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

U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: ROME DISTRICT OFFICE Date:

IN RE: [redacted]

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

ON BEHALF OF PETITIONER:

[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 waiver application was denied by the Officer-in Charge, Athens. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The record reflects that the applicant is a native and citizen of Iran. The applicant was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year. The record reflects that the applicant is the spouse of a U.S. citizen, The applicant last entered the United States as a nonimmigrant tourist in May 1998, with authorization to remain for six months. He remained until July 2000 and is now residing in Iran. filed an I-129F, *Petition for Alien Fiancé,* on the applicant's behalf on August 28, 2002, which was denied on February 11, 2003, for lack of evidence of an in-person meeting within the previous two years. then traveled to Iran and married him there in April 2003. On April 25, 2003, she filed on his behalf a Form I-130, *Petition for Alien Relative,* at the American Embassy in Ankara, Turkey, which was approved the same day. When the consular officer then made the inadmissibility determination, the application for waiver was prepared on the spot and forwarded to Athens for adjudication. *Memorandum of American Embassy, Ankara* (May 30, 2003). On an unknown date, eturned to the United States. The applicant seeks a waiver of inadmissibility in order to immigrate to United States.

The officer-in-charge found that, based on the evidence in the record at the time, the applicant had failed to establish extreme hardship to his U.S. citizen spouse. The application was denied accordingly.

On appeal, counsel does not contest the officer-in-charge's finding of inadmissibility. Counsel asserts that the applicant has established extreme hardship based on financial impact and his U.S. citizen wife's physical and emotional health conditions.

Section 212(a)(9)(B) of the Act provides, in pertinent part:

> (i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who –
>
> > (II) Has been unlawfully present in the United States for one year or more, and who gain seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.
> >
> > . . . .
> >
> > (v) Waiver. – The Attorney General [now Secretary, Homeland Security, "Secretary"] has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General [Secretary] that the

> refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

The concept of extreme hardship "is not . . . fixed and inflexible," and whether extreme hardship has been established is determined based on an examination of the facts of each individual case. *Matter of Cervantes-Gonzalez,* 22 I&N Dec. 560, 565 (BIA1999). In *Matter of Cervantes-Gonzalez*, the Board of Immigration Appeals set forth a list of non-exclusive factors relevant to determining whether an alien has established extreme hardship to a qualifying relative pursuant to section 212(i) of the Act. These factors include, with respect to the qualifying relative, the presence of family ties to U.S. citizens or lawful permanent residents in the United States, family ties outside the United States, country conditions where the qualifying relative would relocate and family ties in that country, the financial impact of departure, and significant health conditions, particularly where there is diminished availability of medical care in the country to which the qualifying relative would relocate. *Id.* at 566. The BIA has held:

> Relevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists. In each case, the trier of fact must consider the entire range of factors concerning hardship in their totality and determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation. *Matter of O-J-O-,* 21 I&N Dec. 381, 383 (BIA 1996). (Citations omitted).

In addition, the Ninth Circuit Court of Appeals has held, "the most important single hardship factor may be the separation of the alien from family living in the United States," and, "[w]hen the BIA fails to give considerable, if not predominant, weight to the hardship that will result from family separation, it has abused its discretion." *Salcido-Salcido v. INS,* 138 F.3d 1292, 1293 (9th Cir. 1998) (citations omitted). The AAO notes that the present case arises within the jurisdiction of the Ninth Circuit Court of Appeals. Separation of family will therefore be considered in the assessment of hardship factors in the present case.

Each of the *Cervantes* factors, cited above, is reviewed in turn. First examined is the financial impact of departure. The prospect of financial hardship is raised numerous times in the record, however, there was no objective documentation whatsoever submitted to address the financial assets or obligations of the applicant or his wife other than the bald statement that [redacted] has owned her own hair salon for 14 years and her health condition has impaired her ability to work and conduct business. On this record, the AAO finds that the applicant has failed to establish financial hardship to his U.S. citizen spouse.

The record also does not establish significant family ties to U.S. citizens or lawful permanent residents in the United States for [redacted] It appears that she has a cousin in the United States who is married to a U.S. citizen. Although her brother appears in a photo in the record, there is no indication of where he lives or whether he has an immigration status in the United States.

