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

U.S. Citizenship and Immigration Services

[redacted]
C/O [redacted]

FILE: [redacted] Office: ATHENS, GREECE Date: JAN 09 2008

IN RE: [redacted]

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

ON BEHALF OF APPLICANT:

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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 Officer-in-Charge, Athens, Greece. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Lebanon who 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 and seeking readmission within ten years of his last departure from the United States and section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for having procured admission into the United States by fraud or willful misrepresentation on September 22, 1999. The applicant is married to a U.S. citizen and has a U.S. citizen child. He seeks a waiver of inadmissibility in order to reside in the United States.

The officer-in-charge based the finding of inadmissibility under section 212(a)(9)(B)(i)(II) of the Act on the applicant overstaying his K-1 fiancé(e) visa. The officer-in charge based the finding of inadmissibility under section 212(a)(6)(C)(i) of the Act on the applicant's statements made on September 22, 2004 to an Immigration and Customs Enforcement (ICE) agent, as recorded in his Record of Deportable/Inadmissible Alien (Form I-831). *Decision of the Officer-in-Charge*, dated September 7, 2006.

The officer-in-charge also found that the applicant had failed to establish that the hardship experienced by his spouse rises to the level of extreme hardship. The application was denied accordingly. *Id.*

On appeal, counsel asserts that the officer-in-charge erroneously found fraud in the applicant's case and that the evidence of record establishes that no fraud occurred. Counsel also asserts that the officer-in-charge failed to engage in any meaningful analysis of the extreme hardship that the applicant's spouse would suffer as a result of the applicant's inadmissibility. In addition to these assertions, counsel submits new evidence of hardship. *Counsel's Brief,* dated October 26, 2006.

The applicant's Form I-213 states that, in a September 22, 2004 interview, the applicant admitted that he had no intention of marrying the woman who filed the Form I-129F, Petition for Alien Fiancé(e), on his behalf. *Form I-213*, dated September 22, 2004. The applicant stated further that he used the K-1 fiancé(e) visa as a means to gain access to the United States. *Id.* Counsel contends that the applicant did intend to marry the petitioner of his Form I-129F. *Counsel's Brief,* dated October 26, 2006. He asserts that the Form I-213 is not sufficient evidence of the applicant's fraud and that this document was never provided to the applicant or his prior counsel. Counsel further contends that ICE did not allege fraud in the Notice to Appear issued to the applicant or prove fraud during the application's removal proceeding. He further states that the ICE trial attorney raised the issue of the applicant's K-1 fraud but that the immigration judge dismissed that comment and granted the applicant voluntary departure. Had the applicant committed fraud, counsel contends, the immigration judge would not have granted him voluntary departure. The AAO notes counsel's assertions but does not find the transcript of the applicant's immigration proceeding before an immigration judge to be included in the present record. Pursuant to 8 C.F.R. §§ 103.2(b)(16)(ii) and 103.8(d), each petition or application filing is a separate proceeding with a separate record and Citizenship and Immigration Services (CIS) is limited to the information contained in that record in reaching its decision. Accordingly, the AAO must analyze the application based on the facts presented in the record before it.

The record contains an affidavit from the petitioner of the Form I-129F. In this affidavit, the petitioner states that she and the applicant did intend to marry, but that she decided to end the relationship because she was diagnosed with breast cancer. *Petitioner's Affidavit*, dated October 24, 2006. The record also contains medical reports showing that the petitioner was diagnosed with breast cancer in June 2000. *Petitioner's Radiology, Operative and Pathology Reports*, dated June 16, 2000 and July 18, 2000. The applicant has submitted an affidavit stating that he intended to marry the petitioner of the Form I-129F, but that the petitioner ended the relationship after she was diagnosed with breast cancer. *Applicant's Affidavit*, dated October 7, 2005. The applicant explains that he cooperated with the Federal Bureau of Investigation concerning former employees of Middle Eastern descent who worked at his place of employment and that through this cooperation he was able to comply with his registration obligations under the NSEERS program. *Id.* He does not refute or otherwise address the statements that the record indicates he made to the ICE agent concerning his K-1 visa fraud at the time of his September 22, 2004 interview. *Id.*

The AAO notes that it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The current record, however, fails to explain or reconcile the inconsistencies between the applicant's and petitioner's affidavits, and the statements that the record indicates the applicant made to the ICE agent. The petitioner's affidavit regarding her belief in the genuine nature of her engagement to the applicant is not proof that the applicant entered into their engagement in good faith. As the applicant has failed to resolve the inconsistent accounts of his intentions upon arrival in the United States as a K-1 beneficiary, the AAO finds that he is subject to section 212(a)(6)(C) of the Act.

