U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF D-A-G-F-

DATE: JULY 14, 2016

APPEAL OF NATIONAL BENEFITS CENTER DECISION

APPLICATION: FORM I-485, APPLICATION TO REGISTER PERMANENT RESIDENCE OR ADJUST STATUS

The Applicant, a native and citizen of El Salvador, seeks to adjust status to that of a lawful permanent resident (LPR) under Section 13 of the 1957 Immigration Act. *See* Section 13 of the Act of September 11, 1957, Pub. L. No. 85-316, 71 Stat. 642, *amended by* Pub. L. No. 97-116, 95 Stat. 161 (1981), 18 U.S.C. § 1255b (Section 13). Section 13 allows an applicant previously in diplomatic status (A-1, A-2 or G-1, G-2 visa holders) to adjust status if a) the duties were diplomatic or semi-diplomatic, b) the applicant is unable to return to the home country due to compelling reasons, c) the applicant is admissible and a person of good moral character, and d) adjustment is in the national interest and not contrary to the national welfare, safety, or security of the United States.

The Director, National Benefits Center, denied the application. The Director concluded that the Applicant is ineligible for benefits under Section 13 because he is a derivative applicant, and the application of the principal applicant, his father, was denied.

The matter is now before us on appeal. On appeal, the Applicant submits the same brief and evidence as submitted in his father's case and states that he has established compelling reasons he is unable to return to El Salvador due to threats against his life should he return. The Applicant also states that the Director did not consider the evidence of record and that U.S. Citizenship and Immigration Services (USCIS) is using an unlawful standard to decide cases under Section 13.

Upon *de novo* review, we will deny the appeal, because the record does not establish that the reasons the Applicant provides for being unable to return to El Salvador are compelling in accordance with Section 13.

I. LAW

The Applicant seeks to adjust to LPR status under Section 13 of the 1957 Immigration Act. 18 U.S.C. § 1255b. Section 13 provides that a foreign national admitted to the United States as an A-1, A-2, G-1, or G-2 nonimmigrant, who has failed to maintain a status under any of those provisions, may apply for LPR status. 18 U.S.C. § 1255b(a). An applicant must show compelling reasons why he or she is unable to return to the country represented by the government which accredited the applicant (or a member of the applicant's immediate family) and that adjustment of

status would be in the national interest. 18 U.S.C. § 1255b(b). Further they must demonstrate that their adjustment would not be contrary to the national welfare, safety, or security of the United States, that they are a person of good moral character, and are admissible to the United States. *Id.* The statute limits the benefit to 50 persons each fiscal year. 18 U.S.C. § 1255b(d).

The regulations provide that the benefit is limited to those foreign nationals who performed diplomatic or semi-diplomatic duties and to their immediate families, and that a foreign national whose duties were of a custodial, clerical, or menial nature, and members of their immediate families, are not eligible for benefits under Section 13. 8 C.F.R. § 245.3.

II. ANALYSIS

The Applicant, who was last admitted to the United States in A-2 status as a dependent of his father who served as [redacted] for the Embassy of El Salvador in [redacted] and is no longer in that status, states that he qualifies for adjustment to LPR status under Section 13 due to the threats against his life in El Salvador.

A. Compelling Reasons Unable to Return

The Applicant states that the Director erred in finding that threats against his life in El Salvador did not constitute compelling reasons under Section 13.[1] He states that the basic rules of statutory construction require that we use the everyday meaning of words and that the "narrow and indeed unsupportable definition [USCIS] has applied to the word 'compelling' has no legal basis" and is *ultra vires*. He asserts that we should use the "everyday" or "dictionary" meaning of the word "compelling."[2] But he provides no definition of "compelling."[3] He then states that "[t]here is no every day or dictionary meaning anywhere of the word 'compelling' that justifies or encompasses a requirement of evidence of government action or inaction or other political entity."[4] The Applicant

[1] Family members may independently establish eligibility under Section 13; however, in this case the Applicant provides the same brief and evidence as the principal diplomat. Therefore the Director did not err in denying his case based on the denial of the principal diplomat's case. The Director, however, did not prepare a substantive decision on the merits for the Applicant. We address the merits of the Applicant's case here.

[2] Merriam-Webster provides three definitions of the word "compelling:" 1) that compels, 2), forceful, and 3) demanding attention. *Compelling,* Merriam-Webster.com, http://www.merriam-webster.com/dictionary/compelling (last visited June 21, 2016).

[3] The Applicant cites what he says is a more sensible definition of "compelling" that USCIS proposed in the Federal Register for a regulation concerning employment authorization documents for high-skilled nonimmigrant workers who are the beneficiaries of approved immigrant visa petitions. 80 FR 81924 (December 31, 2015). The proposed rule that the Applicant refers to, however, specifically states "DHS is not proposing to define the term compelling circumstances." The proposed rule lists some examples of the type of circumstances that would be compelling in relation to why an individual would need an employment authorization document, but those examples are not applicable to Section 13 due to the different nature of the benefit. Section 13 is a limited benefit for former diplomats who are unable to return to their country of accreditation due to compelling reasons.

