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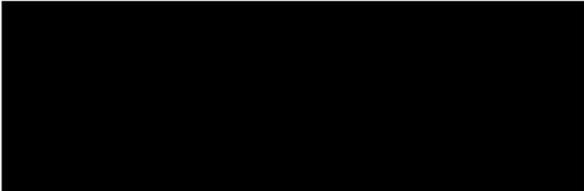
U.S. Department of Homeland Security  
20 Massachusetts Ave. N.W., Rm. 3000  
Washington, DC 20529



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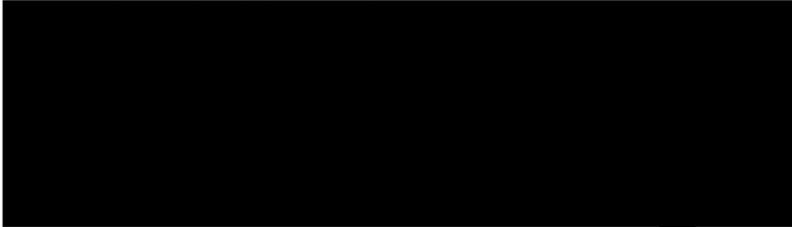
FILE: [REDACTED] Office: SAN FRANCISCO, CA

Date: **AUG 07 2008**

IN RE: Applicant: [REDACTED]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(a)(9)(B)(v) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B)(v)

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, Chief  
Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the District Director, San Francisco, and is now before the Administrative Appeals Office (AAO) on appeal. The district director's decision is withdrawn and the matter remanded to the district director for further action consistent with the present decision.

The applicant is a native and citizen of Thailand who was found to be inadmissible to the United States under section 212(a)(9)(B)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(I), for having been unlawfully present in the United States for more than 180 days but less than one year. The applicant seeks a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), in order to be able to reside in the United States with a U.S. citizen spouse, the petitioner of the approved Form I-130, Petition for Alien Relative (Form I-130).

The district director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility (Form I-601). *Decision of the District Director*, dated August 30, 2004.

The record indicates that subsequent to the applicant's submission of Form I-485, Application to Register Permanent Residence or Adjust Status (Form I-485) in June 2002, CIS sent a rejection notice to the applicant, stating the following:

...Your passport shows you entered the US as a male. Please submit evidence that you've successfully changed your gender....

*See Direct Mail Rejection Notice*, dated August 26, 2002.

In response to the notice, former counsel stated the following, in pertinent part:

...Please accept the application as filed since the entry of 'Male' in the sex column is simply a clerical error made by the U.S. Consulate in Bangkok. We believe it stands for multiple entries visa and should be entered in the 'Entries' column. Similar error can also be found in the 'Entries' column. The entry in the 'Entries' column should be 1,2, or any other numbers or 'M' to represent multiple entries. The entry of 'W', stands for "Woman" is simply another clerical error that should be moved to 'Sex' column.

The applicant was and is a woman before and after entered [sic] the U.S. No sex change operation has ever been done....

*Letter from* [REDACTED] *Attorney at Law*, dated September 4, 2002.

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 Obaighena*, 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). Due to discrepancies in a number of documents in the record and the

unsupported assertions made by former counsel, as referenced above, it remains unclear to the AAO whether the applicant is male or female and as such, the AAO is not able to adjudicate the instant appeal at this time. If the applicant is male, a bona fide marriage to a U.S. citizen may not exist, thereby rendering the Form I-601 moot, due to the potential revocation of the underlying Form I-130. Thus, the AAO finds it necessary to remand the present matter to the district director for further investigation.

The discrepancies with respect to the applicant's gender are as follows:

1. The copy of the applicant's nonimmigrant visa provided by former counsel, on its face, states that the sex of the applicant is Male, as marked by the letter "M."
2. The U.S. Department of State's [DOS] NIV Applicant Detail report obtained by the AAO states the applicant's gender as Male. It also notes under Entries "M" for multiple.
3. The photograph in the applicant's visa appears to be of a male. All pictures taken of the applicant after entry to the United States appear to be of a female.
4. The copy of the nonimmigrant visa from the applicant's passport provided by former counsel appears to have been altered. Under Entries, what appears to have been an "M" for Multiple Entries, is now a "W", which former counsel claims stands for Woman. As the DOS code for Female is "F", former counsel's assertion that the "W" stands for Woman is not credible.
5. The copy of the biographic page of the applicant's passport provided by former counsel also appears to have been altered. Under Sex, what appears to have been an "M" for Male is now a "W", which presumably stands for Woman. However, as referenced above, the widely used notation to indicate the female gender is "F."
6. The section regarding sex, in the applicant's translated copy of the birth certificate provided by former counsel, is blank.
7. The section of the applicant's photocopied Thai identification card provided by former counsel, translated as "Miss", also appears to have been altered.

For the above reasons, the AAO finds that clarification is needed to determine whether the applicant is male or female.

In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). It has not been proven, by a preponderance of the evidence, that the applicant is female, and therefore, eligible to file a Form I-601 waiver based on a Form I-130 approval based on a qualifying marriage to a U.S. citizen.

**ORDER:** The district director's decision is withdrawn and the matter remanded to the district director for further action consistent with the present decision.