



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: Office: NATIONAL BENEFITS CENTER FILE:

SEP 10 2013

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 (director). The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Ecuador who is seeking to adjust his status to that of a 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 an alien who performed diplomatic or semi-diplomatic duties under section 101(a)(15)(A)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(A)(ii).

The director denied the Form I-485, Application to Register Permanent Residence or Adjust Status after determining that the applicant had failed to demonstrate that he performed diplomatic or semi-diplomatic duties and that he had failed to establish compelling reasons why he cannot return to Ecuador. The director also noted that the U.S. Department of State issued its opinion on January 17, 2013, recommending that the applicant's adjustment of status be denied because the applicant had no qualifying status and that there are no compelling circumstances that preclude the applicant from returning to Ecuador. *Decision of the Director*, dated February 4, 2013.

On appeal, counsel for the applicant asserts that the applicant was approved for a diplomatic visa to travel to the United States on official activities for the government of Ecuador and that "all the conditions were met and the petition should have been approved."

Section 13 of the Immigration and Nationality Act of September 11, 1957, Pub. L. No. 85-316, 71 Stat. 642, as amended 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.

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).

A review of the record shows that the applicant entered the United States in A-2 nonimmigrant status on October 25, 2005. The annotation on the applicant's nonimmigrant visa indicates "[REDACTED]". It appears from the record that the applicant was admitted to the United States in A-2 status in 2005 but was no longer in status at the time he filed his adjustment of status application September 16, 2011. Therefore, as required by section 13(a) of the 1957 statute, the applicant was admitted to the United States under section 101(a)(15)(A)(ii) of the Act but no longer held that status at the time he filed his application for adjustment on September 16, 2011.

The issue before the AAO in the present matter is whether the record establishes that the applicant had a qualifying status, that is, that he was accredited by the U.S. Department of States as a diplomat representing the government of Ecuador and that he performed diplomatic or semi-diplomatic duties for the government of Ecuador.

The AAO now turns to a review of the evidence of record, including the information submitted on appeal. In making a determination of statutory eligibility, U.S. Citizenship and Immigration Services (USCIS) is limited to the information contained in the record of proceeding. See 8 C.F.R. § 103.2(b)(16)(ii).

Upon a *de novo* review of the evidence of record, the AAO finds that the applicant is not eligible for consideration for adjustment of status under Section 13 of the Act as he does not have a qualifying status.¹

In an August 26, 2011 affidavit which the applicant prepared and submitted in support of his adjustment of status application, the applicant stated that he graduated from the [REDACTED]

¹ 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).

as a [REDACTED] and began working on the [REDACTED] of then [REDACTED]. On December 11, 2000, he was ranked as an [REDACTED] of the [REDACTED] and was "promoted" to the [REDACTED]. According to the applicant, in [REDACTED] became the president of Ecuador and the applicant was assigned as a member of the [REDACTED]. In April 2005, he was promoted as a [REDACTED] to navigate the [REDACTED]. In October 2005, amidst a growing political crisis in Ecuador, he obtained an A-2 visa and left Ecuador arriving in San Francisco, California on October 29, 2005. The applicant also stated that when the ship arrived in San Pedro, California on April 4, 2005, "I decided to give up my 10 years of my honorable military career. On November 8, 2005, I deserted. I left the ship and started to live in Los Angeles, California.

At his adjustment of status interview on January 9, 2012, the applicant stated under oath that he last entered the United States on October 29, 2005 with an A-2 visa for "a simple visit." In answer to the question from the immigration officer regarding his official position and title, the applicant stated that he was part of the [REDACTED]. The applicant described his duties as providing [REDACTED] at all times for the [REDACTED] and claims that his duties were diplomatic duties. On appeal, counsel asserts that the fact that the applicant was issued an "A" visa by the U.S. Department of State is evidence that the applicant is a diplomat representing his country. Counsel contends that the applicant's visa classification "falls squarely within the broader definition of diplomatic inasmuch as his role was to represent his country in its relations with the United States."

