U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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[redacted]

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FILE: [redacted] Office: ROME, ITALY Date: DEC 15 2008

IN RE: [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:

[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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Ellen C. Johnson

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The District Director, Rome, Italy, denied the waiver application. The matter is now on appeal before the Administrative Appeals Office (AAO) in Washington, DC. The appeal will be dismissed.

The record reflects that the applicant, [redacted], is a native and citizen of France whose Petition for Alien Fiancé(e) was approved on June 22, 2004. She filed an application for a K-1 nonimmigrant visa as the fiancée of a U.S. citizen pursuant to section 101(a)(15)(K)(i) of the Immigration and Nationality Act (the Act). In connection with the application for a K-1 nonimmigrant visa, the district director determined that [redacted] was inadmissible to the United States under 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 more than one year. [redacted] sought a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), which the district director denied, finding that the applicant failed to establish hardship to a qualifying relative. *Decision of the District Director, dated March 7, 2006.* The applicant submitted a timely appeal.

The record establishes the applicant's inadmissibility under section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), which provides that any alien (other than an alien lawfully admitted for permanent residence) who has been unlawfully present in the United States for one year or more, and again seeks admission within 10 years of the date of such alien's departure or removal, is inadmissible.

Unlawful presence accrues when an alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled. Section 212(a)(9)(B)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(B)(ii). The periods of unlawful presence under sections 212(a)(9)(B)(i)(I) and ((II) are not counted in the aggregate.[1] For purposes of section 212(a)(9)(B) of the Act, time in unlawful presence begins to accrue on April 1, 1997.[2] The three- and ten-year bars of sections 212(a)(9)(B)(i)(I) and (II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(I) and (II), are triggered by a departure from the United States following accrual of the specified period of unlawful presence. If someone accrues the requisite period of unlawful presence but does not subsequently depart the United States, then sections 212(a)(9)(B)(i)(I) and (II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(I) and (II), would not apply. *See* DOS Cable, note 1. *See also Matter of Rodarte,* 23 I&N Dec. 905 (BIA 2006)(departure triggers bar because purpose of bar is to punish recidivists). A waiver for unlawful presence is under section 212(a)(9)(B) of the Act.

The record reflects that the applicant entered the United States through the Visa Waiver Program on January 5, 1999 and was authorized to remain until April 5, 1999. She remained in the country until

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[1] Memo, Virtue, Acting Assoc. Comm. INS, Grounds of Inadmissibility, Unlawful Presence, June 17, 1997 INS Memo on Grounds of Inadmissibility, Unlawful Presence (96Act.043); and Cable, DOS, No. 98-State-060539 (April 4, 1998).

[2] *See* DOS Cable, note 1; and IIRIRA Wire #26, HQIRT 50/5.12.

her departure to Mexico on August 5, 2002. For purposes of calculating unlawful presence under section 212(a)(9)(B) of the Act, the applicant began to accrue time in unlawful presence from April 5, 1999 until August 5, 2002; she therefore accrued more than three years of unlawful presence. When the applicant was departed from the United States she triggered the ten-year-bar. Consequently, the finding of inadmissibility under section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1101(a)(9)(B)(i)(II), is correct.

The AAO will now consider whether it will grant a waiver of inadmissibility for unlawful presence.

If an alien seeking a K nonimmigrant visa is inadmissible, the alien's ability to seek a waiver of inadmissibility is governed by 8 C.F.R. § 212.7(a), which provides, in pertinent part:

> (a) *General*—(1) *Filing procedure*—(i) *Immigrant visa or K nonimmigrant visa applicant.* An applicant for an immigrant visa or "K" nonimmigrant visa who is inadmissible and seeks a waiver of inadmissibility shall file an application on Form I-601 at the consular office considering the visa application. Upon determining that the alien is admissible except for the grounds for which a waiver is sought, the consular officer shall transmit the Form I-601 to the Service for decision.

The applicant filed the waiver application on Form I-601 with the American Consulate in Paris, France. The Department of State forwarded the application to the USCIS Rome District Office, which denied the application on March 7, 2006.

Section 212(a)(9)(B) of the Act provides that:

> (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.

