENTER FILE:

MAY 12 2014

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 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 Director, National Benefits Center and was appealed to the Administrative Appeals Office (AAO). The appeal was rejected as untimely filed. The matter is now before the AAO on a motion to reconsider. The motion will be granted, the previous decision of the AAO will be withdrawn as it relates to the untimely appeal and the application will remain denied.

The applicant is a native and citizen of the Republic of Congo (the Congo) 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 dependent child 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 director denied the application for adjustment of status after determining that the applicant had failed to establish compelling reasons that preclude her return to the Congo. The director also noted that the U.S. Department of State issued its opinion on February 9, 2013 recommending that the adjustment of status application of the applicant be denied because the applicant had no compelling circumstances and that the principal, the applicant's father returned to the Congo. *Decision of the Director*, dated March 28, 2013.

On September 5, 2013, the AAO rejected the appeal as it was untimely filed. On October 7, 2013, the applicant through her counsel submits this Form I-290B, Notice of Appeal or Motion. At Part 2E of the form, counsel indicates that he is filing a motion to reconsider. At part 2 of the form that requests information about the Appeal or Motion, counsel indicates September 5, 2013 and March 28, 2013 as the dates of the denial. Counsel also requests that the motion be remanded to the director, National Service Center for adjudication.¹

The record shows that the motion is properly filed, timely and makes a specific allegation of error in law or fact. On motion, counsel asserts that "the AAO/USCIS should have exercised discretion in granting 'equitable tolling' by excusing the delay, since the original Appeal was filed in April 23, 2013 and was received on April 29, 2013 within the time period." Counsel's assertion in this case is incorrect. As fully discussed in the AAO's decision of September 5, 2013, the director issued the decision denying the application on March 28, 2013 and the applicant did not file the appeal until May 13, 2013, 47-days after the decision was issued.

With regards to the equitable relief requested by counsel, the AAO, like the Board of Immigration Appeals, is without authority to grant equitable relief. An equitable form of relief is available only through the courts. The jurisdiction of the AAO is limited to that authority specifically granted to it by the Secretary of the United States Department of Homeland Security. See DHS Delegation Number 0150.1 (effective March 1, 2003); see also 8 C.F.R. § 2.1 (2004).

¹ The regulation provides that the official having jurisdiction over a motion is the official who made the last decision in the proceeding, in this case the AAO. See 8 C.F.R. § 103.5(a)(1)(ii). In addition, as required by 8 C.F.R. § 103.3(a)(2)(ii)-(iv), the director, National Benefits Center, reviewed the appeal prior to forwarding it to the AAO, and did not conclude that it met the requirements of a motion or otherwise warrant favorable action. As such, the AAO will not remand the matter back to the director, National Benefits Center. The AAO has jurisdiction over this matter.

The jurisdiction of the AAO is limited to those matters described at 8 C.F.R. § 103.1(f)(3)(E)(iii) (as in effect on February 28, 2003). Accordingly, the AAO has no authority to address counsel's request for equitable tolling of the time designated for filing an Appeal or Motion.

On motion, counsel asserts that the applicant has established compelling reasons why she cannot return to the Congo. Counsel states that the applicant's father, was admitted in an A-1 nonimmigrant status from September 25, [REDACTED] to October 1, [REDACTED] and thereafter served as the [REDACTED] to the Embassy of the Republic of Congo in [REDACTED] but that the applicant's father was summarily recalled back to the Congo in [REDACTED] based on false allegations made against him by the then Ambassador who accused the applicant's father of spying for the Central Intelligence Agency (CIA). Counsel claims that upon return to the Congo, the applicant's father "became demonized as a traitor or someone working with the CIA, against his country," and that if the applicant returns to the Congo, she will be "feared as a potential for great trouble and thoughts of freedoms like freedom to speak, freedom of the press and all that this freedom would bring and that the government of the Congo is scared that [the applicant] can develop a following because she has been raised in freedom and hope for the future, non-existent in the Congo." Counsel also claims that the applicant will "have virtually no ability to live a normal life, solely because of the service of her father in the United States." Counsel claims the above as well as lack of respect for human rights, corruption and intimidation by the current government of the Congo as compelling reasons why the applicant cannot return to her country.