[4] The Director stated that the Applicant did not show that he was unable to return to El Salvador "due to any action or inaction on the part of" El Salvador's government. The Director then states that USCIS could not conclude that the Applicant's compelling reasons were related to political changes in El Salvador that rendered the Applicant "stateless or

further states that it was inappropriate for the Director to refer to the legislative history from the creation of Section 13 in 1957, as the word "compelling" was not added to the statute until 1981. The Applicant also states that no authority permits USCIS to "outsource" its adjudication of Section 13 cases to the U.S. Department of State (DOS).[5] Lastly, the Applicant states that the Director did not consider the evidence the Applicant submitted. We address the issues raised by the Applicant concerning the Director's decision; however, errors in the Director's decision do not create eligibility for the benefit. The burden of proof is on the Applicant, who must demonstrate his eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). And it is the Applicant's burden to prove eligibility through the adjudication process. *See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305, 1308 (9th Cir. 1984) (stating that the burden to establish eligibility "is not discharged until the visa is issued").

The statute provides that the Applicant must show "compelling reasons demonstrating ... that [he] is unable to return to the country represented by the government which accredited [him]." 18 U.S.C. § 1255b(b). The statute's legislative history is essential in understanding the meaning of the words used in the provisions describing this limited benefit. In particular, Congress used legislative history to further narrow the scope of Section 13 in 1981 to carry out the1957 legislative intent of the provision. The phrase "compelling reasons" was added to Section 13 in 1981 after Congress "considered 74 ... 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 (1981). There may be many reasons a former diplomat is unwilling to return to his or her country, including medical, educational, and professional reasons, or general country conditions.

Here, the Applicant cites threats to his life based on his father's past service in El Salvador as the commander of a specific military unit and based on the assistance his father provided to family members in dealing with gang members. The legislative history from 1957 that Congress considered when they later added the word "compelling" shows, however, that Congress originally intended the benefit for those unable to return to their country of accreditation because "Communist and other uprisings, aggression, or invasion" had in some cases destroyed their governments, leaving worthy persons "homeless and stateless." *Analysis of Bill to Amend the Immigration and Nationality Act,* 85th Cong., 103 Cong. Rec. 14660 (1957) (statement of Senator John F. Kennedy).[6] We read the word "compelling" in conjunction with the phrase "unable to return." In addition, the statute specifically refers to "the country represented by the government" that accredited the applicant. This also must not be ignored. The presence of the word "represented," shows that the benefit was meant to apply in situations where the government that accredited an applicant no longer exists. We look to the facts of each particular case to determine whether events have occurred in the applicant's

---

homeless or at risk of harm."

[5] The plain language of Section 13 specifically requires consultation with the Secretary of State regarding the Applicant's eligibility. 18 U.S.C. § 1255b(b). The Director notified the Applicant of the DOS determination, but there is no indication that Director's decision is based solely on the DOS determination.

[6] The Applicant states that the Director's use of this language by Senator Kennedy was an "unsubstantiated quotation"; however, the Director provided a citation for the quote in the decision.

country of accreditation that, as a result of diplomatic service in the United States, render him or her or their immediate family members unable to return to that country.[7]

The Applicant's compelling reasons for being unable to return to El Salvador are fears of "danger and even death." The Applicant states that he has received threats against his life in El Salvador for two reasons. First, he states that his life is threatened due to his father's prior position, for approximately five months in 2010, as of the Armed Forces of El Salvador, because he arrested dangerous gang members and accused criminals. Second, he states that using his position within the government, his father assisted two family members who were victims of gang activities, and, as a result, he has received threats against his and his family's life should he return to El Salvador. The Applicant's father states that the government of El Salvador cannot protect him or his family from retaliation by these gangs.

In regard to the threats against his life related to his father's service as Brigade in 2010, the Applicant provides a personal statement from his father, newspaper articles, and letters from high-ranking government officials in El Salvador explaining the risk to the Applicant's father and his family. The Applicant's father states that he was the from August 2010 until late December 2010. He states that he was involved in the capture of gang members and other dangerous criminals. He provided newspaper articles that document the arrests that were made under his command. He states that after serving as , he chose to be assigned as in the United States, instead of being promoted to general, to be safe from threats against his life in El Salvador. A letter from the Minister of Defense states that "valid . . . threats to [the Applicant's] physical integrity" still exist. The Minister also specifically states that the threats are "motivated because [the Applicant] served in 2010 as ''" He also states that the threats "could currently affect close relatives." A letter from the chief of the joint staff of El Salvador's armed forces headquarters states that insecurity has grown in El Salvador the last few years due to criminal actions of "terrorist groups," referring to gangs and other similar organizations. He states that those groups have directed attacks against high-level personnel and retired Armed Forces members as well as their families." Specifically, he cites the assassination of a retired colonel in August 2013, noting that the colonel had served as in the United States from June 2003 to June 2004. A letter from the deceased colonel's nephew and newspaper articles indicate that the reasons for the colonel's murder were not determined. The deceased colonel's nephew, however, states that the assassination was a result "of threats received due to the position he occupied while in the Armed Force [sic] and under the Direction of the Civil Protection." He further states that his uncle wanted

