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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

[REDACTED]

A₃

DATE: **SEP 25 2012**

OFFICE: WASHINGTON DISTRICT

FILE: [REDACTED]

IN RE: Applicant: [REDACTED]

APPLICATION: Application for Status as Permanent Resident Pursuant to Section 13 of the Act of September 11, 1957, 8 U.S.C. § 1255b.

ON BEHALF OF APPLICANT:

[REDACTED]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The application was denied by the Field Office Director, Washington, D.C. and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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 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 on the grounds that the applicant had not demonstrated that her spouse had ever failed to maintain diplomatic status. *Decision of Field Office Director*, dated August 19, 2011. It is noted that the field office director, citing *Matter of Aiyer*, 18 I&N Dec. 98, (Reg. Commr. 1981), asserted 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.

On appeal, counsel contends that the field office director erred in determining that the applicant as a dependent family member is ineligible for adjustment of status under Section 13. Counsel asserts that the principal alien, the applicant's spouse, failed to maintain diplomatic status. *See Form I-290B and attachment.*

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 first issue in this proceeding is whether the principal alien, the applicant's spouse, failed to maintain diplomatic status.

Counsel's argument that the applicant's spouse failed to maintain diplomatic status per the holding in *Matter of Penaherrera*, 13 I&N Dec. 334 (BIA 1969), is not supported by that decision. In *Penaherrera*, decided in 1969, the BIA considered the Section 13 adjustment applications of the children of a former diplomat who had never applied for adjustment under Section 13 himself, but who had, subsequent to the termination of his diplomatic status in 1953, departed the United States in 1956, returned as a permanent resident that year and (after losing permanent resident status) again as a visitor in January 1962, and then departed the United States permanently in December 1962. 13 I&N Dec. at 334. Observing that the applicants were admitted to the United States under Section 101(a)(15)(A)(i) of the Act as the accompanying minor children of the principal alien and had never departed, the BIA held that since it had been established that the applicants' father, "because of his class of admission and his duties," would have been eligible for the benefits of Section 13 following termination of his diplomatic status, his loss of eligibility for such relief did not disturb nor in any way affect the eligibility of his children for adjustment of status under Section 13. 13 I&N at 335. Because the principal alien had failed to maintain his diplomatic status, the BIA in *Penaherrera* did not specifically address the issue raised by counsel. *Id.*

Counsel is misguided in contending that the applicant is eligible to adjust status under section 13 based on the holding in *Penaherrera*. Consistent with the holding in *Penaherrera*, the regional commissioner in *Aiyer* concurred with the recommendation of the Secretary of State that the applicant in that case was not eligible for adjustment of status under Section 13, he found the applicant ineligible because the applicant was the dependent of a principal alien who did not fail to maintain his status in the United States. *See* 18 I&N Dec. 100. Unlike the principal alien in *Penaherrera*, who remained in the United States for approximately three years after his employment as a diplomat ended, the principal alien in *Aiyer* had departed the United States prior to having his diplomatic status terminated. *Id.*

Thus, the holding in *Aiyer*, that applicants for adjustment of status under Section 13 who were admitted to the United States as the immediate family members under either section 101(a)(15)(A)(i) or (ii) or 101(a)(15)(G)(i) or (ii) of the Act, derive eligibility only if the principal alien failed to maintain his diplomatic status, is not inconsistent with the holding in *Penaherrera*.

Pursuant to 8 C.F.R. § 214.2(a), an alien admitted under section 101(a)(15)(A)(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.” 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.