A waiver of inadmissibility under section 212(a)(9)(B)(v) is dependent upon a showing that the bar to admission imposes an extreme hardship on a qualifying relative, *i.e.,* the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to [redacted] and to her daughters is not a consideration under the statute, and unlike section 212(h) of the Act where a child is included as a qualifying relative, children are not included under section 212(a)(9)(B) of the Act. Thus, hardship to [redacted] and to her children will be considered only to the extent that it results in hardship to a qualifying relative. The qualifying relative in this case is [redacted]. If extreme hardship to the qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. *See Matter of Mendez-Moralez,* 21 I&N Dec. 296 (BIA 1996).

The evidence submitted in support of the waiver application is as follows:

- An affidavit dated May 18, 2005, [redacted] conveys that he has a close relationship with his fiancée and her two children and that he visited them in France and separation from them has been difficult.

- A June 30, 2005 letter in which [redacted] indicates that he has a close relationship with his fiancée and her children and wants them to live with him in the United States, where he can provide security and financial stability as he has two homes, cats, and dogs, and a job where he worked for 20 years. He states that starting over in France, where he would find unemployment and a language barrier would be very difficult.

- affidavit dated April 25, 2006 is similar in content to his May 18, 2005 affidavit and June 30, 2005 letter. In addition, he states that his fiancée cannot find a decent job in France and struggles to raise her children alone.

- A September 20, 2004 letter by [redacted] describes how he met his fiancée and their relationship.

- A May 13, 2005 letter by [redacted], who is the sister of [redacted] states that she accompanied her brother to France and that he has been grieving on account of separation from his fiancée and her children.

- A letter by [redacted] indicates that worked from December 1, 2005 to May 31, 2004 as a secretary in his surgery practice and he described her character.

- Letters commending [redacted] character and photographs.

- A letter by [redacted] describes her close relationship with her fiancé.

- A May 1, 2005 letter by [redacted] conveys that [redacted] has a close relationship with his fiancée and has kept two homes ([redacted] and [redacted] going, has taken care of animals, and is depressed and stressed without his fiancée and her daughters.

- A letter dated November 17, 2004 by reflectes that [redacted] annual salary as a branch manager with Expedited Deliver, Inc. is $28,000.

- A psychological evaluation of [redacted] dated April 21, 2006, by [redacted] a licensed clinical psychologist, describes how [redacted] met his fiancée and how separation from her and her children has depressed [redacted], causing a fluctuating appetite, insomnia, chronic irritability, hopelessness, sadness, tearfulness, fluctuating concentration, worry, fearfulness, rumination, anger, and anxiety. [redacted] stated that cat is his social support system, and that is concerned about his

personality change. [redacted] stated that [redacted] has a high likelihood of continued mental decompensation, and if he is unable to maintain employment, may depend on social disability programs. [redacted] stated that [redacted] could become actively suicidal in the future.

- Articles describing economic conditions in France and in the United States. Unemployment in France averages nearly 10 percent. *France in Labor Reform Turmoil, by XVOANews.com, dated April 6, 2006.* The unemployment rate in the United States is 4.7 percent. *Unemployment rate matches 5-year low, by CNNMoney, dated April 7, 2006.*

On appeal, counsel states that the submitted documentation established extreme hardship to Mr. [redacted] if the waiver application were denied. Counsel contends that the district director failed to evaluate and weigh [redacted]s hardships and to state the reasons for the denial. Counsel states that in denying the petition the director referenced 20-year-old cases and an irrelevant case, *Matter of Tijam*, 22 I&N Dec. 408 (BIA 1998), that deals with fraud. Counsel states that *Matter of Cervantes-Gonzalez,* 22 I&N Dec. 560 (BIA 1999), sets forth factors that are relevant in determining hardship. He states that [redacted]s factors are his financial and family ties to the United States. He states that for 24 years [redacted] has been gainfully employed with the same company, that he maintains two residences, and that he has a close relationship with his brother and sister who live in the United States. Counsel states that the psychological report shows that [redacted] has psychological and other health problems due to separation from his fiancée and her children. Counsel states that [redacted] has no relatives in France, other than his fiancée and her two children; that the 9.8 percent unemployment rate in France is twice as high as in the United States; and that because [redacted] does not speak French, obtaining gainful employment would be virtually impossible. Counsel states that the Board of Immigration Appeals (BIA) found extreme hardship in *Matter of Kao*, 23 I&N Dec. 45 (BIA 2001), which is similar to [redacted] situation: he is a U.S. citizen who has lived his entire life in the United States and is integrated into the American lifestyle; he has no knowledge of French; would live in inferior conditions economically, socially, culturally, and politically in France; and would leave his entire financial support system in the United States.