Section 212(a)(6)(C) of the Act provides, in pertinent part, that:

> (i) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

Section 212(i) of the Act provides that:

> (1) The Attorney General [now the Secretary of Homeland Security, "Secretary"] may, in the discretion of the Attorney General [Secretary], waive the application of clause (i) of subsection (a)(6)(C) in the case of an alien who is the spouse, 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 the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien.

In the present application, the record indicates that the applicant entered the United States on September 22, 1999 with an authorized period of stay until December 21, 1999. The applicant remained in the United States until January 22, 2006. The applicant accrued unlawful presence from December 22, 1999, the date his authorized stay under his K-1 visa expired until January 22, 2006, the date he departed the United States. In applying for an immigrant visa, the applicant is seeking admission within ten years of his January 22, 2006

departure from the United States. Therefore, the applicant is also inadmissible to the United States under section 212(a)(9)(B)(II) of the Act for being unlawfully present in the United States for a period of more than one year.

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

> (B) Aliens Unlawfully Present.-
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> (i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-
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> . . . .
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> (II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.
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> . . . .
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> (v) Waiver. – The Attorney General [now the Secretary of 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.

Section 212(i) and section 212(a)(9)(B)(v) waivers of the bars to admission resulting from section 212(a)(6)(C) and section 212(a)(9)(B)(i)(II) of the Act are dependent first upon a showing that the bar imposes an extreme hardship to the U.S. citizen or lawfully resident spouse and/or parent of the applicant. Hardship the alien experiences or his child experiences due to separation is not considered in section 212(i) and section 212(a)(9)(B)(v) waiver proceedings unless it causes hardship to the applicant's spouse.

The concept of extreme hardship to a qualifying relative "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 (BIA 1999). In *Matter of Cervantes-Gonzalez*, the Board of Immigration Appeals set forth a list of non-exclusive factors relevant to determining whether an applicant 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.

> 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). Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. *See Matter of Mendez*, 21 I&N Dec. 296 (BIA 1996).

The AAO notes that extreme hardship to the applicant's spouse must be established in the event that she resides in Lebanon or in the event that she resides in the United States, as she is not required to reside outside of the United States based on the denial of the applicant's waiver request. The AAO will consider the relevant factors in adjudication of this case.

In her brief, counsel outlines the experiences of the applicant, his spouse and his child throughout the immigration process. She states that the applicant's spouse and child visited Lebanon for the last time in July 2006, a few days before the armed conflict between Israel and Hezbollah began. *Counsel's Brief*, dated October 26, 2006. Counsel states that the applicant and his family suffered through the bombings, which they could hear from where they were staying and were eventually evacuated to a camp in Cyprus. Counsel states that the applicant's family stayed in the camp for two weeks and then had to move into a hotel room, where they awaited the visa decision in the applicant's case. They stayed in this hotel room for over a month until they received notification that the applicant's visa was denied. Counsel asserts that the applicant's spouse and son then returned to the United States where they are now suffering extreme hardship as a result of the applicant's inadmissibility. *Id.*

Counsel submits additional documentation with her brief and states that pursuant to well-established case law, the applicant's suffering rises to the level of extreme hardship. She states that the applicant's spouse suffers from emotional hardship related to her own symptoms as well as the symptoms and medical problems of her son and that she is also suffering financial hardship. *Id.*

In support of the applicant's spouse's emotional suffering, counsel submits a psychological evaluation from Dr. [redacted], a licensed psychologist. Dr. [redacted] states that she conducted a three-hour interview with the applicant's spouse on September 29, 2006. *Psychological Evaluation*, dated October 13, 2006. Dr. [redacted] finds that the applicant's spouse is now suffering from her first episode of Major Depression, as well as symptoms of Panic Attack with Anxiety Disorder. Dr. [redacted] states that the applicant's spouse is at risk for recurrent, more serous episodes of depression because her mother suffered from depression and she lost her father at an early age. *Id.* Dr. [redacted] states that the applicant's spouse now suffers from the following symptoms: (1) depressed mood and tearfulness; (2) loss of interest in usually enjoyable activities, including personal hygiene; (3) decreased appetite and unplanned weight loss; (4) insomnia; (5) fatigue; (6) difficulty concentrating; and (7) increased irritability. In addition, Dr. [redacted] states that the applicant's spouse is suffering from symptoms of panic attack and anxiety. She states that the applicant's spouse's anxiety symptoms match those described in the DSM IV-R for Anxiety with Panic Attack, and include: (1) rapid heartbeat; (2) nightmares; (3) headaches; (4) shortness of breath; (5) diarrhea; (6) dizziness; (7) feelings of unreality and detachment; and (8) constant