[7] The Applicant states that courts owe no deference to USCIS decisions in Section 13 cases, because the agency has not published a precedent decision interpreting the statutory provision, citing *Chevron U.S.A, Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Where there is no precedent decision, we apply existing law and policy to the facts of a given case. *See* USCIS Policy Memorandum PM-602-0086.1, *Precedent and Non-Precedent Decisions of the Administrative Appeals Office (AAO)*, 2 (Nov. 18, 2013), https://www.uscis.gov/sites/default/files/files/nativedocuments/PM-602-0086-1_AAO_Precedent_and_Non-Precedent_Decisions_Final_Memo.pdf.

to stay in the United States after he served as in 2004 but returned because he felt that his family needed him.

The Applicant also states that he has received threats against his life from gang members seeking to retaliate against his father for having obtained police assistance for his grandfather and his mother's cousin when they faced harm by gang members. The Applicant provides a letter from his grandfather, who states that states that after they blackmailed him, in 2012 a gang took over his farm in El Salvador while he was away, and because the police initially did not help protect his property, he called the Applicant's father in the United States, who managed to have the police remove the gang. He states that he gives the gang food and money so that they won't harm him, but the gang has threatened revenge if something were to happen to one of its members, "even with [the Applicant's father] upon his return." In addition, the Applicant provides a letter from his mother's cousin stating that in 2012, a gang was trying to extort her by calling her in the United States and demanding that she wire money to prevent the gang from harming her family in El Salvador. She also states that the Applicant's father assisted her in obtaining the help of the police and armed forces to capture the extortionists. She states, however, that the threats have continued against her family and also specifically against the Applicant's father and his family if they return to the area.

Section 13 is not intended to protect individuals against threats that existed before their diplomatic service and for which they left the country. Although the veracity of the threats against former military officials in El Salvador and against the Applicant due to his father's role as is not questioned, these threats are not directly related to diplomatic service in the United States or changes affecting the government of El Salvador during the Applicant's father's diplomatic service. The Applicant's father stated specifically that he chose to serve in the United States rather than be promoted to general in El Salvador to protect himself and his family. His security was already threatened before he came to the United States to serve as The legislative history of Section 13 makes clear that the benefit applies to individuals who cannot return to their country of accreditation because of changes that occurred in their country of accreditation during their diplomatic service, and more specifically changes in the government brought on by "uprisings, aggression, or invasions" that leave individuals "homeless and stateless." 103 Cong. Rec. 14660.

In addition, the Applicant's father's role in assisting his family members obtain protection against criminal elements and the threats that he and his family may face as a result of that assistance are also not directly related to the Applicant's father's diplomatic service, although the events occurred during his service. This is not the type of situation contemplated in the creation of Section 13. The Applicant states that the government of El Salvador cannot protect him or his family and supports his statement with letters; however, the government of El Salvador's inability to protect the Applicant is not related to his father's diplomatic service or changes that occurred in the government during the Applicant's father's diplomatic service.[8]

[8] The Applicant's father states that the government of El Salvador cannot protect him from the threats against his life because he is now retired and that he and his family are "extremely vulnerable to the gang retaliation of violence and

B. Additional Requirements under Section 13

The Applicant must also establish that there are compelling reasons that his adjustment to LPR status under this provision is in the national interest of the United States. As the Applicant has not established that compelling reasons under Section 13 make him unable to return to El Salvador, we need not address the issue of whether he has established that his adjustment is in the national interest. Moreover, as the Applicant has not demonstrated eligibility under Section 13, we need not consider whether the Applicant warrants adjustment to LPR status in the exercise of discretion.

III. CONCLUSION

The Applicant has the burden of proving eligibility for adjustment of status under Section 13. *See* section 291 of the Act, 8 U.S.C. § 1361. The Applicant has not met that burden because the record does not establish that the reasons he provides for being unable to return to El Salvador are compelling in accordance with Section 13. The appeal is dismissed.

ORDER: The appeal is dismissed.

Cite as *Matter of D-A-G-F-*, ID# 18258 (AAO July 14, 2016)

---

kidnapping." He states that he was largely insulated from gang retaliation while he had the protection of the Salvadoran government.