The AAO has reviewed the applicant's statements and counsel's assertions on appeal and find them insufficient to establish that the applicant had a qualifying status and that he is eligible for adjustment of status under Section 13 of the Act. The AAO acknowledges that the terms diplomatic and semi-diplomatic are not defined in Section 13 or pertinent regulations and that the standard definitions of terms such as diplomat, diplomatic and diplomacy are varied and broad, and that, in practice, diplomacy may encompass many responsibilities and duties. The AAO finds, however, that the essential role of a diplomat is the representation of a country in its relations with other countries. See *American Heritage Dictionary of the English Language, 4th Edition, 2000* (Diplomat: One, such as an ambassador, who has been appointed to represent a government in its relations with other governments); *Black's Law Dictionary* (Diplomacy: The art and practice of conducting negotiations between national governments). Both section 101(a)(15)(A) of the Act and the Vienna Convention recognize that certain accredited employees or officials admitted to serve within embassies or other diplomatic missions are not "diplomatic" staff. The Vienna Convention refers to such personnel as administrative and technical staff, service staff, or personal servants. *The Vienna Convention on Diplomatic Relations, Art. 1* (April 18, 1961), 500 U.N.T.S. 95. These "non-diplomatic" employees are nevertheless afforded the rights and immunities of diplomatic staff. See *Vienna Convention, supra*, Art. 37. In the matter of non-diplomatic employees who are admitted pursuant to section 101(a)(15)(G)(i) of the Act, USCIS must evaluate the position held and its attendant duties to determine whether the applicant is eligible under Section 13.

In this case, although the record shows that the applicant obtained classification under section 101(a)(15)(A)(ii) of the Act, and no longer maintained that status at the time he filed for adjustment of status, the director determined that the applicant did not perform duties of a

diplomatic or semi-diplomatic nature. The AAO concurs with this determination.² The AAO observes that the record does not contain evidence that the applicant represented the government of Ecuador in any capacity when he entered the United States in October 2005 or thereafter. There is no evidence in the record that the government of Ecuador requested that the applicant be registered as a diplomat with the U.S. Department of State in Washington, D.C. The record clearly shows that the applicant entered the United State on a temporary tour of duty [REDACTED] as noted on his visa for the United States. The applicant deserted the ship upon its arrival in the United States and has remained in the United States without authorization. It is noted that at the time the applicant entered the United States in October 2005, he was not performing his claimed duties as a member of the [REDACTED]. The record indicates that the applicant was never registered as a diplomat in the United States and as such was never recognized as a diplomat by the U.S. Department of State. By his own admission, the applicant came to the United States for a "simple visit" and not as a diplomat from Ecuador.

The applicant's statement at his adjustment of status interview on January 9, 2013 that he was part of the [REDACTED] and that he performed diplomatic duties on behalf of the government of Ecuador is not substantiated by the record and is inconsistent with his prior statement under oath that the purpose of his trip to the United States in October 2005 was for "a simple visit." The statement is also inconsistent with the applicant's affidavit of August 26, 2011. In that affidavit, the applicant stated that he left Ecuador on board [REDACTED] in October 2005 because of a political crisis in the country at the time and that when he left Ecuador, President [REDACTED] was in Brazil where he was granted political asylum. The inconsistencies call into question the veracity of the applicant's statements. It is incumbent upon the applicant to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice without competent objective evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the applicant's evidence also reflects on the reliability of other evidence in the record. *See id.*

Counsel's assertions on appeal that the fact that the U.S. Department of States issued an A-2 visa to the applicant is in and of itself evidence that the applicant was qualified as a diplomat representing the government of Ecuador is not substantiated by any other evidence. 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 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)). Therefore, the applicant has failed to establish that he performed diplomatic or semi-diplomatic duties for the government of Ecuador.

² It is also noted that the U.S. Department of State has recommended that the applicant's request for adjustment of status be denied because the applicant had no qualifying status. *See* Interagency Record of Request (Form I-566).

For the reasons discussed above, the AAO finds that the applicant is not eligible for adjustment of status under Section 13 of the Act. The applicant has failed to establish that he performed diplomatic or semi-diplomatic duties. As the applicant has failed to establish his eligibility for adjustment of status under section 13, the issue of whether he has established compelling reasons that prevent his return to Ecuador or whether his adjustment of status will be in the national interest of the United States will not be discussed. Pursuant to section 291 of the Act, 8 U.S.C. 1361, the burden of proof is upon the applicant to establish that he is eligible for adjustment of status. The applicant has failed to meet that burden.

ORDER: The appeal is dismissed.