worry. *Id.* Dr. [redacted] adds that the applicant's spouse also stated that she suffers from hair loss. The record includes additional documentation in support of the applicant's spouse's mental condition, including a car accident report and an emergency room discharge record. The accident report shows that the applicant's spouse was in a car accident on September 30, 2006 where she was at fault. *Motor Vehicle Crash Operator Report*, dated September 30, 2006. The applicant's spouse stated to Dr. [redacted] during a telephone conversation that she believes the accident was a result of her current condition. *Psychological Evaluation*, dated October 13, 2006. She stated that she was on her way to fax documents concerning the applicant's case, was stressed and was not attentive to how she was driving. *Id.* The emergency room discharge record states that the applicant was diagnosed with anxiety and insomnia and was prescribed Benadryl to help her sleep. *Emergency Department Discharge Record*, dated October 24, 2006. The record also states that the applicant's spouse should follow-up with the doctor within the week. *Id.* In the applicant's spouse's affidavit she states that her life without the applicant is horrible and she is not able to eat or sleep well. *Spouse's Affidavit*, dated October 24, 2006. She states that she is not able to stay at their house alone and that she feels out of control and sad all the time. She states that she sometimes cries uncontrollably and is depressed, lonely and scared. *Id.*

The AAO notes that the psychological evaluation of the applicant's spouse's emotional state is based on a single interview and would ordinarily be viewed as having limited evidentiary value in this proceeding. However, in the present matter, the evaluation's findings are supported by documentary evidence related to the applicant's spouse's medical treatment for anxiety and insomnia, and the observations made by a significant number of friends and family regarding of the applicant's spouse's emotional state. *Letters and statements of support*, dated October 2006. The AAO will, therefore, consider Dr. [redacted] evaluation of the applicant's spouse.

The AAO notes that the record also indicates that the applicant's son suffers from asthma and has frequently required medical attention. The record includes a letter from the applicant's son's pediatrician, Dr. [redacted]. Dr. Hazen states that the applicant's son is approximately ten months old, who had his first visit to the pediatrician at the age of two months when they had to surgically remove bilateral hydroceles. *Letter from Pediatrician*, dated March 16, 2006. About two months later, the applicant's son began a series of visits to Dr. [redacted]'s office to treat upper respiratory infections. *Id.* At the age of six months the applicant's son contracted croup, which resulted in several admissions to Children's Hospital in Boston. When he failed to improve from this virus, he was admitted to the hospital and was diagnosed with moderate asthma. After the admission to the hospital, the applicant's son has been on and off Albuterol Syrup and Orepred/Prednisone, a steroid. Dr. [redacted] also states that during a recent trip to Lebanon, the applicant's son was treated for a severe respiratory infection and that the applicant's spouse was told to always bring all of her son's medications to Lebanon, because he might need to take the steroid at anytime and the particular steroid that he takes is not available in Lebanon. During the applicant's son's flight home to Boston, he developed a high fever and was taken to the Children's Hospital emergency room, where his temperature was recorded at 104 degrees. The applicant's son was diagnosed with roseola, a virus. Dr. [redacted] states that currently the applicant's son is using a nebulizer treatment, which he will need for at least six months and that the current course of steroids will need to be reduced, as tolerated. Dr. [redacted] concludes her letter by stating that the applicant's son is a very special little boy who needs even more attention than the usual amounts of love and care any healthy child requires. He has repeatedly needed all night surveillance, frequent medications and has had more than one late night run to the emergency room. She states that it is clearly in the child's best interest to have both parents readily accessible

to meet his significant medical needs. *Id.* The AAO notes that various medical records, including one medical record from Lebanon, were also submitted concerning the condition of the applicant's son.

