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U.S. Citizenship
and Immigration
Services

DATE: Office: NATIONAL BENEFITS CENTER FILE:

MAY 27 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,

A handwritten signature in black ink, appearing to read "Ron M. Rosenberg".

Ron M. Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The application was denied by the Director, National Benefits Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native citizen of Iraq 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 amended, 95 Stat. 1611, 8 U.S.C. § 1255b, as the dependent spouse of an alien who performed diplomatic or semi-diplomatic duties under section 101(a)(15)(A)(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 filed the adjustment of status application while her spouse is still maintaining diplomatic status. The director also noted that the U.S. Department of State issued its opinion recommending that the applicant’s adjustment application be denied because the applicant’s spouse is still active with the Office of Protocol. *Decision of the Director*, dated February 27, 2014.

On March 14, 2014, counsel for the applicant filed a Form I-290B, Notice of Appeal or Motion. Counsel asserts that the information on which the determination of denial was based upon is incorrect; that the U.S. Department of State did not update their diplomatic record to reflect the termination of the status of the applicant’s spouse despite the fact that the [redacted] Embassy had sent notices on “three separate occasions” notifying the U.S. Department of State that the applicant’s spouse has “left the Embassy as of August 1, 2010.” Counsel contends that the applicant filed the adjustment of status application two months after the status of her husband was terminated. Counsel is of the opinion that the applicant “failed to maintain a status under any portion of Section 13.” Counsel submits a letter dated March 8, 2014, a statement dated March 5, 2014 from [redacted] the applicant’s spouse and a statement dated June 11, 2012, from the [redacted] Embassy in Washington, D.C. in support of the appeal.

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 [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.

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)(G)(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." Therefore, the authority to determine the date of termination of status under section 101(a)(15)(G)(i) of the Act rests exclusively with the U.S. Department of State.

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, the record reflects that the applicant was last admitted into the United States in an A-1 nonimmigrant status on May 30, 2009 as the dependent Spouse of [REDACTED] who works for the Embassy of the [REDACTED] in Washington, D.C. The applicant's spouse continues to maintain his diplomatic status as evidenced by an A-1 visa issued on November 16, 2011 and an A-2 visa issued on May 25, 2012. There is no documentary evidence in the record to establish that the status of the applicant's spouse has ever been terminated by the U.S. Department of State and the date of any such termination. The statement from the [REDACTED] Embassy referred to by counsel and the applicant's spouse states that "Mr. [REDACTED] Second Secretary, has left the embassy as of August 1, 2010 and his status was terminated with the Department of State at that time." There is no evidence in the record demonstrating that the [REDACTED] government formally requested the U.S. Department of State to terminate the diplomatic status of the applicant's spouse. There is no evidence in the record of any document issued by the U.S. Department of State terminating the status of the applicant's

spouse. On the contrary, the record shows that the applicant's spouse was issued an A-1 diplomatic visa on November 16, 2011 and an A-2 visa on May 25, 2012. As indicated above, 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." There is no evidence in the record to the contrary.

The March 5, 2014 statement from the applicant's spouse claims that he finished his work at the Embassy of the [REDACTED] in Washington, D.C. on August 1, 2010, that he returned to [REDACTED] at that time to work for the [REDACTED] and that the [REDACTED] Embassy in Washington has "sent several notices verbal to the U.S. State Department about my termination. . ." There is no evidence of the "several notices" that the [REDACTED] Embassy sent to the U.S. Department of State requesting that the status of the applicant's spouse be terminated.

Although the applicant claims that her spouse's position as the Second Secretary at the [REDACTED] Embassy in Washington D.C. terminated on August 1, 2010, recent entries by the applicant's spouse clearly shows that he continues to work for the [REDACTED] government's diplomatic mission. As stated by the applicant's spouse in his March 5, 2014 statement, he has "visited United States several times over the past 3 years in an official capacity . . . and participated in several meetings in New York . . . and in D.C. with the [REDACTED] Embassy as a diplomatic official . . ." The March 5, 2014 statement from the applicant's spouse clearly shows that the applicant's spouse continues to work for the [REDACTED] government's diplomatic corps after leaving his position as Second Secretary at the Embassy in Washington, D.C. Therefore, counsel's assertion on appeal that the diplomatic status of the applicant's spouse was terminated by the U.S. Department of State on August 1, 2010 is not supported by the evidence of record. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the applicant'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)).

As previously indicated above, the authority to determine the date of termination of diplomatic status under section 101(a)(15)(A)(i) of the Act rests exclusively with the U.S. Department of State. Based on the evidence of record, the applicant's spouse continues to maintain his diplomatic status in the United States. As his derivative dependent, the applicant's spouse also maintains the same status as her husband. The applicant filed the Form I-485, Application to Register Permanent Residence or Adjust Status, on October 4, 2010. Thus, when the applicant filed her Form I-485 application on October 4, 2010, she was not eligible to apply for adjustment of status under Section 13 of the Act because she is still maintaining diplomatic status.

Based upon a *de novo* review of the record, the AAO finds that the applicant was admitted to the United States in diplomatic status under section 101(a)(15)(A)(i) of the Act as the dependent spouse of an alien who performed diplomatic or semi-diplomatic duties, that the applicant was maintaining that status at the time of her application for adjustment on October 4, 2010, and that the applicant was

therefore not eligible to apply for adjustment under Section 13 at the time of the filing.¹ The AAO also finds that the director properly determined that the applicant was not eligible to apply for adjustment of status pursuant to section 13 of the Act on October 4, 2010.²

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 has established compelling reasons that prevent her return to Iraq and whether her adjustment of status will serve 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 she 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.

¹ 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).

² It is noted that the U.S. Department of State issued its opinion recommending that the adjustment of status of the applicant be denied because at the time the applicant submitted her adjustment of status application, her husband was still active with the office of protocol. *See Form I-566*.