In rendering this decision, the AAO has carefully considered all of the evidence in the record.

"Extreme hardship" is not a definable term of "fixed and inflexible meaning" and establishing extreme hardship is "dependent upon the facts and circumstances of each case." *Matter of Cervantes-Gonzalez* at 565. As stated by counsel, the BIA in *Matter of Cervantes-Gonzalez* lists the factors it considers relevant in determining whether an applicant has established extreme hardship pursuant to section 212(i) of the Act. The factors include the presence of a lawful permanent resident or United States citizen spouse or parent in this country; the qualifying relative's family ties outside the United States; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative's ties in such countries; the financial impact of departure from this country; and significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate.

Id. at 565-566. The BIA indicated that these factors relate to the applicant's "qualifying relative." *Id.* at 565-566.

In *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996), the BIA stated that the factors to consider in determining whether extreme hardship exists "provide a framework for analysis," and that the "[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists." It further stated that "the trier of fact must consider the entire range of factors concerning hardship in their totality" and then "determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation." (citing *Matter of Ige*, 20 I&N Dec. 880, 882 (BIA 1994).

Applying the *Cervantes-Gonzalez* factors here, extreme hardship to [redacted] must be established if he were to join [redacted] and alternatively, if he were to remain in the United States. A qualifying relative is not required to reside outside of the United States based on the denial of the applicant's waiver request.

On appeal, counsel asserts that the district director failed to weigh the evidence and provide reasons for the denial of the waiver application. The AAO disagrees. As found by the district director, the submitted evidence of letters and affidavits discussed the character of the applicant; they did not discuss whether [redacted] would experience extreme hardship if the waiver application were denied.

has been diagnosed by with Adjustment Disorder, with Mixed Anxiety and Depressed Mood, Chronic, and with extreme distress, and [redacted] indicated that, because of his condition, [redacted] may be unable to maintain his employment as a branch manager with Expedited Deliver, Inc., and that he has a high likelihood of continued mental decompensation and could become suicidal in the future.

The AAO notes that had a four-year separation from the applicant as of the date of the denial letter. Although [redacted] indicates that [redacted] may be unable to maintain his job on account of separation from his fiancé, no documentation has been furnished to show that Mr. employment was ever in jeopardy during his four-year separation from the applicant.

Although the input of a mental health professional is respected and valuable, the AAO notes that the psychological evaluation is based on a single interview between the applicant's fiancé and Mr. [redacted]. The record fails to reflect an ongoing relationship between a mental health professional and [redacted] or any history of treatment for the disorders experienced by [redacted]. Moreover, the conclusions reached in the evaluation, being based on a single interview, do not reflect the insight and elaboration commensurate with an established relationship with a psychologist, thereby rendering [redacted] findings speculative and diminishing the evaluation's value to a determination of extreme hardship.

With regard to family separation, courts in the United States have stated that "the most important single hardship factor may be the separation of the alien from family living in the United States," and

also, "[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); *Cerrillo-Perez v. INS,* 809 F.2d 1419, 1424 (9th Cir. 1987) (remanding to BIA) ("We have stated in a series of cases that the hardship to the alien resulting from his separation from family members may, in itself, constitute extreme hardship.") (citations omitted).

