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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: BANGKOK, THAILAND Date:

IN RE: Applicant: [redacted]

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:

[redacted]

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 application for permission to reapply for admission after removal was denied by the District Director, Bangkok, Thailand and is now before the Administrative Appeals Office (AAO) on appeal. The District Director's decision will be withdrawn and the application declared moot.

The applicant is a native and citizen of Australia who entered the United States in 1994, 1996, and April 5, 1995, as a visitor for business and on April 2, 1998, as a visitor for pleasure under the Visa Waiver Program. On all his entries he remained longer than authorized and after his last entry on April 2, 1998, he remained until April 4, 2003. On May 30, 2003 at the Hagatna, Guam Port of Entry the applicant applied for admission under the Visa Waiver Program and 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 and section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for a period of one year or more. Consequently, the applicant was removed from the United States on the same day. The District Director found the applicant inadmissible pursuant to section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii) for a prior removal, section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for a period of one year or more and section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i) for having procured admission into the United States by fraud and willful misrepresentation of a material fact. The applicant is the beneficiary of an approved Petition for Alien Relative filed by his U.S. citizen spouse. He 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 to travel to the United States and reside with his spouse and stepchild.

The District Director determined that the unfavorable factors in the applicant's case outweighed the favorable factors, and denied the Application for Permission to Reapply for Admission After Removal (Form I-212) accordingly. *See District Director's Decision* dated November 25, 2003.

The regulation at 8 C.F.R. § 217.4 states in pertinent part:

> (a) Determinations of excludability and inadmissibility.
>
> > (1) An alien who applies for admission under the provisions of section 217 of the Act, who is determined by an immigration officer not to be eligible for admission under that section or to be inadmissible to the United States under one or more of the grounds of inadmissibility listed in section 212 of the Act (other than for lack of a visa), or who is in possession of and presents fraudulent or counterfeit travel documents, will be refused admission into the United States and removed. Such refusal and removal shall be made at the level of the port director or officer-in-charge, or an officer acting in that capacity, and shall be effected without referral of the alien to an immigration judge for further inquiry, examination, or hearing, except that an alien who presents himself or herself as an applicant for admission under section 217 of the Act, who applies for asylum in the United States must be issued a Form I-863, Notice of Referral to Immigration Judge, for a proceeding in accordance with § 208.2(b)(1) and (2) of this chapter.
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> . . . .

> **(3) Refusal of admission under paragraph (a)(1) of this section shall not constitute removal for purposes of the Act.**

[Emphasis added] For this reason, the AAO finds that the District Director erred in her decision finding that section 212(a)(9)(A)(ii) of the Act is applicable in this case. Accordingly, the application for permission to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act is moot as the applicant is not inadmissible pursuant to section 212(a)(9)(A) of the Act.

The AAO notes that the applicant has been found inadmissible into the United States pursuant to sections 212(a)(6)(C) of the Act, for having procured admission into the United States by willful misrepresentation of a material fact and 212(a)(9)(B)(i)(II) of the Act, for having been unlawfully present in the United States for a period of one year or more. The record of proceedings reveals that the applicant filed an Application for Waiver of Grounds of Inadmissibility (Form I-601) that has not been adjudicated by the District Director.

ORDER: The District Director's decision is withdrawn, as it has not been established that the applicant is inadmissible under section 212(a)(9)(A) of the Act.