

Identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

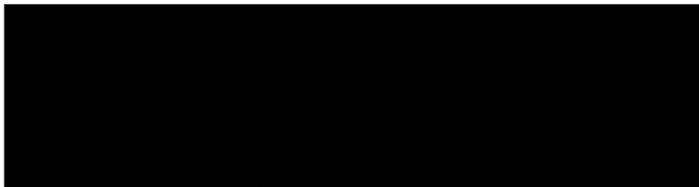
U.S. Department of Homeland Security  
20 Massachusetts Ave., N.W., Rm. 3000  
Washington, DC 20529



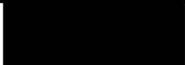
U.S. Citizenship  
and Immigration  
Services

**PUBLIC COPY**

H3



FILE:



Office: CALIFORNIA SERVICE CENTER

Date:

**MAY 21 2008**

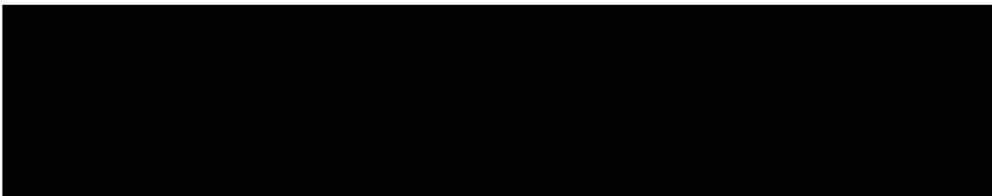
IN RE:



APPLICATION:

Application for Waiver of the Foreign Residence Requirement under Section 212(e) of the Immigration and Nationality Act; 8 U.S.C. § 1182(e).

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The matter will be remanded to the Director to request a section 212(e) waiver recommendation from the Director, U.S. Department of State (DOS), Waiver Review Division (WRD).

The applicant is a native and citizen of India who obtained J-1 nonimmigrant exchange status in July 2004 to participate in graduate medical training. She is thus subject to the two-year foreign residence requirement under section 212(e) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(e). The applicant presently seeks a waiver of her two-year foreign residence requirement, based on the claim that her U.S. citizen children, born in February 2003 and January 2007, would suffer exceptional hardship if they moved to India temporarily with the applicant and in the alternative, if they remained in the United States while the applicant fulfilled her two-year foreign residence requirement in India.

The director determined that the applicant failed to establish that her U.S. citizen children would experience exceptional hardship if the applicant fulfilled her two-year foreign residence requirement in India. *Director's Decision*, dated June 5, 2007. The application was denied accordingly.

In support of the appeal, counsel for the applicant provides a brief, dated August 1, 2007. The entire record was reviewed and considered in rendering this decision.

Section 212(e) of the Act states in pertinent part that:

No person admitted under section 101(a)(15)(J) or acquiring such status after admission

(i) whose participation in the program for which he came to the United States was financed in whole or in part, directly or indirectly, by an agency of the Government of the United States or by the government of the country of his nationality or his last residence,

(ii) who at the time of admission or acquisition of status under section 101(a)(15)(J) was a national or resident of a country which the Director of the United States Information Agency, pursuant to regulations prescribed by him, had designated as clearly requiring the services of persons engaged in the field of specialized knowledge or skill in which the alien was engaged, or

(iii) who came to the United States or acquired such status in order to receive graduate medical education or training, shall be eligible to apply for an immigrant visa, or for permanent residence, or for a nonimmigrant visa under section 101(a)(15)(H) or section 101(a)(15)(L) until it is established that such person has resided and been physically present in the country of his nationality or his last residence for an aggregate of a