However, in *Hassan v. INS,* 927 F.2d 465, 468 (9th Cir. 1991), the Ninth Circuit upheld the finding that deporting the applicant and separating him from his wife and child was not conclusive of extreme hardship as it "was not of such a nature which is unusual or beyond that which would normally be expected from the respondent's bar to admission." (citing *Patel v. INS,* 638 F.2d 1199, 1206 (9th Cir.1980) (severance of ties does not constitute extreme hardship). In *Shooshtary v. INS*, 39 F.3d 1049 (9th Cir. 1994), the court upheld the finding of no extreme hardship if Shooshtary's lawful permanent resident wife and two U.S. citizen children are separated from him. *Id.* 1050-1051. As stated in *Perez v. INS,* 96 F.3d 390, 392 (9th Cir. 1996), "[e]xtreme hardship" is hardship that is "unusual or beyond that which would normally be expected" upon deportation and "[t]he common results of deportation or exclusion are insufficient to prove extreme hardship." (citing *Hassan v. INS,* 927 F.2d 465, 468 (9th Cir.1991)). In *Sullivan v. INS*, 772 F.2d 609, 611 (9th Cir. 1985), the Ninth Circuit stated that deportation is not without personal distress and emotional hurt.

The record reflects that is very concerned about separation from his fiancée and her children. The AAO is mindful of and sympathetic to the emotional hardship that is undoubtedly endured as a result of separation from a loved one. After a careful and thoughtful consideration of the record, however, the AAO finds that the situation of [redacted], if he remains in the United States, is typical to individuals separated as a result of removal and does not rise to the level of extreme hardship as required by the Act. The record before the AAO is insufficient to show that the emotional hardship, which will be endured by [redacted], is unusual or beyond that which is normally to be expected upon removal. *See Hassan, Shooshtary, Perez,* and *Sullivan, supra.*

There is no documentation in the record to demonstrate extreme financial hardship to [redacted] if he were to remain in the United States without the applicant.

The conditions in the country where the applicant's qualifying relative would live if he or she joined the applicant are a relevant hardship consideration. Although political and economic conditions in an alien's homeland are relevant, they do not justify a grant of relief unless other factors, such as advanced age or severe illness, combine with economic detriment to make deportation extremely hard on the alien or his qualifying relatives. *Matter of Ige*, 20 I&N Dec. 880 (BIA 1994)(citations omitted).

A higher unemployment rate in France than in the United States, and the claim that the applicant will find it impossible to obtain employment in France because of his inability to read and write in French are not sufficient to establish extreme hardship to [redacted] without having other factors such as advanced age or severe illness combine with economic detriment. *See Matter of Ige, supra.* "General economic conditions in an alien's native country will not establish "extreme hardship" in

the absence of evidence that the conditions are unique to the alien." *Kuciemba v. INS,* 92 F.3d 496, 500 (7th Cir. 1996) (citation omitted).

U.S. court decisions have held that the difficulty an applicant may experience in securing employment is not sufficient to establish extreme hardship. *See, e.g., Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996) (difficulty in finding employment and inability to find employment in one trade or profession, although a relevant hardship factor, is not extreme hardship); *Santana-Figueroa v. INS*, 644 F.2d 1354, 1356 (9th Cir. 1981) ("difficulty in finding employment or inability to find employment in one's trade or profession is mere detriment"); and *Pelaez v. INS*, 513 F.2d 303 (5th Cir. 1975) (difficulty in obtaining employment and a lower standard of living in the Philippines is not extreme hardship).

Counsel contends that [redacted]'s situation of living his entire life in the United States, his integration into the American lifestyle, and his lack of knowledge of the French language is similar to that in *Matter of Kao*, where the BIA found extreme hardship. The AAO does not find this persuasive because in *Matter of Kao,* the BIA found extreme hardship to a 14-year-old girl who would have been uprooted at a critical stage in her education and her social development to live in a foreign country. Here, [redacted] is a mature adult; he is not at a critical stage in his education or his social development.

There is no documentation to demonstrate that would live in inferior conditions economically, socially, culturally, and politically in France. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Having carefully considered each of the hardship factors raised, both individually and in the aggregate, it is concluded that these factors do not constitute extreme hardship to [redacted] if he were to remain in the United States without his fiancé, and alternatively, if he joined her in France. Thus, extreme hardship to a qualifying family member for purposes of relief under 212(i) the Act, 8 U.S.C. § 1182(i), has not been established.

Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether she merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B)(v) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. The applicant has not met that burden. Accordingly, the appeal will be dismissed. The application will be denied.

ORDER: The appeal is dismissed. The application is denied.