As to family ties and country conditions in Iran, where [redacted] would relocate to be with her husband, it appears from the record that her mother and father still reside in Tehran, where the applicant is currently living. Counsel asserts that [redacted] could not reside with her husband in Iran, due to potential "hostility

and antagonism towards U.S. citizens." *Brief in Support of Appeal and in the Alternative, a Motion to Reopen* at 6. In support of this contention, counsel states that Iran has been designated as a terrorist state by the U.S. State Department, but does not further elaborate or provide documentation of why the applicant's wife would be unable to reside in her country of birth, due solely to her naturalization as an American citizen. The record indicates that mmigrated to the United States at approximately the age of 26. She was married and divorced in Iran prior to her immigration to the United States. Further, there is no indication she suffered "hostility or antagonism" from the Iranian people or government during her 2003 visit to the country. Ms. asserts that her travel to Iran in 2003 was hazardous to her health, due to her serious asthma condition because asthma makes a long flight dangerous, Iran has air pollution, and her "breathing machine" was not adaptable to Iranian electrical outlets. None of the medical documentation addresses her ability to travel or describes her need to use a "breathing machine" on a chronic basis. Even assuming her need for the item, there is no indication that, if she relocated to Iran, she could not obtain a "breathing machine" with an appropriate electrical plug. There is nothing in the record to support a finding that the air pollution in Tehran is any worse than wha experiences in West Los Angeles. The record does not support a finding of extreme hardship if she returned to Iran on these facts: faces, as do all spouses facing potential separation from a spouse, a decision of whether to remain in the United States or to take up residence in Iran to reside with her spouse. She was born and raised in Iran, and her parents live there, in the same city as her husband. The BIA has held, "[t]he mere election by the spouse to remain in the United States, absent [a determination of exceptional hardship] is not a governing factor since any inconvenience or hardship which might thereby occur would be self-imposed." *See Matter of Mansour,* 11 I&N Dec. 306, 307 (BIA 1965). The determination of extreme hardship therefore hinges on an assessment of the impact of her health conditions on these circumstances.

In support of the assertions regarding physical health, counsel has recently supplemented the record with evidence that uffered a stroke and has been hospitalized since August 6, 2004, and faces multiple surgeries and a potentially lengthy rehabilitation. Although the attorney's cover letter states that "she went through the surgeries," and the medical records and letters show that was to undergo at least some surgery, it is unclear from the medical documentation whether any surgery has actually occurred. *See Submission on Behalf of the Applicant* (August 12, 2004). The AAO notes that much of the medical documentation is either illegible or indecipherable to anyone other than a medical expert, and no brief or medical summary has been submitted since the stroke occurred.

Prior to the stroke, although considered in "reasonably good healt suffered from asthma, diabetes, mild anemia, hypothyroidism, serious allergic reactions, uterine fibroids and bleeding, and elevated cholesterol. *See Cardiology Consultation, Dr. Mark A. Zatzkis* (August 9, 2004) at 1; *Neurological Consultation, Dr. Russ Shimizu* (August 6, 2004), at 1. Evidence relating to medical issues prior to the stroke was submitted upon the filing of the appeal, on January 27, 2004. Materials submitted include doctors' letters and hospital records reflecting care and treatment for asthma, severe allergic reaction, diabetes, and gynecological symptoms, at least since the year 2000 to present.

Counsel also submitted a letter from a "marriage family therapist" who had been seeing since September of 2000, after her now-husband returned to Iran. *Letter of Amethyst B. Kiani* (undated). A resumé of her qualifications was not provided. The therapist describes state as "suffering from severe depressed affect, lack of energy, intense hypersomnia, diminished interest . . . and complete social withdrawal."

Id. She also stated that "her client is not improving but also starting to develop suicidal thoughts and gestures." *Id.*

The record contains an unsworn statement from [redacted] ated January 16, 2004, in which she mentions, among other things, that she wants to try to conceive a child with her husband. *Statement of Simin Ali Hemat Hariri.* A letter from her gynecologist advised, pre-stroke, "[b]ecause of the limitations of age and uterine fibroids she would require the presence of her husband so that she may have a chance at starting a new family given her current health condition." *Letter of Dr. James A. Danielzadeh* (January 19, 2004). Her gynecologist later submitted a letter stating that her severe uterine bleeding required surgery, with a projected recovery period of 6 weeks, during which she would not be able to work and would need home care and assistance. *Letter of Dr. James A. Danielzadeh* (June 7, 2004). There is no update as to the status of her gynecological complications post-stroke, whether the surgery has taken place, or the consequences of the surgery on her potential for conceiving a child.