least two years following departure from the United States: Provided, That upon the favorable recommendation of the Director, pursuant to the request of an interested United States Government agency (or, in the case of an alien described in clause (iii), pursuant to the request of a State Department of Public Health, or its equivalent), or of the Commissioner of Immigration and Naturalization [now, Citizenship and Immigration Services (CIS)] after he has determined that departure from the United States would impose exceptional hardship upon the alien's spouse or child (if such spouse or child is a citizen of the United States or a lawfully resident alien), or that the alien cannot return to the country of his nationality or last residence because he would be subject to persecution on account of race, religion, or political opinion, the Attorney General [now the Secretary, Homeland Security (Secretary)] may waive the requirement of such two-year foreign residence abroad in the case of any alien whose admission to the United States is found by the Attorney General (Secretary) to be in the public interest except that in the case of a waiver requested by a State Department of Public Health, or its equivalent, or in the case of a waiver requested by an interested United States government agency on behalf of an alien described in clause (iii), the waiver shall be subject to the requirements of section 214(l): And provided further, That, except in the case of an alien described in clause (iii), the Attorney General (Secretary) may, upon the favorable recommendation of the Director, waive such two-year foreign residence requirement in any case in which the foreign country of the alien's nationality or last residence has furnished the Director a statement in writing that it has no objection to such waiver in the case of such alien.

In *Matter of Mansour*, 11 I&N Dec. 306 (BIA 1965), the Board of Immigration Appeals stated that, "Therefore, it must first be determined whether or not such hardship would occur as the consequence of her accompanying him abroad, which would be the normal course of action to avoid separation. The mere election by the spouse to remain in the United States, absent such determination, is not a governing factor since any inconvenience or hardship which might thereby occur would be self-imposed. Further, even though it is established that the requisite hardship would occur abroad, it must also be shown that the spouse would suffer as the result of having to remain in the United States. Temporary separation, even though abnormal, is a problem many families face in life and, in and of itself, does not represent exceptional hardship as contemplated by section 212(e), supra."

In *Keh Tong Chen v. Attorney General of the United States*, 546 F. Supp. 1060, 1064 (D.D.C. 1982), the U.S. District Court, District of Columbia stated that:

Courts deciding [section] 212(e) cases have consistently emphasized the Congressional determination that it is detrimental to the purposes of the program

and to the national interests of the countries concerned to apply a lenient policy in the adjudication of waivers including cases where marriage occurring in the United States, or the birth of a child or children, is used to support the contention that the exchange alien's departure from his country would cause personal hardship. Courts have effectuated Congressional intent by declining to find exceptional hardship unless the degree of hardship expected was greater than the anxiety, loneliness, and altered financial circumstances ordinarily anticipated from a two-year sojourn abroad." (Quotations and citations omitted).

The first step required to obtain a waiver is to establish that the applicant's U.S. citizen children would experience exceptional hardship if they resided in India for two years with the applicant. To support this contention, the applicant states the following:

...My U.S. citizen children, [REDACTED] and [REDACTED] would suffer exceptional hardship if we were required to move to India... [REDACTED] and [REDACTED] would be subject to extreme discrimination and harassment because I, and consequently my children by birth, belong to a 'scheduled caste.' I am a Dalit, a person of one of the lower castes in the Hindu caste system. Those of the scheduled caste face discrimination and harassment in my native India. Moreover, my children would face further discrimination because my husband and I have an intercaste marriage. My husband, [REDACTED], is of a higher caste. [REDACTED] and [REDACTED] would also be put in grave physical harm because of the unstable political climate and prevalence of terrorist groups in India. Moreover, living in India for two years or more would severely compromise [REDACTED]'s educational and language development. The environmental conditions and high pollution would put [REDACTED]'s health at potentially serious risk. Last, our entire family would suffer exceptional economic difficulties, creating a hardship for my children.

I am a member of a class of people in India that has been discriminated against and harassed for thousands of years, as I was born into the 'scheduled caste' of Dalits. This class of peoples is popularly known as the 'untouchables.' The caste system, which has existed in India for over 3,000 years, represents a rigid hierarchy of classes of people determined solely by birth. Dalits, who constitute 25% of the Indian population, are the lowest class of people, and they are considered sub-human in the eyes of many of the upper classes. They are considered 'polluted' to even touch, and people often perform complex rituals to purify themselves if they or their property has been despoiled by the presence of a Dalit.... Dalits are not allowed into many Hindu temples, they live mainly in segregated communities, and they are discriminated against in schools and the workplace. My daughters, being born of a parent who is a member of the scheduled castes, will also be classified as 'untouchables,' and they will endure extreme hardship as a result.

