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U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
and Immigration
Services

H4



FILE:



Office: BANGKOK, THAILAND

Date: FEB 09 2005

IN RE:

Applicant:



APPLICATION: Application for Permission to Reapply for Admission into the United States after Deportation or Removal under section 212(a)(9)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A)(iii)

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Bangkok, Thailand, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and the application approved.

The applicant is a native and a citizen of Thailand who applied for admission into the United States on January 3, 2003, at the San Francisco International Airport. The applicant presented a valid Thai passport and a non-immigrant visa. She was found inadmissible under section 212(a)(7)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182 (a)(7)(A)(i)(I) for being an immigrant not in possession of a valid immigrant visa or lieu document. Consequently the applicant was expeditiously removed from the United States pursuant to section 235(b)(1) of the Act 8 U.S.C. § 1225(b)(1). The applicant is inadmissible under section 212(a)(9)(A)(i) of the Act, 8 U.S.C. § 1182(a)(9)(A)(i). The applicant is the beneficiary of an approved Petition for Alien Relative (Form I-130) and an approved petition for a K-3 nonimmigrant visa filed on Form I-129F as the spouse of a U.S. citizen. She seeks permission to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(iii) in order travel to the United States to reside with her U.S. citizen spouse

The District Director determined that the unfavorable factors in the applicant's case outweighed the favorable factors and denied the applicant's Application for Permission to Reapply for Admission After Removal (Form I-212) accordingly. *See District Director's Decision* dated August 5, 2004.

Section 212(a)(9). Aliens previously removed.-

(A) Certain alien previously removed.-

(i) Arriving aliens.- Any alien who has been ordered removed under section 235(b)(1) or at the end of proceedings under section 240 initiated upon the alien's arrival in the United States and who again seeks admission within five years of the date of such removal (or within 20 years in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

(iii) Exception. – Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the aliens' reembarkation at a place outside the United States or attempt to be admitted from foreign continuous territory, the Attorney General has consented to the aliens' reapplying for admission.

A review of the 1996 IIRIRA amendments to the Act and prior statutes and case law regarding permission to reapply for admission, reflects that Congress has (1) increased the bar to admissibility and the waiting period from 5 to 10 years in most instances and to 20 years for others, (2) has added a bar to admissibility for aliens who are unlawfully present in the United States, and (3) has imposed a permanent bar to admission for aliens who have been ordered removed and who subsequently enter or attempt to enter the United States without being lawfully admitted. It is concluded that Congress has placed a high priority on reducing and/or stopping aliens from overstaying their authorized period of stay and/or from being present in the United States without a lawful admission or parole.

On appeal, counsel asserts that Citizenship and Immigration Service (CIS) failed to correctly adjudicate the Form I-212. Counsel states that the District Director incorrectly held the applicant to a higher burden of proof to establish her eligibility to enter the United States as a nonimmigrant. Counsel further states that there is no need for the applicant to show a compelling reason for the visit and refers to *Matter of Hranka*, 16 I & N Dec. 491 (BIA 1978). Furthermore counsel states that the District Director in making her decision should have considered the following:

- The risk of harm to society if the applicant is admitted;
- The seriousness of the applicant's prior violations;
- The person's reasons for wishing to enter the United States.

The regulation at 22 CFR § 41.81 discusses the eligibility for the issuance of a "K" visa.

22 C.F.R. 41.81 provides, in pertinent part, that:

Fiancé(e) or spouse of a U.S. citizen and derivative children.

(b) Spouse. An alien is classifiable as a nonimmigrant spouse under INA 101(a)(15)(K)(ii) when all of the following requirements are met:

(1) The consular officer is satisfied that the alien is qualified under that provision and the consular officer has received a petition approved by the INS pursuant to INA 214(p)(1), that was filed by the U.S. citizen spouse of the alien in the United States.

...

(4) The alien otherwise has met all applicable requirements in order to receive a nonimmigrant visa, including the requirements of subsection (d).

(d) *Eligibility as an immigrant required.* The consular officer, insofar as is practicable, must determine the eligibility of an alien to receive a nonimmigrant visa under subsections (a), (b) or (c) of this section as if the alien were an applicant for an immigrant visa, except that the alien must be exempt from the vaccination requirement of INA 212(a)(1) and the labor certification requirement of INA 212(a)(5).

[Emphasis added] *Matter of Hranka* applies to non-immigrants applying for a waiver under section 212(d)(3)(A). The applicant in the present matter, as the spouse of a U.S. citizen, must establish eligibility under the same criteria as those applying as an immigrant. Based on the above, the AAO finds counsel's assertions unpersuasive and that the District Director correctly applied the standards applicable to an immigrant visa applicant.

In his brief counsel asserts that the applicant's knowledge of registering her children to attend school without the proper immigration visas does not rise to the level of "disrespect for immigration laws" as stated by the

District Director since the United States Supreme Court held that unlawfully present immigrant students are obligated to attend school until they reach the age mandated by State law. *Plyler v. Doe*, 457 U.S. 202(1982).

Counsel further states that the applicant enrolled her children into school because she was concerned whether she would be in violation of the Oklahoma State laws.

In *Matter of Tin*, 14 I&N Dec. 371 (Reg. Comm. 1973), the Regional Commissioner listed the following factors to be considered in the adjudication of a Form I-212 Application for Permission to Reapply After Deportation:

The basis of deportation; the recency of the deportation; the length of legal residence in the U.S.; the applicant's moral character and his respect for law and order; evidence of reformation and rehabilitation; the applicant's family responsibilities; and hardship to if the applicant were not allowed to return to the U.S.

Matter of Lee, 17 I&N Dec. 275 (Comm. 1978) further held that a record of immigration violations, standing alone, did not conclusively support a finding of a lack of good moral character. *Matter of Lee* at 278. *Lee* additionally held that,

[T]he recency of deportation can only be considered when there is a finding of poor moral character based on moral turpitude in the conduct and attitude of a person which evinces a callous conscience [toward the violation of immigration laws] In all other instances when the cause of deportation has been removed and the person now appears eligible for issuance of a visa, the time factor should not be considered. *Id.*

In *Tin*, the Regional Commissioner noted that the applicant had gained an equity (job experience) while being unlawfully present in the U.S. The Regional Commissioner then stated that the alien had obtained an advantage over aliens seeking visa issuance abroad or who abide by the terms of their admission while in this country, and he concluded that approval of an application for permission to reapply for admission would be a condonation of the alien's acts and could encourage others to enter without being admitted to work in the United States unlawfully. *Id.*

The District Director states that the unfavorable factors in the applicant's case include the fact that the applicant enrolled her children in school while she was aware that they did not possess the proper non-immigrant student visas and that she planned to live in the United States as a tourist for pleasure prior to her marriage to her boyfriend.¹

The District Director concluded that these factors outweighed the fact that the applicant is married to a U.S. citizen.

¹ The AAO notes that there is no evidence in the record that the applicant intended to remain in the United States beyond her authorized stay. Her previous immigration history of complying with the terms of the visa does not support that contention.

The AAO finds that the District Director failed to consider other favorable factors, including the fact that the applicant has no criminal history, has an approved petition for alien relative, and has never overstayed her authorized periods of stay in the United States.

While the applicant's decision to enroll her children in school without the proper non-immigrant visas is a serious matter that cannot be condoned, the AAO finds that given all of the circumstances in the present case, the applicant has established that the favorable factors outweigh the unfavorable factors, and that a favorable exercise of the Secretary's discretion is warranted. Accordingly, the appeal will be sustained and the application approved.

ORDER: The appeal is sustained and the application approved.