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.

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.

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.

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).

The legislative history of Section 13, including the 1981 amendment adding the term "compelling reasons," 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 AAO has reviewed the record including the evidence submitted on motion and find them insufficient to establish compelling reasons within the requirement of Section 13 as to why the applicant cannot return to her country. On motion, counsel claims that the applicant will be harmed if she returns to the Congo "solely because of the service of her father in the US." The record

however does not contain specific evidence to establish that the applicant's father had been harmed in the Congo because of his prior government service in [REDACTED] and that his dependents, such as the applicant will be harmed also upon returning to the Congo. There is no evidence in the record to substantiate counsel's claim on motion.

Counsel does not provide any evidence to establish that the applicant as a returning dependent of a former diplomat will be at greater risk of harm because of her father's services at the Embassy of the Republic of Congo in [REDACTED] from [REDACTED]. 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 Obaighena*, 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)). Therefore, the evidence of record in this case is insufficient to establish that the applicant in her role as a returning former diplomat's child would be at greater risk of harm because of her father's past government employment, political activities or other related reason.

On motion, counsel also cites the civil war, government corruption, general insecurity, and lack of freedom and human rights in the Congo as additional reasons why the applicant cannot return to her country. Counsel submits on-line newspaper articles and country condition reports on the Congo in support of these assertions. The AAO acknowledges the applicant's claim of a lack of freedom and insecurity in the Congo. However, a general threat of insecurity is not a sufficiently compelling reason under Section 13 as any threat is directed to the general population and not specifically to the applicant based on her father's duties as a former diplomat for the government of the Congo in [REDACTED]. 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 the Congo 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 father's past government employment, political activities or other related reason. It is also noted that the U.S. Department of State issued its opinion recommending that the application be denied because the applicant has established no compelling reasons why she cannot return to the Congo and that the applicant's father returned to the Congo.² See Interagency Record of Request (Form I-566). 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 the Congo. As the applicant has failed to demonstrate that there are compelling reasons preventing her return to the Congo, the question of whether adjustment of status would be in the national interest need not be addressed.

In the instant matter, the applicant has provided no reasons for reconsideration that are supported by pertinent precedent decisions to establish that the AAO's prior decision was based on an incorrect application of law or USCIS policy. The applicant has also failed to provide pertinent

² The record reflects that the applicant's father returned to the Congo following his service in the United States in [REDACTED] and that in January [REDACTED] he accepted a position with the Congo's [REDACTED] until his retirement.

precedent decisions or evidence to establish that the AAO's decision was incorrect based on the evidence of record at the time of the initial decision or established that the director or the AAO misinterpreted the evidence of record. On motion, the applicant has failed to provide evidence to overcome the grounds for the AAO's decision. The applicant on motion has failed to adequately and fully address whether the AAO's decision was incorrect as a matter of law, precedent decision or USCIS Service policy. Therefore the motion shall be dismissed.

Furthermore, the motion shall be dismissed for failing to meet an applicable requirement. The regulation at 8 C.F.R. §§ 103.5(a)(1)(iii) lists the filing requirements for motions to reopen and motions to reconsider. Section 103.5(a)(1)(iii)(C) requires that motions be "[a]ccompanied by a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding." In this matter, the submission constituting the motion does not contain a statement as to whether or not the unfavorable decision has been or is the subject of any judicial proceeding as required by 8 C.F.R. § 103.5(a)(1)(iii)(C). Thus, the applicant failed to comply with this requirement for properly filing a motion. Accordingly, the motion must be dismissed for this reason also.

The regulation at 8 C.F.R. § 103.5(a)(4) states that a motion which does not meet applicable requirements must be dismissed. Therefore, because the instant motion to reconsider does not meet the applicable filing requirements, it must be dismissed.

The motion to reconsider will be dismissed for the reasons stated above. The burden of proof in these proceedings rests solely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The applicant has not met that burden. Accordingly, the motion will be dismissed, and the previous decisions of the director and the AAO will not be disturbed.

ORDER: The motion to reconsider is dismissed. The director's prior decision of March 28, 2013 is affirmed. The application remains denied.