Dalits are segregated in all areas of life, and they are typically relegated to the most menial jobs. They often work as servants or janitors, and they are subjected to discrimination in the workplace...The government even issues certificates identifying persons who are members of the Scheduled Caste. My daughters will, of course, have to get these certificates, and our caste membership would be widely known in the community. Even though discrimination based on my caste is illegal, it is not enforced, and discrimination against Dalits is widely practiced. As a result, my daughters would face constant discrimination and inhumane treatment, which would certainly have a negative effect on their self-esteem....

As a member of a scheduled caste, my daughters will have to endure mistreatment from others in our community. When we return to India, [REDACTED] will have to begin school there. As stated above, when we enroll her, we will have to show the certificate declaring scheduled caste status. It will not take long for her peers and most especially their parents to find out.... Moreover, these parents will also find out that her parents had an intercaste marriage.... Many parents will forbid their children to play with my daughter if they find out she is a Dalit and she will most certainly not be allowed to go to their homes. Unfortunately, the better, private schools in New Delhi are dominated by those from the upper castes. If we choose to send our daughter to a school with a lower caste majority, we will be depriving her of the best chance of getting an excellent education....

My daughter, [REDACTED], has been found to have Abnormal Hemoglobinopathy.... Although [REDACTED] does not have the well-known disorders such as sickle-cell anemia, she is at high risk of complications.... [REDACTED] is at 'risk of complications if exposed to excessive heat and dehydration, low oxygen levels or physical exhaustion.' If [REDACTED] were to live in India, she would most certainly be at risk for complications. India has a tropical climate.... During the summer months, temperatures in New Delhi can reach up to 113°.... Summer in New Delhi lasts from April through September. Once the monsoons come in June, the extreme humidity makes it feel even warmer.... Schools in India are not equipped with air conditions and the vast majority only have fans. [REDACTED]'s health and life will be at risk no matter where we live in India....The only place in India where this is not true is in the mountainous regions of Punjab and Kashmir, which are embroiled in war and conflict....

**As parents we are concerned about factors for our daughter's safety.** Child kidnapping is an 'industry' in India. Being the children of two physicians from the United States, my children are extremely vulnerable to kidnapping threats and other threats of violence. Groups target physicians' children because they believe the physicians have money, especially those coming from the United States.... My daughters will not be able to freely play outside or enjoy their lives as children....

Unfortunately, another reason for fear of my children's safety is the rise of terrorist

attacks in India. Some of the violence is due to the unrest between Extremist Muslims and Extremist Hindus in my country. Violence has also stemmed from the threat of war between India and Pakistan. It is also believed that Al-Qaeda has begun to target India....

My daughters are U.S. citizens and I want them to develop as normal American children. Moving to India would be a radical change for [REDACTED]... my daughter would be taken from the United States at an age crucial to language and educational development, as well as the age when a child goes through an intense period of socialization.

[REDACTED] speaks very little Hindi and communicates almost completely in English. In India she will be almost exclusively exposed to Hindi. Pre-schools for children age are primarily run in the native language.... She will most certainly be teased for not being able to speak the native language....

After the expiration of the foreign residency requirement, my daughter would return to America and find that all of the children their age have accelerated in educational and social development. During the crucial years of language development, she will not have been in an English language-speaking environment....They will have to enter school with a serious impediment to learning, and will most certainly be unable to qualify for gifted programs. Even with special language education, they will be far behind their peers....

There is a tremendous over-supply of physicians in India, and even many well-connected doctors with long employment histories in India are unable to find work. This will be exacerbated by the fact that I am a Dalit. Many employers will simply refuse to hire me because I am a member of a lower caste. Even if the employer himself does not have a problem with me, he will have to contend with all the patients who will refuse to be treated by a Dalit.... My children would suffer the initial impact of being in an impoverished family, and the long-term consequences are equally as troubling. Such a disruption in my career could seriously compromise my earning potential, and drastically reduce the standing of living my daughters enjoy....