The record establishes the applicant’s eligibility for consideration under Section 13. *See Form I-94, Departure Record.* The applicant’s spouse served as a [REDACTED] in Washington, D.C. from September 22, 1997. His employment was terminated on August 18, 2008. *See Form DS-2006.* The record also reflects, however, that although the applicant’s spouse’s employment had been terminated on August 18, 2008, the applicant’s spouse was admitted as an A-1 diplomat on August 24, 2008, with authorization to stay through the duration of his diplomatic status. *See Form I-94, Departure Record.* According to counsel, after he was admitted on August 24, 2008, the applicant’s spouse reported for duty at the [REDACTED] and was informed that his position had been terminated on August 18, 2008. He subsequently departed the United States on September 3, 2008. The State Department has indicated that the applicant’s position at the [REDACTED] was terminated on August 18, 2008, and that his diplomatic status was terminated on September 9, 2008. Notwithstanding the date on which the applicant’s employment may have been formally terminated by the government of [REDACTED] he maintained legal status in the United States under section 101(a)(15)(A)(i) of the Act through September 3, 2008, when he departed the United States. Therefore, per the requirements of Section 13, the applicant and her spouse were admitted to the United States in status under 101(a)(15)(A)(i) of the Act and the applicant’s spouse performed diplomatic duties. However, his diplomatic status - and consequently, the applicant’s status - had not been terminated at the time of his September 3, 2008 departure.

The AAO finds, that the record establishes that the applicant did not fail to maintain diplomatic status, and is therefore ineligible to apply for adjustment of status under Section 13.

Beyond the decision of the director, the AAO now turns to the issue of whether the applicant is unable to return to the country represented by the government that accredited the principal alien, her spouse. The AAO notes that the express language of 8 C.F.R. § 245.3—“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” (emphasis added)—allows for consideration both of reasons compelling to the principal alien and reasons compelling to dependent family members. In most cases, these reasons are the same or similar, and the principal alien articulates the compelling reasons why all the applicants are unable to return. However, as occurred in *Penaherrera*, it is possible for dependent family members to establish eligibility for adjustment of status under Section 13 even where the principal alien is not also an applicant, if the principal alien would have met the eligibility requirements. Unlike the eligibility requirements concerning status of admission, failure to maintain status and performance of semi-diplomatic or diplomatic duties, all eligibility criteria based on past events, the requirement that an applicant demonstrate compelling reasons why he or she is unable to return to the country represented by the government that accredited the applicant refers to the current state of affairs in that country and the nature of the applicant’s current relationship to the government and/or other entities or individuals in that country.

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 “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 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. Even where the meaning of a statutory provision appears to be clear from the plain language of the statute, it is appropriate to look to the legislative history to determine “whether there is ‘clearly expressed legislative intention’ contrary to that language, which would require [questioning] the strong presumption that Congress expresses its intent through the language it chooses.” *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 433, fn. 12 (1987).

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 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 supports the plain meaning of the language in Section 13 that those eligible for adjustment of status under Section 13 are those diplomats that have been, in essence, rendered stateless or homeless by political upheaval, hostilities, etc., and are thus *unable* to return to and live in their respective countries.

The AAO has considered evidence of the compelling reasons the applicant claims prevents her and her family members from presently returning to [REDACTED] the country represented by the government that accredited them. However, the record lacks evidence to demonstrate that the applicant is unable to return to [REDACTED] for compelling reasons. There is no evidence that the government of [REDACTED] opposes the applicant’s return to the country, or will seek to harm her for any particular reason articulated in the record. In a sworn statement dated February 9, 2011, the applicant stated that two of her children suffer from autism. The record, however, does not include documentation to establish the children’s medical condition and why they cannot return to [REDACTED]. The applicant does not provide any further details. The AAO acknowledges that the “compelling reasons” standard is a different standard than the persecution standards applicable in asylum or withholding of removal adjudications. Nevertheless, a reasonable fear of persecution in the country represented by the government that accredited an applicant for adjustment of status under Section 13 is, in most cases, strong evidence that compelling reasons prevent his or her return there.

There is no evidence of record to establish that the applicant and her family will be affected by political conditions in [REDACTED]. It is noted that by letter, dated September 7, 2011, the applicant's spouse, who served in the diplomatic position, indicates that he is employed with the [REDACTED] [REDACTED], in Yaounde. The evidence does not show that the applicant has been rendered essentially "homeless" or "stateless" as a consequence of these conditions. Therefore, since the applicant has failed to demonstrate that she is unable to return to [REDACTED] because of compelling reasons, and therefore is not eligible for adjustment of status under Section 13, it is not necessary to address whether her adjustment of status would be in the national interest.

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 [REDACTED]. 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 decision of the field office director will be affirmed.

ORDER: The decision of the field office director is affirmed. The appeal is dismissed.