Dr. [redacted]'s evaluation of the applicant's spouse finds that all of the concerns related to her son's health have placed her under additional extreme stress. *Psychological Evaluation*, dated October 13, 2006. The applicant's spouse explains that the applicant was a huge support to her when their son was sick. *Spouse's Affidavit*, dated October 24, 2006. She states that when their son was sick she would be very upset and would start to cry, shake and fret, but the applicant was always there to provide support. She states that she would not have been able to handle her son's sickness without the applicant. The applicant's spouse describes how her son had to stay in the hospital for eight days while doctors tried to find out what was wrong with him and that during this time the applicant was always strong, calm and positive. She states that now without the applicant in the United States she feels completely vulnerable when her son is sick. *Id.* Based on the record before it, the AAO finds that continued separation from the applicant would constitute extreme hardship for the applicant's spouse. The applicant's own emotional state and her reaction to her son's medical problems combine to establish that she would experience extreme emotional hardship if she continues to care for her son without the applicant.

Furthermore, the record shows that the applicant's spouse would suffer extreme hardship as a result of relocating with her son to Lebanon. The record includes statements from the applicant's spouse, his son's doctor and medical reports showing that while in Lebanon and/or while traveling home from Lebanon the applicant's son has required medical care. The record also indicates that the son's medication is not available in Lebanon. Counsel asserts that in addition to the son's medical condition in Lebanon and his inability to find adequate health care, the applicant's family would not have health insurance and would not be able to afford health care in Lebanon. *Counsel's Brief*, dated October 26, 2006. Counsel also submitted country conditions reports regarding the devastation caused by bombings in Lebanon. Counsel cites a United Nations Report cited in a *New York Times* article, which states that the attacks during the war have obliterated most of the progress Lebanon has made in recovering from the devastation of the civil war years. "Fragile Ceasefire Allows Thousands to Return Home," *New York Times*, August 15, 2006. Counsel also cites an article from the British Broadcasting Corporation (BBC), which states that more than a quarter of Lebanon's four million people live below the poverty line and that emigration is increasing with unemployment though to be around 25 percent. "Gloomy Outlook for Lebanese Economy," *BBC News*, dated August 20, 2001. The AAO also notes that the most recent Department of State travel advisory continues to strongly advise U.S. citizens against traveling to or remaining in Lebanon. *Department of State Travel Warning*, dated October 17, 2007. The applicant's spouse states that there is no job stability in Lebanon and that the applicant has been unable to find employment. *Spouse's Affidavit*, dated October 24, 2006. She states that she does not believe that she will be able to find employment because she cannot read or write Arabic. *Id.* In light of the applicant's son's medical history during his past visits to Lebanon, the AAO finds that applicant's spouse's concerns regarding his medical problems would result in extreme emotional hardship for her should she relocate to Lebanon. Moreover, it finds the security situation in Lebanon, as set forth in the record, and the recent Department of State traveling warning, to establish an additional basis for a finding of extreme hardship in the event that the applicant's spouse joined him in Lebanon.

Given the evidence of hardship, considered in the aggregate and in light of the *Cervantes-Gonzalez* factors, cited above, the AAO finds that the applicant has established that his spouse would suffer extreme hardship if his waiver of inadmissibility were denied. In proceedings for application for waiver of grounds of inadmissibility

under section 212(i) and 212(a)(9)(B)(v) of the Act, the burden of proving eligibility rests with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has met that burden.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the applicant bears the burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957).

> In evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the factors adverse to the alien include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and if so, its nature and seriousness, and the presence of other evidence indicative of the alien's bad character or undesirability as a permanent resident of this country. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where alien began residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value or service in the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends and responsible community representatives).

See Matter of Mendez-Moralez, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then, "[B]alance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on the alien's behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country. " *Id.* at 300. (Citations omitted).

The favorable factors in the present case are the applicant's extended family ties to the United States; the extreme hardship to his U.S. citizen wife if he were to be denied a waiver of inadmissibility; the health problems experienced by his U.S. citizen son, the absence of a criminal record beyond that previously noted, and, as indicated by letters from 20 family members and friends, the applicant's value to his community and his attributes as a reliable employee, a good friend and a loving husband and father.

The adverse factors in the present case are the applicant's unlawful presence in the United States and his 1999 admission to the United States through fraud or misrepresentation, and his several years of unauthorized employment in the United States .

The AAO finds that the immigration violations committed by the applicant are serious in nature and cannot be condoned. Nevertheless, the AAO finds that 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.