Even if either my husband or myself were to find work in India, the remuneration would be very small compared to what I could earn in the United States. Even doctors with upwards of twenty-five years of experience receive about \$500 a month. This salary is not nearly enough to provide for my daughters in a metropolitan city like New Delhi....We would want to enroll [REDACTED] in a private school so that she could develop at a pace comparable to her peers in the United States, but we would most certainly not be able to afford this....

*Affidavit of* [REDACTED] dated January 30, 2007.

The Country Report on Human Rights Practices-India, states the following, in pertinent part, regarding discrimination in India towards the Scheduled Caste.

The law provides that the practice of untouchability, which discriminated against Dalits and others defined as scheduled castes, is a punishable offense; however, such discrimination remained ubiquitous, stratifying almost every segment of society.

The law gives the president the authority to identify historically disadvantaged castes, Dalits, and tribal persons (members of indigenous groups historically outside the caste system) for special quotas and benefits. These "scheduled" castes, Dalits, and tribes were entitled to affirmative action and hiring quotas in employment, benefits from special development funds, and special training programs. According to the 2001 census, scheduled castes, including Dalits, made up 16 percent (166.6 million) of the population, and scheduled tribes eight percent (84.3 million). In December 2006 parliament passed a bill to reserve 27 percent of seats at educational institutions for scheduled castes and backward classes.

Dalits faced significant discrimination despite laws to protect them; they often were socially prohibited from using the same wells, attending the same temples, and marrying upper-caste Hindus. They faced social segregation in housing, land ownership, and public transport and were the majority of bonded laborers. Many Dalits were malnourished and lacked access to health care and basic education. There were episodes of vigilante retribution against Dalits who tried to assert their rights. While rare in urban settings, examples of intolerance occurred regularly in rural areas. Many rural Dalits worked as agricultural laborers for caste landowners without remuneration. Reports from the UN Committee on the Elimination of Racial Discrimination found systematic abuse against Dalits, including torture and extrajudicial killings, and an "alarming" rate of sexual violence against Dalit women. NGOs reported that crimes committed by upper caste Hindus against Dalits often went unpunished, either because the authorities failed to prosecute such cases or because the crimes were unreported by victims fearing retaliation.

On September 11, villagers of Multai, in Baitul district of Madhya Pradesh, allegedly killed two members of the Pardhi tribe, and destroyed 62 houses of Pardhi tribe members. The villagers suspected some members of the Pardhi community of having raped a higher caste woman. Although police arrested the alleged rapists, the villagers insisted on carrying out reprisals against nearly 300 members of the Pardhi settlement, who fled to Bhopal, the state capital. While the National Commission for Minorities visited the relief camp in Bhopal and the

village and urged the Pardhi to return to Multai, villagers remained adamant against the Pardhi's return to their village. At year's end police had registered a complaint about the murder and the destruction of the houses.

There were no updates regarding the January 2006 case in which a high-caste mob in the Vaishali district of Bihar burned alive a man, woman, and five of their children, despite direct involvement from the Bihar Chief Minister.

The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act lists offenses against disadvantaged persons and prescribes stiff penalties for offenders; however, the Act had only a modest effect in curbing abuse, and there were very few convictions. Human rights NGOs alleged that caste violence was on the increase. Caste violence was especially pronounced in Uttar Pradesh, Bihar, Rajasthan, Madhya Pradesh, Tamil Nadu, Karnataka, and Andhra Pradesh.

In July 2006 the Supreme Court passed a judgment stating that police and government are obliged to help intercaste couples and prevent social ostracism. In September 2006 the Ministry of Social Justice and Empowerment directed state governments to increase the incentive for intercaste marriage to \$1,050 (46,000 rupees). The central government pays 50 percent.