On August 5, 2004 [redacted] experienced numbness and weakness on her left side and reported to the emergency room, where her stroke was diagnosed. *Cardiology Consultation,* at 1. Hematology results for numerous blood tests obtained during her hospitalization for the stroke (of unknown type, due to the lack of explanation of the medical abbreviations) display a high number of demarcations indicating that results are either "Potentially Life Threatening/Toxic High" or "Potentially Life Threatening/Toxic Low." *Cumulative Patient Summary* (printed August 10, 2004) (covers August 5-9). However, the significance and implications of these blood test results are not explained anywhere in the record.

In terms of prognosis and follow-up, her treatment plan for the stroke specifically cites needs to restrict, or obtain assistance or instruction for, basic body movements, to maintain a quiet, relaxing environment with emotional support, administration of several medications, and to obtain home health rehabilitation. *Patient's Care Plan – Cerebrovasc Accident* (August 6, 2004). The plan indicates a need for her to rehabilitate her ability to communicate, and the need for significant assistance and medical attention. *Id.* Hospital records, not specifically prepared in anticipation of these proceedings, further show that [redacted] was referred to a hospital social worker for depression and sadness. Her projected recovery time is not clear from the record. The medical records seem to indicate that her mental faculties are intact, but her physical disabilities, while not completely debilitating, are serious. Her functional level, as described in her *Discharge Planning Assessment*, is ranked as "Mod. Assist," which is third on a four-point scale from "Independent" to "Max. Assist." Although not explained, the AAO considers it a reasonable interpretation of the abbreviated designation that [redacted] will require a moderate amount of assistance to function, an interpretation which is supported by the notes in her *Patient Care Plan – Cerebrovasc Accident,* at 1-6 ("[m]aintain bed rest in quiet environment . . . instruct on how to rise from bed . . . [i]nstruct Pt [patient] transfer/sitting technique, roll to unaffected side, push up with good arm . . . reinforce proper use of walking aids . . . [p]lace all food/utensils where Pt can see them, provide with assistive devices as needed . . . [p]lace food on unaffected side of mouth if feeding Pt . . .").

Counsel has also submitted evidence related to the *bona fides* of the marriage and letters from friends, family, and business associates attesting to the hardship that would befall Ms. [redacted] due to the absence of her husband from the United States.

As stated above, prior to her stroke, the record did not support a finding of extreme hardship if she were to relocate to Iran. The question therefore becomes, now that her stroke has resulted in (at the least) an extended temporary inability to travel, whether the separation from her husband during her recovery period constitutes extreme hardship.

Applying the *Cervantes-Gonzalez* factors to the totality of the circumstances, and taking into consideration Ninth Circuit law emphasizing the weight of hardship that would result from family separation, the applicant has established that the refusal of his admission would cause his U.S. citizen spouse extreme hardship. It is unclear from the record whether she will fully recover from her stroke or suffer permanent disability, but it is clear that she faces an intense period of rehabilitation. Although she may be able to obtain medically sufficient assistance here in the United States for her basic needs, the AAO finds that, particularly in view of 9th circuit law, the separation from her husband and his unique ability to provide her with emotional support and tranquility that medical professionals have determined she requires as part of her treatment, would constitute an extreme hardship, beyond that which is commonly experienced in cases of separation. Accordingly, the AAO finds that the applicant has established that his U.S. citizen wife would suffer extreme hardship if his waiver of inadmissibility application were denied.

The AAO also finds that the applicant merits a waiver of inadmissibility as a matter of discretion.

In discretionary matters, the alien bears the burden of proving eligibility in terms of equities in the United States that are not outweighed by adverse factors. *See Matter of T-S-Y-,* 7 I&N Dec. 582 (BIA 1957). The adverse factor in the present case is the applicant's overstay of his nonimmigrant visa in 2000, although he did return to his home country voluntarily after his overstay. The favorable factors in the present case are the extreme hardship to the applicant's wife if he were refused admission, the applicant's subsequent attempts to comply with U.S. immigration laws, and the affidavits from the family, friends and business associates of his wife attesting to the *bona fides* of the marital relationship.

The AAO finds that, although the immigration violation committed by the applicant cannot be condoned, when taken together, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.