*Country Report on Human Rights Practices-India, Bureau of Democracy, Human Rights and Labor, U.S. Department of State, dated March 11, 2008.*

In addition, the U.S. Department of State references the following regarding the problematic country condition in India:

A number of anti-Western terrorist groups (some of which are on the U.S. government's list of foreign terrorist organizations) are believed to be active in India including, but not limited to, Islamic extremist groups such as Harakat ul-Mujahidin, Jaish-e-Mohammed, Lashkar-e Tayyiba, and Harkat-ul-Jihad-i-Islami. While historically the state of Jammu & Kashmir has been a focal point of terrorist activity, bomb blasts resulting in deaths and injuries have occurred in public places such as markets, as well as on public transportation such as trains and buses throughout India. Examples of major attacks in recent years include an attack on a government paramilitary facility in Uttar Pradesh (December 2007), coordinated bomb blasts at court facilities in three cities in Uttar Pradesh (November 2007), an explosives blast in a cinema hall in Punjab (November 2007), two explosions at a popular park and restaurant in Hyderabad, Andhra Pradesh (August 2007), an explosion at the main mosque in Hyderabad, Andhra Pradesh (May 2007), the detonation of explosive devices on a train northwest of Delhi (February 2007), simultaneous attacks on Mumbai commuter trains (July 2006), simultaneous attacks on a train station and places of worship in Varanasi

(March 2006), and simultaneous attacks on several markets in New Delhi (October 2005). Terrorist incidents causing fewer casualties occur on a frequent basis, including a few in which American citizens were injured.

Beyond the threat from terrorism, demonstrations often cause disruption. Local demonstrations can begin spontaneously and escalate with little warning, disrupting transportation systems and city services and posing risks to travelers' personal safety. In response to such events, Indian authorities occasionally impose curfews and/or restrict travel. U.S. citizens are urged to avoid demonstrations and rallies as they have the potential for violence, especially immediately preceding and following elections and religious festivals (particularly when Hindu and Muslim festivals coincide). In addition, religious and inter-caste violence is unpredictable and occurs occasionally. In some cases, demonstrators specifically block roads near popular tourist sites in order to gain the attention of Indian authorities; occasionally vehicles transporting tourists are attacked in these incidents. Mobs have, however, attacked Indian and American missionaries and social workers as such activity provokes strong reactions in some areas. Anti-Christian violence has seen a slight increase in recent years in certain areas of India, such as in Gujarat. U.S. citizens should monitor local television and print media and contact the U.S. Embassy or the nearest U.S. Consulate for further information about the current situation in areas where they wish to travel. Finally, visitors should exercise caution when swimming in open waters along the Indian coastline, particularly during the monsoon season. Every year, several people in Goa, Mumbai, Puri (Orissa), and other areas drown due to the strong undertow. It is important for visitors to heed warnings posted or advised at beaches and avoid swimming in the ocean during the monsoon season.

Jammu & Kashmir: The Department of State recommends that U.S. citizens avoid travel to the state of Jammu & Kashmir, with the exception of visits to the eastern Ladakh region and its capital, Leh. A number of terrorist groups operate in the state, targeting security forces that are present throughout the region, particularly along the Line of Control (LOC) separating Indian and Pakistani-controlled Kashmir, and those stationed in the primary tourist destinations in the Kashmir Valley: Srinagar, Gulmarg, and Pahalgam. Since 1989, as many as 60,000 people (terrorists, security forces, and civilians) have been killed in the Kashmir conflict. Many terrorist incidents take place in the state's summer capital of Srinagar, but the majority of attacks occur in rural areas. Foreigners are particularly visible, vulnerable, and definitely at risk. There have been attacks specifically targeted at civilians. For example: in October 2007 five soldiers and two civilians were killed in an IED blast carried out by militants in the Baramulla district of Kashmir; in August 2007 terrorists lobbed a grenade at the venue of an Independence Day function in the Bandipora district; in July 2007 a blast on an out-of-state tourist bus killed six and injured

20 civilians in the capital, Srinagar. The Indian government prohibits foreign tourists from visiting certain areas along the LOC (see the section on Restricted Areas, below). U.S. Government employees are prohibited from traveling to the state of Jammu & Kashmir (except for Ladakh) without permission from the U.S. Embassy in New Delhi. When traveling to Kashmir, U.S. official travelers attempt to lower their profiles, limit their lengths of stay, and exercise extreme caution.

**India-Pakistan Border:** The State Department recommends that U.S. citizens avoid travel to areas within five to ten kilometers of the border between India and Pakistan. Both India and Pakistan maintain a strong military presence on both sides of the border. The only official India-Pakistan border crossing point for persons who are not citizens of India or Pakistan is in the state of Punjab between Atari, India, and Wagah, Pakistan. The border crossing is usually open, but travelers are advised to confirm the current status of the border crossing prior to commencing travel. A Pakistani visa is required to enter Pakistan. An American citizen seeking a Pakistani visa while in India must first come to the U.S. Embassy in New Delhi to sign an affidavit of intent to apply for the Pakistani visa. This is a requirement of the Pakistani government.

Both India and Pakistan claim an area of the Karakoram mountain range that includes the Siachen glacier. U.S. citizens traveling to or climbing peaks in the disputed areas face significant risks. The disputed area includes the following peaks: Rimo Peak; Apsarasas I, II, and III; Tegam Kangri I, II and III; Suingri Kangri; Ghiant I and II; Indira Col; and Sia Kangri.

**Northeast States:** Incidents of violence by ethnic insurgent groups, including the bombing of buses and trains, occur with a degree of frequency in parts of Assam, Manipur and Nagaland. While U.S. citizens have not been specifically targeted, they may be affected as bystanders. Visitors to India's Northeast states are cautioned not to travel outside major cities at night. Security laws are in force, and the central government has deployed security personnel. Certain Northeastern states can be visited by foreigners only with a permit (see the section on Restricted Areas, below.) Travelers may check with the U.S. Consulate in Kolkata for information on current conditions. (Please see the section on Registration/Embassy and Consulate Locations, below.) U.S. Government employees are prohibited from traveling to the state of Manipur and to portions of the Karbi Anglong districts and Tinsukia in Assam without permission from the U.S. Embassy in New Delhi and U.S. Consulate in Kolkata. When traveling to these areas, U.S. official travelers attempt to lower their profiles, limit their lengths of stay, and exercise extreme caution.

East Central and Southern India: A disparate number of Maoist extremist groups called "Naxalites" are active in the region, primarily in rural areas. The Naxalites have a long history of conflict with state and national authorities, including frequent attacks on police, paramilitary forces, and government officials. The Naxalites have not specifically targeted U.S. citizens, but have attacked symbolic targets that have included Western companies. The primary Naxalite group is represented by the Communist Party of India (Maoist). The party's regional affiliates are active in the states of Andhra Pradesh, Orissa, Chhattisgarh, Bihar, Jharkand, and West Bengal. There was significant Naxalite activity in these states in 2007. In addition, the State of Orissa has seen violence against foreigners accused of proselytizing.

Petty crime, especially theft of personal property, is common, particularly on trains or buses. Pickpockets can be very adept, and women have reported having their bags snatched, purse-straps cut or the bottom of their purses slit without their knowledge. Theft of U.S. passports is quite common, particularly in major tourist areas, on overnight trains, and at airports. Train travelers are urged to lock their sleeping compartments and take valuables with them when leaving their berths. Air travelers are advised to carefully watch their bags in the arrival and departure areas outside of airports. Violent crime, especially directed against foreigners, has traditionally been uncommon, although in recent years there has been a modest increase. As U.S. citizens' purchasing power is comparatively large, travelers also should exercise modesty and caution in their financial dealings in India to reduce the chance of being a target for robbery or other crime. Gangs and criminal elements operate in major cities and have sometimes targeted unsuspecting businessmen and their family members for kidnapping.

U.S. citizens, particularly women, are cautioned not to travel alone in India. Western women continue to report incidents of physical harassment by groups of men. Known as "Eve-teasing," these incidents can be quite frightening. While India is generally safe for foreign visitors, according to the latest figures by Indian authorities, rape is the fastest growing crime in India. Among large cities, Delhi experienced the highest number of crimes against women. Although most victims have been local residents, recent sexual attacks against female visitors in tourist areas underline the fact that foreign women are also at risk and should exercise vigilance.

Women should observe stringent security precautions, including avoiding using public transport after dark without the company of known and trustworthy companions; restricting evening entertainment to well known venues; and avoiding walking in isolated areas alone at any time of day. Women should also ensure their hotel room numbers remain confidential and insist the doors of their hotel rooms have chains, deadlocks, and spy-holes. In addition, it is advisable

for women to hire reliable cars and drivers and avoid traveling alone in hired taxis, especially during the hours of darkness. It is preferable to obtain taxis from hotels rather than hailing them on the street. If women encounter threatening situations, they can call 100 for police assistance.

*Country Specific Information-India, U.S. Department of State, Bureau of Consular Affairs, dated March 25, 2008.*

Based on the documented discrimination of the Scheduled Caste, to which the applicant and her daughters belong, the political and social turmoil in India, the security concerns with respect to U.S. citizens, the applicant's daughter's documented medical problem, the children's unfamiliarity with the country and its language, and the financial hardship they would face due to the applicant's inability to find gainful employment, the AAO finds that the applicant's U.S. citizen children would experience exceptional hardship were they to accompany the applicant to India for a two-year term.

The second step required to obtain a waiver is to establish that the applicant's children would suffer exceptional hardship if they remained in the United States during the two-year period that the applicant resides in India. As stated by counsel:

Dr. [REDACTED]'s [the applicant's] husband, [REDACTED] is currently working in the United States under an H-1B classification. This allows [REDACTED] to temporarily work in the United States. E [REDACTED]'s status in the United States is most certainly not secure. If [REDACTED]'s employer lays off or fires [REDACTED], his H-1B is no longer valid and he will begin to accrue unlawful status. At this point, there is no guarantee that [REDACTED] will be able to find a new employer who will be willing to sponsor another H-1B visa, especially because the H-1B cap has been reached and filled until October 2008. If [REDACTED] does lose his job and his H-1B visa, he will then have to return to India....

*Brief in Support of Appeal, dated August 1, 2007*

The applicant further elaborates on her spouse's status in the United States:

My husband, [REDACTED], is currently on an H-1B visa. Thus, he could not stay in the U.S. indefinitely.... Under no circumstances would we leave our daughters in the United States because they are far too young to be left behind....

*Supra at 1.*

The AAO concurs with counsel that due to the applicant's spouse's nonimmigrant status and its temporary and revocable nature, it has not been established that the children would be able to remain in the United States during the two-year period that the applicant has to return to India. As such, were the applicant's spouse required to depart the United States at some point in the future, such a predicament would leave the young

children in the United States without their parents. This situation would constitute exceptional hardship to the applicant's children.

The AAO finds that the applicant has established that her children would experience exceptional hardship were they to relocate to India and in the alternative, were they to remain in the United States without the applicant, for the requisite two-year term. As such, upon review of the totality of circumstances in the present case, the AAO finds the evidence in the record establishes the hardship the applicant's children would suffer if the applicant temporarily departed the U.S. for two years would go significantly beyond that normally suffered upon the temporary separation of families.

The burden of proving eligibility for a waiver under section 212(e) of the Act rests with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. The AAO finds that in the present case, the applicant has met her burden. The appeal will therefore be sustained. The AAO notes, however, that a waiver under section 212(e) of the Act may not be approved without the favorable recommendation of the DOS. Accordingly, this matter will be remanded to the director so that she may request a DOS recommendation under 22 C.F.R. § 514. If the DOS recommends that the application be approved, the secretary may waive the two-year foreign residence requirement if admission of the applicant to the United States is found to be in the public interest. However, if the DOS recommends that the application not be approved, the application will be re-denied with no appeal.

**ORDER:** The matter will be remanded to the Director to request a section 212(e) waiver recommendation from the Director, U.S. Department of State, Waiver Review Division.